

MEMORY OF NATIONS

Democratic Transition Guide



[Experience of Selected Countries]



National Endowment
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Memory of Nations: Democratic Transition Guide Experience of Selected Countries

Authors: *The Argentine Experience:* Maria Cecilia Alegre, Paula Canelo, Sofía del Carril, Sergio Gabriel Eissa, Gabriela Ippolito-O'Donnell, Fernando Pedrosa; *The Cambodian Experience:* Pechet Men, Kosal Path, Bernd Schaefer, Savina Sirik; *The Chilean Experience:* Cath Collins, Mireya Dávila, Claudio Fuentes S., Boris Hau, María Luisa Ortiz, Daniela Fuentealba, Omar Sagredo Mazuela, Rodolfo Ibarra; *The Czech Experience:* Markéta Bártová, Ladislav Mrklas, Pavel Žáček; *The Egyptian Experience:* Ashraf Al-Sabagh; *The Estonian Experience:* Toomas Hiio, Meelis Maripuu, Meelis Saueauk; *The Georgian Experience:* Levan Avalishvili, David Jishkariani, Irakli Khvadagiani, Giorgi Kldiashvili, Ghia Nodia, Anton Vacharadze; *The German Experience:* Hans Altendorf, Joachim Förster, Anna Kaminsky, Christoph Schaefer; *The Polish Experience:* Franciszek Dąbrowski, Radosław Peterman; *The Romanian Experience:* István Bandi, Ștefan Bosomitu, Stefano Bottoni, Luciana Jinga; *The Russian Experience:* Nikolai Bobrinsky, Natalia Kolyagina, Evgenia Lezina, Svetlana Shuranova; *The South African Experience:* David Bruce, Geraldine Frieslaar, Tasneem Kalla, Guy Lamb, Hugo van der Merwe, Chris Saunders, Nobukhosi Zulu; *The Spanish Experience:* Anna Katarzyna Dulska, José Manuel Ferrary, Pablo Pérez-López, Santiago de Navascués, José Luis Orella Martínez, Gema Perez, Rafael Escobedo Romero, Ricardo Ruiz de la Serna

Editors: Jiří Kozák, Natálie Maráková, Michaela Oplíštilová, Pavel Žáček

Layout and typesetting: Martin Sládeček

Production: Nakladatelství Jalna; Mickiewiczova 17, 160 00 Praha 6, Czech Republic; www.jalna.cz

Publisher: CEVRO, z. s.; Jungmannova 29/19, 110 00 Praha 1, Czech Republic; e-mail: info@cevro.cz; www.cevro.cz

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INTRODUCTION

Since September 2016 CEVRO has been working on the very ambitious project, *Memory of Nations: Democratic Transition Guide*, under the auspices of the US based National Endowment for Democracy. This project offers a unique and a systematic way of experiencing the transition process of selected countries that successfully transitioned from authoritarian regimes to democracies. Each democratic transition is carefully analyzed by a team of experts from the particular country, which is meticulously selected by CEVRO to ensure the most transparent and accurate description of the transition process.

The general aim of the project is to provide a guide to those countries that have not yet democratized, particularly to the forces in these countries who are trying to bring about democratization. The expertise the country wants can be extracted from the experiences of the previous democratic transitions of the countries themselves. It is clear from all the examples covered in the *Guide* that the amount of preparation of the democratic forces directly affects the transition process by making it quicker, smoother and more viable. Hence the *Guide* most importantly serves the purpose of helping the democratic forces in countries where democracy is still only an idea of the silent few or the oppressed, in addition, it has an educational and historiographical purpose. The *Guide* is not a step-by-step instruction manual to the transitioning nation, this would be unrealistic, since every country's situation is unique. The aim is simply to provide the transitioning country and its democratic forces a comprehensive set of issue-specific advice, coming from real life experience.

The first edition of the *Guide* covered seven countries (Czech Republic, Estonia, Egypt, Germany, Poland, Romania, and Russia) and three countries were added to the second edition (Argentina, Cambodia, and Georgia). In this latest edition we continued by adding three more democratic transitions from three other countries (Chile, Republic of South Africa, and Spain). We furthermore expanded the *Guide's* the scope of influence by translating all the volumes to Spanish. We believe that it is necessary for such an extensive database of important knowledge to be accessible in more than one language, so it can reach a larger audience, especially in the region of Latin America where democratic transitions are still rare and there are still petrifying dictatorships in place.

Events of recent years have shown that the demand for democratization of authoritarian or otherwise non-democratic regimes is strong and growing worldwide, spreading even to societies without democratic traditions. Concurrently, the rise of modern communication technologies and information have become accessible, like never before. It can be argued that non-democratic regimes will, in the near future, find it increasingly difficult to resist the pressure of their own people wanting to democratize,

which will inherently hinder the government's ability to stay in power. In this environment, what is often overlooked are the issues of long-term reconciliation within their society, resolving the questions of past wrongdoings, and dealing with its own history in a way that is just and honest. The focus of any new governing body stepping in immediately after a political transition is indeed critical to maintaining national stability, developing a working government and political structure, and preserving the well-being of its people.

The experience of countries that have undergone transition in recent decades shows that facing the questions of the past, in particular, addressing the legitimacy and legality of the former regime, and remembering its crimes and their perpetrators, is as crucial to the democratization of any society as is a working legal system or a developed economy. To avoid the proverbial "repeating of its own past", marginalization of its history and past wrongs, taking a clear stance concerning both the victims and the culprits, embedding this stance into the legal system, education and society's memory is a necessary, but an often underestimated task for every transitioning nation. A prime example of the consequences of such an underestimation might be the Czech Republic, where more than 30 years after the fall of communism, the unreformed Communist Party still presents a major political force with an increasing portion of its electorate being young voters. Former members and informants of the brutally oppressive secret service remain in high positions in both the private and public sector, and members of the anti-communist resistance movement still have not been fully recognized for their activities. It is therefore important for any reformers and democratic leaders to pay attention to reconcile with the past.

Unfortunately, the issues of reconciliation, punishment of the totalitarian crimes, and preservation of national memory are not priorities for the first phases of any transition. Partly, it is because the democratic leaders have other priorities (such as economic transformation or free elections), but it is also because the issues of memory preservation and reconciliation are not priorities for democratic assistance, and therefore the leaders are not equipped with the sufficient skills. The *Guide* aims to provide the democratizing forces a comprehensive and extensive database of transition experiences that can help the transition process and prepare the ground for a stable and viable democracy arising from totalitarian or authoritarian regimes of all types.

This *Guide* of the transitional experience will be regularly updated and new countries will be added. Organizers of this project will further focus on making the *Guide* more universal by adding more countries and translating it to more languages.

Team CEVRO would like to thank the National Endowment for Democracy for supporting this project, democracy, and freedom worldwide in general.

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AUTHORS

MARIA CECILIA ALEGRE

Historian and Graduate in Political Science at the University of Buenos Aires and the National University of General San Martín (UNSAM). Professor of Introduction to the Human Rights and Constitutional Law in the Basic Common Cycle of the University of Buenos Aires. Professor of History of the Law in the University of Managerial and Social Sciences, Buenos Aires. Visiting Professor at the Meritorious Autonomous University of Puebla, México. Adviser to the Subsecretary of Government of the City of Buenos Aires.

PAULA CANELO

Sociologist and Independent Researcher of the National Council of Scientific and Technical Research (CONICET-Argentina). Professor and Researcher in the Institute for Higher Social Studies, National University of General San Martín (IDAES-UNSAM) and in the Faculty of Social Sciences, University of Buenos Aires. Specialist in Recent History and Political Sociology. Author of numerous publications on government, bureaucracies and elites, memory and human rights, military dictatorships and security policies.

SOFÍA DEL CARRIL

Lawyer, Professor and Policy Analyst specializing in governance and rule of law. Senior Adviser at the Undersecretariat of Political Reform of the Buenos Aires City Government. Visiting Professor of constitutional law at the Torcuato Di Tella University, Argentina. Lecturer in international affairs and coordinator of the Parliamentary Diplomacy program at the Austral University, Argentina.

SERGIO GABRIEL EISSA

Professor of Political Science, Public Policies and Security Issues at the University of National Defense, Buenos Aires and at the University of Buenos Aires, Buenos Aires.

GABRIELA IPPOLITO-O'DONNELL

Scholar in the fields of civil society organizations, urban social movements, contentious politics, and democratic theory. Director of the School of Politics at the University of El Salvador, Buenos Aires. Professor of Political Science, School of Humanities, The National University of General San Martín (UNSAM), Buenos Aires. Director of Institutional Development at National Association of Argentine Political Scientists.

FERNANDO PEDROSA

Historian and Professor of Political Science at the University of Buenos Aires and at the University of El Salvador, Buenos Aires. Researcher at the Institute for Research on Latin America and the Caribbean at the Faculty of Social Sciences, University of Buenos Aires. Visiting Professor at the Chulalongkorn University, Thailand and at the University of Malaya, Malaysia.

TRANSFORMATION OF THE POLITICAL SYSTEM

FERNANDO PEDROSA

INTRODUCTION

During the 20th century, Argentina experienced continuous *instability* in its political regime.¹ This marked a notable difference from other countries in the region that had few institutional interruptions (including Uruguay, Chile, Colombia and Venezuela) and others that maintained undemocratic regimes, but with a high level of stability (Brazil and Paraguay).

Argentina moved smoothly between democratic, undemocratic and semi-democratic regimes² although all of them were unable to generate any institutional stability. It was only with the presidential elections held between 1983, 1989 and 1999 that a democratic functioning was consolidated. However, this happened after the authoritarian experience of 1976, which produced a cut in the country's recent history, not only because of the disastrous economic and social consequences it brought about, but also because of the issues linked to State terrorism and defeat in the Malvinas-Falkland war.

The military repression targeted some of the sectors of the elites (in political, trade union, cultural and economic terms), which after the return to democracy occupied high-level positions, both state, governmental and non-governmental. For this reason, the issues related to the 1970s were of great importance from 1983 onwards, as well as being a sustained presence in the public debates of the following decade.

PREVIOUS SITUATION

There were several conditions that explain the military uprising in 1976. **Firstly**, the international and global geopolitical context can be mentioned. The Cold War in Latin America implied a reactivation of the presence of the Armed Forces in the internal life of countries in the name of fighting communism and within the context of the so-called *National Security Doctrine*.³

Secondly, the regional context which, related to the above, influenced the coups d'état in Chile and Uruguay in 1973. In 1975, Peru also joined the list that included Bolivia, Brazil and Paraguay well before that.⁴

Thirdly, the explosive internal situation led the country to a degree of uncontrol and violence unprecedented in its history. The death of the then-President Juan D. Perón led to a confrontation between the left and the right of his party. This resulted in increased guerrilla and vigilante activity, resulting in a significant increase in the number of political assassinations, kidnappings, exiles, bombs, command robberies, etc. The social weariness, the power vacuum and the absence of leaderships, contributed to create a growing expectation for a military intervention, waiting to recover some kind of order.⁵

Fourthly, the economic meltdown of the country in the context of the so-called global *oil crisis* must be mentioned. In 1975 there was a great inflationary crisis and a subsequent adjustment and devaluation of the national currency that marked

the beginning of the end of middle-class Argentina, as well as the growing increase in poverty and inequality, later accentuated in the years of the dictatorship.

THE DICTATORSHIP

The self-styled "National Reorganization Process" took power on March 24, 1976. The new government was supported by a military junta considered to be the "supreme organ of the State" and composed of the three commanders. The *Junta*, formally, took precedence over the President of the Nation himself. From the very first minute, an equal distribution of power, territory and institutions between the three branches of the Armed Forces (Air Force, Army and Navy) and their respective civilian allies was agreed. However, this was quickly strained by the different ambitions and personal projects of the military.

The "Process..." did not formally change the National Constitution, but all application of its dogmatic part (rights and guarantees) was suspended. Above all, the military imposed above the current legal framework (including the constitution) a series of acts and statutes drawn up by themselves, in which they formalized the distribution of power, objectives and mechanisms of operation of the new regime. In addition, the national legal framework, apart from the political aspects and the restriction of freedoms, maintained its traditional structure.

During the first few years, the military government did not encounter any major obstacles to consolidating and developing its plans, especially in the repressive and economic fields. But by 1982, after six years in power, the military government was not responding to the social demands that had generated that initial consensus. Quite the contrary.

To the violence that the country had in 1976, the military government brought worse, illegal and clandestine violence, which was coming to light, especially, due to international pressure. The economic situation was far from improving. Unemployment, poverty, inequality, corruption and uncontrolled external indebtedness produced a great social discontent that was being exploited by the trade unions and the renewed presence of political parties.⁶

1 Luis Alberto Romero, *Breve historia contemporánea de la Argentina. 1916-2010*, Buenos Aires: Fondo de Cultura Económica, 2017.

2 Scott Mainwaring, Daniel Brinks, Aníbal Pérez-Liñán, "Classifying Political Regimes in Latin America, 1945-1999", in *Studies in Comparative, International Development*, 2001, (1), 37-65.

3 Genaro Arriagada, Manuel Garretón, "Doctrina de Seguridad Nacional y régimen militar", in *Estudios Sociales Centroamericanos*, 1979, (20), 129-153.

4 Manuel Alcántara, Ludolfo Paramio, Flavia Freidenberg, José Déniz, *Reformas económicas y consolidación democrática*, Madrid: Síntesis, 2006.

5 Luis Alberto Romero, *Breve historia contemporánea de la Argentina. 1916-2010*, Buenos Aires: Fondo de Cultura Económica, 2017.

6 In addition, the international context was very unfavorable: since the combination of Mexico's debt crisis, falling commodity prices and rising interest rates. Beginning in the 1980s, the period of economic contraction for Latin America began.

In that context, the military saw in the occupation of the Falkland Islands – in British hands – the possibility of exploiting a widespread nationalist sentiment that would renew their legitimacy to remain in power. Therefore, the defeat in the war left the government without any support and with the repudiation of the citizens. In this context, the government had to call for elections to return to a democratic regime and there the transition and a new opportunity for democracy was opened.⁷

DESCRIPTION OF THE TRANSITION

For a better description, the transition years will be grouped into three different times. First, in the so-called *liberalization of the regime*⁸ between the years 1982–1983, then the first transitional government and its challenges (1983–1989), to end with the government initiated in 1989 that ended with the threats of an authoritarian setback beginning the period of consolidation.

1982–1983 THE LIBERALIZATION OF THE REGIME

The Argentine dictatorship collapsed in 1982 with no other plan than to leave the government as soon as possible and return to the barracks.⁹ Argentine politicians were faced with the possibility of regaining power in the short term and without conditions. At the same time, they faced an extremely serious economic and political situation.

Despite the military's planned speedy exit, before leaving the government, they tried to resolve the problem that most concerned them: the possibility of being tried, above all, for human rights violations. To that end, shortly before the elections, they acquitted themselves of all crimes under Law No. 22.924, popularly known as "self-amnesty".¹⁰

Despite the problems with the immediate future, the political parties did not seek to confront them in a common and agreed manner and hardly agreed to press for the immediate holding of elections. The end of the dictatorship did not produce a considerable change in the ruling elites which, in turn, did not generate any space for foundational agreements, as happened in post-Franco Spain. This elusive behavior of the political elite influenced scenarios of recurrent political instability from 1983 to the present day.

On the other hand, the military managed to reach an agreement with some Peronist leaders, thinking that they would be the winners of the elections. The election was called under the current constitution, although some rules were added and removed to privileged political parties related to the dictatorship and Peronism.¹¹ On the other hand, the Peronist candidate stated that he would accept the *self-amnesty* proposed by the military in the withdrawal.

Things were different than expected. In 1983, the candidate of the Radical Civic Union, Raúl Alfonsín, who had been critical of the Malvinas-Falkland war and rejected *self-amnesty*, triumphed, proposing something unprecedented in the country's history: to try the military juntas for the crimes of state terrorism.

1983–1989 THE FIRST TRANSITIONAL GOVERNMENT

Although democracy was once again reigning in Argentina, the above-mentioned *collapse* referred only to the political regime, as military power and its support remained in place.¹²

The Armed Forces, the Catholic Church, the Peronist unions and the big businessmen sought to permanently condition the government with the support of important opposition sectors and the press. At the same time, the radical government was a minority in the Senate and had only a few pro-government governors. The situation that Alfonsín was dealing with resembled the perfect storm.¹³

Even so, Alfonsín repealed the *self-amnesty* and reformed the Military Code of Justice with the vain expectation that the military would initiate a process of purging and punishment while respecting legal procedures and providing for constitutional challenges. Far from that, they remained firm in what they did during the dictatorship, arguing for the annihilation of the subversive activities in decrees signed by the last Peronist government and for the social demand against violence.¹⁴

Alfonsín embarked on one of the most complex and paradigmatic processes in recent Argentine history: the trial of the military juntas.¹⁵ To this end, he formed the National Commission on the Disappearance of Persons (CONADEP), whose function would be to gather information so that the judiciary could then act.¹⁶ In April 1985, the trial began and after months of (harsh and convincing) allegations, the existence of a systematic criminal plan became clear and the members of the first three military juntas were condemned. At the same time, the leaders of the guerrilla organizations were also condemned.

The nostalgic sectors of the military regime redoubled their opposition, above all because the possibility of the prosecution of other ranks of the forces beyond the members of the juntas was opened. In fact, new trials began in 1986 that generated a climate

7 Guillermo O'Donnell, Phillipe Schmitter, Lawrence Whitehead, *Transiciones desde un gobierno autoritario*, Barcelona: Paidós, 1988.

8 Ibid.

9 Manuel Alcántara, Ludolfo Paramio, Flavia Freidenberg, José Déniz, *Reformas económicas y consolidación democrática*, Madrid: Síntesis, 2006.

10 Marcos Novaro, Vicente Palermo, *La Dictadura Militar 1976/1983: Del golpe de Estado a la restauración democrática*, Buenos Aires: Paidós, 2003.

11 Law 22.847 (July 1983) increased the minimum number of deputies per district to five, favoring small provinces where conservative parties and Peronism were stronger and added a 3 % threshold that complicated the left. In the Senate, the third seat per province that would have strengthened the radical party was eliminated. The military agreed with the Peronist unions on benefits and wage increases that conditioned the new government.

12 As the classic work of O'Donnell et al (1988) shows, *uncertainty* is one of the characteristics of transitions. The possibility of regression is always latent and it was so during Alfonsín's term in office, even more so considering that the region was still plagued by military governments.

13 In addition to the inherited problems, there was the upsurge of the Cold War with the arrival of Ronald Reagan to the US presidency, the explosion of the debt crisis with the Mexican *default* of 1982 and a dramatic fall in the international prices of the products exported by Argentina. See Luis Alberto Romero, *Breve historia contemporánea de la Argentina. 1916–2010*, Buenos Aires: Fondo de Cultura Económica, 2017.

14 Marcos Novaro, Vicente Palermo, *La Dictadura Militar 1976/1983: Del golpe de Estado a la restauración democrática*, Buenos Aires: Paidós, 2003.

15 It cannot be ignored that more than 40 % of the electorate voted for the Peronist candidate who had opposed judging the military. Interestingly, the greatest opposition came from human rights organizations, with technical arguments or, simply, prejudices against Alfonsín for not coming from the left.

16 CONADEP was composed of a plural group of personalities from the fields of culture, law and legislation, as well as members of some human rights organizations. The final report describes the cases of 8,961 missing persons and 380 clandestine detention centers. The CONADEP's report, called *Never Again*, is, to this day, an icon of democratic reconstruction.

of discontent and permanent conspiracy between the military and its civilian supporters.

The Armed Forces were divided between the top (the high ranks) and the non-commissioned officers with troop command. The latter were the most conflictive and produced three rebellions (between 1987 and 1988) that Alfonsín managed to contain with great difficulty. The military leadership, although confronted with the rebel group, did not support the transitional government either, which was required to *resolve* the issue of the trials definitively and therefore did not repress the uprisings.

The so-called *Final Point and Due Obedience laws*, which limited the universe of military personnel who could be tried, were the result of this conflict between the military and a government that already had scant political capital at that time. At the same time, the unions were constantly confronting the government, taking advantage of its multiple open fronts and producing a wear and tear that Peronism would later take advantage of in electoral terms. In 1989, the violent reappearance of a leftist guerrilla group further complicated the government's situation, especially on the military front.¹⁷

In addition to the military issue, Alfonsín tried to implement policies of modernization and democratization in various areas of society and the State. He was more successful in education, culture, the renewal of the Supreme Court and in some social laws, such as divorce and shared parental responsibility. At the same time, he failed to reform the trade unions and, above all, to manage the economy, which, at the end of its mandate, was in the midst of a hyperinflationary meltdown. This was key to the ruling party's defeat and the Peronist victory in the 1989 presidential elections.

Peronism defined his leadership in the leader from *La Rioja*, Carlos Menem. Since then, and until its decline, Menemism acted without any other type of interest than its own political benefit and the construction of a leadership that later O'Donnell¹⁸ would include within the so-called delegative democracies. This forced Alfonsín to move forward with the handing over of his command due to the extortion he suffered from the president-elect and in the midst of a crisis that seemed to have no end in sight.

1989–(1990)1999 PERONISM RETURN. THE END OF THE TRANSITION

The end of the transition may be in the late 1990s, with the fourth military uprising.¹⁹ That time, the Peronist Carlos Menem managed to repress it with the strength that the previous government did not have from a series of strategies to defuse the military resistance. Menem had skillfully negotiated with the rebel groups to wear down Alfonsín, but then in power he agreed with the leadership, granting the pardons they demanded for the military chiefs convicted during the previous government. Satisfied with the presidential measure, the Armed Forces bloodily repressed the rebels in what would be, until today, the last military uprising.

In the context of the end of communism, Menem opened a new economic agenda, where the issues linked to the last dictatorship began to lose some of their validity. Through constant budget constraint, the firepower of the military was significantly reduced and, with the end of compulsory military service for 18-year-olds, the Armed Forces were deprived of a large number of troops and, at the same time, of access to a large section of the population.

In 1998 the Armed Forces carried out an important self-criticism for what happened during the dictatorship, which closed the circle of official policy on the recent past. Before the end of

Menem's first term, democracy, in electoral terms, was consolidated and the military was no longer a threat. At the same time, new challenges, not minor ones, opened up, even for the stability of the system itself.

CURRENT STATUS

Argentina's current political problems are far from those it faced during the transition. However, the way in which that process was approached somehow influenced and shaped the course of politics to this day.

While there is no longer any danger of authoritarian regression or interruption of elections, political instability is a constant that Argentine governments have yet to face. This is especially true for those rulers who do not belong to Peronism, which continues to dominate the Senate, provincial politics and the trade union world, using the latter as a battering ram to regain power when it is defeated electorally.

Political parties rarely acted in a coordinated manner, even in times of great crisis. It was not until 1994 that the first major formal agreement between the parties for constitutional reform was reached. That was possibly the kind of pact they should have made 10 years earlier, in the face of the fall of the military government.

However, this late pact did not survive much more than the reformist process that, on the other hand, was opened up by Menem's need to achieve a re-election until now forbidden. In fact, the radical president who succeeded Menem in 1999 (Fernando De la Rúa) suffered a strong boycott from Peronism, which – in addition to its own mistakes – ended in 2001 with his early resignation and the return of Peronism to the presidency, less than two years after losing the elections.

Menem's years had two important institutional impacts that reversed some of the policies of the Alfonsínist period and that are still being observed today. **Firstly**, a drastic deterioration in the course of justice.²⁰ This was symbolized by a reform of the Supreme Court that was placed under the political orbit of Peronism. The same thing happened with the main judicial positions in the country (the federal justice).²¹

Secondly, the prevalence of corruption and drug trafficking should be noted as a subject that would become nodal in the country's institutional life (which would extend even further into the Kirchner years). There was also a growing *informalization* of social and political life – in the context of increasing poverty

17 Claudia Hilb, *Usos del pasado. Qué hacemos hoy con los setenta*, 2nd edition, Buenos Aires: Editorial Siglo XXI, 2014.

18 Guillermo O'Donnell, "Delegative Democracy", in *Journal of Democracy*, 1994 (1), 5, 55–69.

19 On the basis of what was pointed out by O'Donnell (1988) in 1983, the first stage of the transition was completed, but at the same time another stage was initiated that had to go on until democratic consolidation, that is, until the moment when the new regime no longer ran the risk of regression. In 1990, Argentina reached that point.

20 At the same time, the horizontal *accountability* bodies were distorted (O'Donnell, 2004) while the elements provided for in the new Constitution to contain the marked presidentialism of the Argentine political system were blocked.

21 The Peronist takeover of federal justice in the provinces began during the transition when radicalism gave up these spaces in exchange for co-existence in the national congress. These positions are approved by the Senate, which had a Peronist majority from 1983 until today.

and unemployment – which had repercussions for the emergence of new actors (social movements) and the growing discredit of traditional political parties.

After the frustrated mandate of President De la Rúa (1999–2001), Peronism completed the remaining period with Eduardo Duhalde (2002–2003) in the context of an unprecedented deterioration of the economic and social situation. So came the turn of a leftist variant of Peronism, led by Néstor Kirchner (2003–2007) and his wife Cristina Fernández (2007–2011 and 2011–2015) who, with populist rhetoric and in the context of a society that was unbelieving and desperate, but also in the midst of an accelerated economic recovery due to the reconfiguration of international prices of raw materials, remained in power for 12 years.

During that time, many of the debates that had characterized the transition returned to the political agenda, especially after the review of the human rights issue. The strongly *vindicating* rhetoric of the Peronist government's policy of the 1970s was supported in part by the renewed participation of numerous political actors in the 1970s and the transition. But at the same time, it was also a *discursive strategy* to legitimize its intention to hegemonically control the state apparatus that supported politically and economically the reappearance of this discursive axis.

This was also possible because the consequences of the dictatorial process had been resolved more by military pressure and the political groups that supported them than by a free and consensual social debate. In this context, the National Congress annulled Final Point and Due Obedience laws of the radical stage and this allowed the Kirchnerist government to promote the trials that had been truncated at the end of the 1980s, although the pardons issued by the also Peronist Carlos Menem were never annulled.

However, these issues were restricting their impact on very informed and involved sectors of public opinion. Among the population, interest in economic and social issues continued to prevail. In addition, the partisanship of the Peronist government produced a noticeable break in the social consensus on human rights issues, going back to the few agreements reached during the transition.²²

This was seen, above all, in the manipulation of previously prestigious characters and institutions such as the Mothers and Grandmothers of Plaza de Mayo. The participation of important members of these groups in well-known corruption scandals or receiving government benefits generated a strong deterioration in public consideration, within the context of a growing social weariness with the primacy of these issues.

The accession of Mauricio Macri to the presidency in 2015 could mark the definitive end of the problems linked to the transition and the opening of new and more current political and social debates. At the same time, it can be observed that the State abandoned its pretensions to build and disseminate unique and closed visions of the past, as in previous years.

On the other hand, more than four decades later and with a renewed population generationally, the questions linked to this past are already part of the history and concern of some numerically reduced (although politically important) social groups.

LESSONS LEARNT

Argentine society does not learn easily. However, the events during the years of dictatorship and transition left some very strong and consolidated marks. This was because a large part of

the generations that lived through those events are *still* actors in the public life of the country. However, this is already changing and will deepen as they produce the generational replacements that link these elites to that past.

A symptom of this situation was observed after the death of former president Alfonsín. While he was alive, he never recovered the large shares of social consensus of the 1980s, his figure had a strong vindication beyond his party's borders. Like any transitional government, it was subjected to a high degree of wear and tear due to the demands and challenges of the moment, especially in a very complicated global situation. The passing of the years allowed for a calmer and more objective look at this situation and the expertise required to carry it forward.

In terms of the lessons learnt, **firstly**, there is a sustained rejection of everything related to the military in public life. This is manifested in the impossibility of reiterating, even superficially, the strategies that this institution had proposed since 1930, with a constant pretension to get involved in the political decisions of the State. A certain anti-militarism (especially of the elites) led to the point that Argentina was the country in the region with the lowest military budget and zero rearmament.²³

Secondly, it should be mentioned that the validity of the democratic system has not been questioned again, neither among the population nor, above all, among the political elites. The 2001 crisis that put an end to the De la Rúa government – whose triumph had created great expectations – could have led to the emergence of anti-political, outsider or Venezuelan-style military movements. However, it was resolved through institutional channels with the predominant participation of Congress and political parties.

This had not always been the case, in fact one of the central causes of the constant constitutional interruptions in Argentina was the lack of confidence in democratic rules to regulate social and political life and the absence of specific political clout of Congress.

The Latinobarómetro survey shows the Argentinean case to be always closer to those who value democracy than to those who disbelieve in it. On the democratic development scale (average per country between 2006–2017), Argentina ranks third after Uruguay and Costa Rica.²⁴ However, this is significantly reversed by consulting on trust in public institutions (Congress and the judiciary) and leading political parties.

Thirdly, Argentina is a country where various aspects that characterize a modern democracy are very present, such as a high level of organization in civil society, an abundant press and a more than acceptable level of freedom of expression in both traditional and digital media in the context of a dense cultural and intellectual life.

RECOMMENDATIONS

Argentina remains a country that finds it difficult to process political conflicts and definitions of state policies in a consensual

22 Hugo Vezzetti, *Sobre la violencia revolucionaria. Memorias y olvidos*, Buenos Aires: Editorial Siglo XXI, 2009.

23 Although this is a volatile issue, the Latinobarómetro survey showed that by 2017 only 50 % of the population had a good image of the Armed Forces. Retrieved from www.latinobarometro.org. Report 2017.

24 The question asked is “On a scale of 1 to 10, where 1 is ‘undemocratic’ and 10 is ‘completely democratic’”. Where is your country located? Latinobarómetro Report 2017. Retrieved from www.latinobarometro.org

and institutional manner. The Kirchnerist years were remembered for these issues, to which must be added the emergence of a process of social polarization which in the 1980s and 1990s appeared to be attenuated.

A *first* recommendation is that those issues related to the transition and the immediately preceding stages should be dealt again with equable, professional criteria and with the exact importance they have, within the context of a history that is already quite violent and polarized.

Secondly, and within the context of formal education, it is essential that the teaching and dissemination of these facts be done in the search for greater civic learning and a growing democratic

commitment. That is why it is necessary not to continue to promote and point out culprits and to reiterate sterile discussions which, moreover, are anachronistic today.

Thirdly, the nationalist/territorialist approach to the Malvinas-Falklands issue should be reviewed, especially in the public sphere, as it remains an element that can potentially be used for possible authoritarian appeals.

Fourthly and finally, the pending issue remains the social question, especially in view of the high levels of poverty, insecurity (also linked to drug trafficking) and precarious employment conditions which, if not resolved, could become a danger to political stability and democratic life.

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DISMANTLING THE STATE SECURITY APPARATUS

SERGIO GABRIEL EISSA

INTRODUCTION

In Argentina, there were six (6) coups d'état between 1930 and 1976. However, the use of violence to resolve political conflicts in the country can be traced back to the years after the War of Independence (1810–1824). Indeed, the constitutive process of a “violent normality”¹ has its roots in a way of doing politics legitimized by the social and political actors, military and civil, during the process of building the National State.

The use of violence to modify a correlation of political forces continued beyond the approval of the National Constitution in 1853. In the following years, Bartolomé Mitre carried out “the first coup d'état” against the government of President Santiago Derqui (1860–1861) in 1861, the same politician took up arms in 1874 when he considered that he had lost the presidential elections fraudulently. The governor of the Buenos Aires Province, Carlos Tejedor, rebelled against the national government in 1880 for the same reasons. This situation also continued during the radical “failed coups” of 1890, 1893 and 1905 that demanded compulsory, universal and secret voting in order to put an end to electoral fraud. All the political “families” in Argentina used violence as a method of doing politics.

In this context, the formation of the Argentine Armed Forces was not without contradictions and setbacks in line with the process of building the National State.² The first steps towards the professionalization of the Armed Forces were taken by President Domingo Faustino Sarmiento (1868–1874), motivated by the Paraguayan War (1865–1870) and the experience gained by him during his diplomatic activity in Europe and the United States (USA). In this sense, the creation of the National Military College (1869) and the Military Naval School (1872) are noteworthy. Finally, when the rebellion led by the governor of the Buenos Aires Province, Carlos Tejedor, was defeated in 1880, Law No. 1.072 was passed, prohibiting the provinces from forming military bodies under any name, guaranteeing the legitimate monopoly of violence to the National State.

Towards the end of the second decade of the 20th century, on the one hand, these professional Armed Forces considered themselves to have the legitimate right to intervene in the political contest and, on the other, political actors continued to validate the use of violence, resorting to the military to change the political results that were adverse to them.³ This self-assigned, society-validated “function” gradually mutated to its peak with the last dictatorship between 1976 and 1983. While the first coups were made to make “corrections” (tutelary functions) in the political system (1930, 1943, 1955 and 1962), those of 1966 and 1976 were made without a plan to call for elections. That is to say, they intended to remain in power *sine die*: the Armed Forces were constituted as a “military party”⁴, seeking to produce fundamental transformations in the social, political and economic life of Argentina.

In this context, the design of the Armed Forces was based on the hypotheses of conflict with Brazil and Chile and on

the tradition of using the military in tasks of “internal security.” For example, during the imposition of the political and economic model of Buenos Aires on the rest of the provinces (1820–1862); the struggle against the native peoples (1878–1919); in the repression of social protests such as the Tragic Week (1919) and the Rebel Patagonia (1920–1921); and the protests of radicals, anarchists, socialists and trade unionists between 1890–1955.

The practices listed in the preceding paragraph were fuelled by the incorporation of the French and American counterinsurgency doctrines in the context of Argentina's accession to the Western bloc during the Cold War (1947–1991).⁵ In fact, in that country this doctrine was first reflected in the “Plan Continentes” (1959), which consisted of using the Armed Forces⁶ and the security forces to repress the “internal ideological enemy”: mainly Peronist and leftist militants, but also any opponent of the political project of the Armed Forces.⁷ Argentina ascribed to the National Security Doctrine that was “founded on a hypothesis of permanent internal war on different fronts” in which the Armed Forces should not only defend territorial integrity but, fundamentally, “the ideological frontiers that separated, within each community, the supporters of the Western and Christian bloc from the adherents to the communist world.”⁸ This doctrine was in force until well into the 1980s in Latin America.⁹

In this context, the future dictator Juan Carlos Onganía (1966–1970) implemented the last relevant military reform in the Army between 1963 and 1966.¹⁰ The deployment, the organizational structure and the doctrine were designed for the Armed

1 Luis Alberto Romero, “La violencia en la historia argentina reciente: un estado de la cuestión”, paper presented at the Workshop Historicizing a troubled and living past in memory: Argentina, Chile, Perú, London: Institute of Latin American Studies, London University, 2003.

2 For more details, see Oscar Osizlak, *La formación del Estado argentino*, Buenos Aires: Planeta, 1997.

3 Alain Rouquié, *Poder militar y sociedad política en la Argentina. Tomo I*, Buenos Aires: Hyspamérica, 1986.

4 Mario Rapoport, Claudio Spiguel, *Política exterior argentina. Poder y conflictos internos (1880–2001)*, Buenos Aires: Capital Intelectual, 2005, 43.

5 Ernesto López, La introducción de la Doctrina de la Seguridad Nacional en el Ejército Argentino, in Oscar Moreno (Coord.), *La construcción de la Nación Argentina. El rol de las fuerzas armadas. Debates históricos en el marco del Bicentenario 1810/2010*, Buenos Aires: Ministerio de Defensa, 2010.

6 Formulated during the government of Juan Domingo Perón in 1954 and applied by Arturo Frondizi (Decreets No. 9880/58 and 2628/60). Sergio Eissa, *¿La irrelevancia de los Estados Unidos? La política de defensa argentina (1983–2010)*, Buenos Aires: Arte y Parte, 2015.

7 Mario Rapoport, Claudio Spiguel, op. cit., 2005, 52.

8 Mario Rapoport, *Historia económica, política y social de la Argentina (1880–2000)*, Buenos Aires: Ediciones Macchi, 2000, 631.

9 Sergio Eissa, op. cit., 2015.

10 Subsequently, partial adjustments were made due to budget reductions, such as the dissolution of the Army Corps. See Guillermo Lafferriere & Germán Soprano, *El Ejército y la política de defensa en la Argentina del Siglo XXI*, Buenos Aires: Protohistoria Ediciones, 2015, 39.

Forces to face inter-state conflicts (Chile and Brazil) and internal political groups, of an insurgent nature or simply opposed to government policies.¹¹

SITUATION DURING THE COUP AND FALL OF THE DICTATORSHIP

Unlike the previous coups, the Armed Forces decided to avoid the personalities of the past. To this end, as of March 24, 1976, they established that the supreme organ of the state should be a Military Junta (JM) composed of the heads of each force and that it should be responsible for appointing the president.¹² They also decided to divide the positions in the state structure into thirds (33 % for each). This rule produced parallel policies and distortions in state action, while “the military officials appointed in the different areas of the state placed their first loyalties, according to the most elementary military logic, in their respective forces and not in the military authorities [who were their immediate superiors] or of those in charge of the government.”¹³ Although this agreement was followed in the formation of the Legislative Council (CAL) and in the Ministries, the Army always held the presidency and retained the main ministries; as well as “the so-called institutional presidency, comprised of the Presidential Secretariats, whose main activity is the management of the political coordination of the presidency”, among them the General Secretariat and the Secretariat of State Intelligence (SIDE).

This force also dominated the distribution of provincial governorships: twelve (12) for the Army, five (5) for the Navy and two (2) for the Argentine Air Force.¹⁴

As for the structure through which the illegal repression was exercised, the Argentine Army had control over the entire territory through the Army Corps¹⁵ divided into zones, subzones and areas:¹⁶

a/ Army Corps I

Zone 1: Autonomous City of Buenos Aires (Federal Capital) and the municipalities of the southeast, center and northwest of the province of Buenos Aires. Until the end of 1979 it also covered the entire province of La Pampa.

In the Federal Capital Subzone, Area IIIA was in charge of the Argentine Navy and where the Naval School of Mechanical Engineering (ESMA) operated as a Clandestine Detention Center (CCD) or Meeting Place for Detainees (LRD).

Subzone 16, which included the municipalities of Merlo, Morón and Moreno, was placed under the Directorate of the Argentine Air Force.

b/ Army Corps II

Zone 2: provinces of Santa Fe, Entre Ríos, Corrientes, Misiones, Chaco and Formosa.

c/ Army Corps III

Zone 3: provinces of Córdoba, San Luis, Mendoza, San Juan, Catamarca, Santiago del Estero, Tucumán, Salta and Jujuy.

d/ Commander of the Military Institutes (Campo de Mayo)

Zone 4: covered the northern municipalities of the Buenos Aires Province.

e/ V Army Corps

Zone 5: south and southwest of the province of Buenos Aires, and the provinces of Neuquén, Río Negro, Chubut, Santa Cruz and the National Territory of Tierra del Fuego.

This organization was intended to conduct defensive and offensive military operations. The former concerned population control and the prevention of “subversive” activities. These were carried out by the areas, which also provided support to the Task Forces (TF); who were responsible for carrying out the offensive actions, i.e. kidnapping the victims. These TF depended on the services of the intelligence headquarters in each area and were composed of officers and non-commissioned officers from the relevant areas. Once the person was abducted, he or she was transferred to a CCD until it was decided whether he or she would be killed, passed to the National Executive or the Judiciary (launched) or released.

Sixty-one (61) CCDs depended on zone commanders;¹⁷ although some unofficial sources claim that there were 610 CCDs (LRDs and Transitional Sites (LTs)) in 1976, stabilizing at around 364 in 1977.¹⁸

Likewise, Directive No. 1/75 of the National Defense Council “Fight against Subversion”, issued pursuant to Decrees Nos. 261, 2770, 2771 and 2772 of 1975 [presidency of María Estela Martínez de Perón (1974–1976)], established that the Army should have operational control of the provincial prison police and services; the Federal Police; and the National Penitentiary Service.

In addition, it had functional control over SIDE. The Navy was in charge of the operational control of the police of the National Territory of Tierra del Fuego. While the Argentine Air Force would have control of the provincial police and prison services, it would have to agree with the Argentine Army.¹⁹

Little information is available on the members of the Task Forces that participated in state terrorism, which immediately resulted in the disappearance of 30,000 Argentines and the theft of half a thousand babies. For this reason, in order to have an estimated size of the repressive apparatus, we will mention, firstly, that spending on the Armed Forces increased by 450 % (see Graph 1); taking 1951 as a base year.

Secondly, the Task Forces were composed of staff (officers and non-commissioned officers only) of the Armed Forces (Army, Navy and Air Force), the Security Forces (Gendarmerie

11 Germán Montenegro, “El marco normativo y doctrinario de la defensa nacional”, in *Revista de la Defensa Nacional*, 2007, (1), Buenos Aires: Ministerio de Defensa, 17.

12 Roberto Russell, El proceso de toma de decisiones en la política exterior argentina (1976–1983), in Roberto Russell, *Política exterior y toma de decisiones en América Latina*, Buenos Aires: Grupo Editor Latinoamericano, 1990, 14. The figure of the fourth man exacerbated inter-force and inter-force bids in the government, as did the 33 % quote. Paula Canelo, *La política secreta de la última dictadura argentina (1976–1983)*, Buenos Aires: Edhasa, 2016.

13 Roberto Russell, *op. cit.*, 1990, 15.

14 Paula Canelo, *op. cit.*, 2016, 57.

15 *Ibid.*, 58–59.

16 See <http://www.desaparecidos.org/nuncamas/web/zonas/zonas.htm> and Case No. 1261–1268 “Olivera Róvere, Jorge Carlos y otros s/homicidio, privación ilegítima de la libertad, tormentos y otros delitos del Código Penal”, Buenos Aires: Tribunal Oral en lo Criminal Federal No. 5, December 2009.

17 *Ibid* and National Commission on the Disappearance of Persons (2017 [1984]), *Nunca Más. Report of the National Commission on the Disappearance of Persons*, Buenos Aires: Eudeba.

18 María Seoane, *El dictador*, Buenos Aires: Sudamericana, 2001, 227–228.

19 See <http://www.desaparecidos.org/nuncamas/web/document/document.htm> and Causa No. 1261–1268 “Olivera Róvere, Jorge Carlos y otros s/homicidio, privación ilegítima de la libertad, tormentos y otros delitos del Código Penal”, Buenos Aires: Tribunal Oral en lo Criminal Federal No. 5, December 10, 2009.

TABLE NO. 1: TROOPS OF THE ARMED FORCES, SECURITY AND INTELLIGENCE IN 1977

	Army	Navy	Air Force	Gendarmerie	Naval Prefecture	Federal Police	SIDE
Troops	80,000	32,900	17,000	11,000	9,000	22,000	
Reserve	250,000						
Intelligence²⁰	4,867	712	1,200				2,200

Fuente: International Institute for Strategic Studies, “Balance Militar” in Ejército. Revista de las Armas y los Servicios, XXXIX (461), Madrid: Ejército de Tierra, 1978 y Revista Veintitrés, Buenos Aires, no data.

and Prefecture, which were part of the Army and Navy, respectively, until 1984), the Federal Police, the 23 provincial police and the Secretariat of State Intelligence (SIDE).

The approximate number of troops was: *See Table No. 1*

Currently, provincial police represent 62 %²¹ of the federal police system. If that proportion had been the same in 1977, the provincial police forces would have totalled approximately 25,000.

It should be noted that “during 1975 the subversive gangs were defeated in all the major large-scale actions undertaken, and although their actions had not been annihilated, the military and security operations initiated had begun to achieve the objectives set.”²²

With regard to legal regulations (see table 2), it should be emphasized that the democratic government of María Estela Martínez de Perón (1974–1976)

had given the Armed Forces and the Security Forces the necessary legislation and normative instruments to deal with the subversive problem, but there was no reason to justify the illegal and clandestine actions carried out by the military government, and in this sense it should be stressed that “the coup d’état of March 24, 1976 did not mean a substantial change in the legal provisions in force at that date regarding the fight against subversion. (...) the prevailing system only authorized the suspect to be detained, to be housed occasionally and temporarily in a prison or military unit, and to be immediately released or brought before the civil or military courts or the executive branch (...) However, it is clear from the analysis carried out (...) that what happened was radically different.

Although the operational structure continued to function in the same way, the personnel subordinated to the accused detained a large number of people, illegally housed them in military units or in places under the control of the Armed Forces, interrogated them under the torture method, held them in captivity under inhuman conditions of life and accommodation and, finally, either legalized them by placing them at the disposal of the courts or the National Executive Power, released them or physically eliminated them.”²³

In conclusion, despite the fact that “the legislative policy applied to the subversive phenomenon by the constitutional government did not undergo substantial changes after its overthrow, [instead of] making full use of such legal powers, the military government preferred to implement a clandestine mode of repression.”²⁴ The coup d’état did not aim to annihilate and/or eliminate subversion,²⁵ but rather to bring about a political and economic change in Argentine society that required the elimination of all forms of opposition to the authoritarian regime.²⁶

The defeat in the Malvinas/Falkland war (1982) will highlight the lack of professionalization of the Argentine Armed Forces to face a traditional conflict – the first since the Paraguay War (1865–1870) – in which, beyond the heroism demonstrated by the officers, non-commissioned officers and soldiers of the three Forces, the lack of preparation, the lack of means, the individual actions of each Force in the face of the need for joint action and the political factionalism in which the military instrument had been submerged was exposed.

The Armed Forces were an autonomous actor of political power for much of the 20th century and, despite defeat in the Malvinas/Falkland war and the “transition due to collapse”, the military – together with their civil allies – retained an important veto power during the government of Raúl Alfonsín (1983–1989) and bureaucratic autonomy to try to define their mission and roles from the 1990s onwards.²⁷

ACTIONS TO STRENGTHEN DEMOCRACY DURING THE CONSOLIDATION PROCESS

In order to transform the security and military apparatus inherited from the dictatorship, the democratic government faced, with varying success, four courses of action during the democratic consolidation:

20 It is not clear from the sources whether such personnel are also included in the totals for each force.

21 Facundo Salles Kobilanski, “La política de las reformas policiales a nivel subnacional en Argentina: algunas contribuciones y lecciones desde la ciencia política”, in *Cuadernos de Seguridad*, Buenos Aires: Ministerio de Seguridad, no data, 2, http://www.minseg.gob.ar/sites/default/files/cuadernos/14_Kobilanski.pdf

22 Causa No. 1261–1268 “Olivera Róvere, Jorge Carlos y otros s/homicidio, privación ilegítima de la libertad, tormentos y otros delitos del Código Penal”, Buenos Aires: Tribunal Oral en lo Criminal Federal No. 5, December 10, 2009, 610.

23 Ibid., 610–611.

24 Ibid., 610.

25 The Secret Order of December 17, 1976 eliminated the order to “neutralize and/or annihilate subversive actions” (as instructed by the so-called annihilation decrees of 1975, including No. 261/1975). The Armed Forces themselves, therefore, believed that “subversion” no longer existed militarily. However, the Secret Order states that from then on “subversive criminals must be annihilated”. In fact, the 1976 directive states: “Operations against subversive elements (R-C-9-1) (...) 4003 i): Apply fighting power with maximum violence to annihilate subversive criminals wherever they are. Military action is always violent and bloody (...) The subversive criminal who wields arms must be annihilated, since when the Armed Forces enter into operations they must not interrupt the combat or accept surrender (...) 4008: the attack will be executed: a) By locating and annihilating subversive activists.”

26 Mario Rapoport, Claudio Spiguel, *op. cit.*, 2005, 52.

27 Sergio Eissa, *op. cit.*, 2015.

TABLE NO. 2: LEGAL FRAMEWORK FOR REPRESSION	
Type and number of standard	Content
Decree-Law No. 16.970/1966	National Defense – National Security Doctrine
Decree-Law No. 16.896/1966	It authorizes searches and detentions of persons for up to ten days before they are brought to justice.
Law No. 20.642 (1974)	Increases penalties under the Penal Code.
Law No. 20.840 (1974)	“Anti-subversive”.
Decree No. 1368/1974	State of siege.
Decree No. 261/1975	It orders the Argentine Army to execute operations to neutralize and/or annihilate the subversion.
Directive of Commander-in-Chief of the armed forces No. 333 and 334	Operations against subversion in Tucumán.
Decree No. 2770, 2771 y 2772 de 1975	They created, respectively, the Defense Council (CD); signed agreements with the provinces to place the police and provincial prison services under the operational control of the CD; and ordered the annihilation of the actions of the subversive elements.
Defense Council Directive No. 1/75	“Fight against subversion”.
Directive No. 404/75 “Fight against subversion” (Commander-in-Chief of the Argentine Army)	It established the priority fight zones, divided the strategic maneuver into phases and maintained the pre-existing territorial organization – composed of defense zones, sub-zones, areas and sub-areas – in accordance with the 1972 Capabilities Plan.
Anti-subversive Directive No. 1/75 Secret of the Argentine Navy that approved “Capabilities Plan –PLACINTARA 75-.”	
“Orientation-Updating of the 1975 Internal Framework Capability Plan” of the Argentine Air Force.	
Statute for the National Reorganization Process.	
Partial Order No. 405/76	Restructuring of jurisdictions to intensify operations.
Directive of the Commander in Chief of the Army No. 504/77.	
“Final Document” of the Military Junta of 28 April, 1983.	

Source: own creation from public documents.²⁸

1. THE ROLE OF FOREIGN POLICY

While Raúl Alfonsín’s foreign policy (1983–1989) clearly had “the protection and consolidation of democracy”²⁹; as its ordering axis; that of Carlos Menem (1989–1999) cannot be explained solely from the change in economic policy, but also on the basis of the government’s diagnosis of the post-Cold War international scene, which had its roots in the theoretical development of Carlos Escudé, known as Peripheral Realism.³⁰ However, both governments bet, one in political terms and the other in economic terms, on regional integration.

In effect, the deactivation of the conflict hypothesis with Chile and Brazil³¹ contributed to the military subordination, while the Armed Forces could not justify their budget in terms of either the same or the internal ideological enemy. To this end, Raúl Alfonsín (UCR) began the process of regional integration through the signing of the Program for Economic Integration and Cooperation (PICE) with Brazil, to which Uruguay later joined, as well as the referendum and the subsequent approval of the Treaty of Peace and Friendship with the Republic of Chile in 1984.

Moreover, the position taken in the face of the Central American crisis sought not only to place Argentina as a protagonist on the regional stage, defending the principle of non-intervention and legal equality of states, but also to “prevent the conflict from evolving in a way that would put the [new] democratic governments at a disadvantage”.³²

28 See <http://www.desaparecidos.org/nuncamas/web/document/document.htm> y Causa No. 1261–1268 “Olivera Róvere, Jorge Carlos y otros s/homicidio, privación ilegítima de la libertad, tormentos y otros delitos del Código Penal”, Buenos Aires: Tribunal Oral en lo Criminal Federal No. 5, December 10, 2009.

29 Roberto Russell, Políticas exteriores: hacia una política común, in Mario Rapoport (Comp.), *Argentina y Brasil en el MERCOSUR. Políticas comunes y alianzas regionales*, Buenos Aires: Grupo Editor Latinoamericano, 1995, 35.

30 Carlos Escudé, *Realismo periférico. Fundamentos para la nueva política exterior argentina*, Buenos Aires: Planeta, 1992.

31 The distention with Brazil began with the signing of the Multilateral Agreement on Corpus-Itaipu in 1979.

32 José Paradiso, *Debates y trayectorias de la política exterior argentina*, Buenos Aires: Grupo Editor Latinoamericano, 1993, 187.

The Justicialist president³³ Carlos Menem (PJ) deepened this strategy of regional integration. MERCOSUR, comprising Argentina, Brazil, Paraguay and Uruguay, was launched on 26 March 1991 and continued the work of PICE. Finally, and almost simultaneously, Brazil and Argentina formally ended their respective conflict scenarios in 1996.³⁴ As for Chile, after a long process that began in 1992, on December 29, 1998, the Argentine Congress approved the treaty that put an end to the demarcation of some twenty points that had not yet been demarcated on the border with that country. Among them, the most important were Laguna del Desierto, resolved through Latin American arbitration, and Hielos Continentales.³⁵

2. THE ROLE OF ECONOMIC POLICY

Raúl Alfonsín reduced the defense budget to its historical level of 2 % of the GDP, not only because of economic austerity, but also to contribute to the subordination of the Armed Forces to civil power³⁶ (see Graph 3). Carlos Menem, for his part, disinterested himself in national defense after consolidating civilian control of the Armed Forces in 1990. As a result, the budget sank to 0.9 % of GDP³⁷ until the first decade of the 21st century.

3. TRIAL OF THOSE RESPONSIBLE FOR STATE TERRORISM

From 1983 to the present day, the Argentine government, with advances and setbacks, faced the trial of those responsible for the state terrorism that caused the disappearance of thirty thousand (30,000) people and of half a thousand newborns.

The first phase of this trial was addressed by the radical government (UCR) between 1983 and 1989. While Raúl Alfonsín “philosopher” thought that

*Coups d'état have always been civil-military. The undoubtedly military responsibility for its operational aspect must not make us forget the heavy civil responsibility of its ideological programming and feeding. The coup has always reflected a loss of the legal sense of society and not just a loss of the legal sense of the military. Therefore, it would be absurd, to expect that overcoming the coup would come from military self-criticism or from civil society action on the military. Overcoming the coup can only come from a global reflection of Argentine society on itself.*³⁸

Raúl Alfonsín, a statesman and politician, considered that the military had carried out a “strategic withdrawal”, leaving the country in a deep economic crisis; in an international scenario where the Cold War (1947–1991) in which the arrival of Ronald Reagan (1981–1989) had faced what would be the final offensive against the Soviet Union; where he had also begun the involvement of his armed forces in the so-called War on Drugs in Latin America (first with Richard Nixon in 1971 and Ronald Reagan in 1986); and in a country where the last military dictatorship (1976–1983) “enjoyed the tacit consent of a significant part of Argentine society.”³⁹ For this reason, years later, he argued

it was absolutely unthinkable to prosecute thousands of members of the armed and security forces (most of them active) who participated in one way or another in the illegal repression [...]. Our aim could not be to try and convict all those who had violated human rights in one way or another, because this was

unattainable, but to achieve an exemplary punishment that would prevent the repetition of similar events in the future [...]. it would have been absolutely irresponsible to claim such a far-reaching universe of judgment when the consequences of that action, far from preventing future crimes, could promote them again or cause greater harm to the still incipient democracy [...]. Did anyone seriously believe and still believe that, at that time, with a democracy that was just emerging from years of military dictatorship, it was possible to arrest and try 1,500 or 2,000 active officers of the armed forces? Not only was it tactically impossible, but the Argentinians had not voted in that direction [...]. it would have been absolutely irresponsible to claim such a far-reaching universe of judgment when the consequences of that action, far from preventing future crimes, could promote them again or cause greater harm to the still incipient democracy.⁴⁰

Indeed, despite the fact that society and human rights organizations thought otherwise, Raúl Alfonsín had argued during the election campaign that he would declare self-amnesty null and void and that

*we're not going to go backwards looking with a sense of revenge either. We will not build the country of the future in this way [...]. Here, there are different responsibilities: there is a responsibility of those who took the decision to act as it was done, there is a different responsibility of those who committed excesses in the repression, and there is a different responsibility of those who did nothing other than, in a framework of extreme confusion, to comply with orders.*⁴¹

Thus, the president, tense between his convictions and that of fulfilling his maximum objective, which was to hand over the government to another democratically elected ruler, promoted the trial of the Military Juntas – the only one in the world if Nuremberg is not taken into account – but he had to retreat because of errors in the implementation of the reforms of the Code of Military Justice and because the military issue was exacerbated by the irresolution of the government.

Already in two different socio-political contexts, President Carlos Menem opted to put an end to the military issue by pardoning those responsible for state terrorism, while Presidents Néstor Kirchner (2003–2007) and Cristina Fernández de Kirchner (2007–2015), with the support of human rights organizations, opted to promote the reopening of the trial.

33 The expressions Justicialist Party or Peronism shall be used interchangeably in the text.

34 Rosendo Fraga, El concepto de las hipótesis de conflicto, in Andrés Cisneros (Comp.), *Política exterior argentina 1989–1999. Historia de un éxito*, Buenos Aires: Nuevo Hacer. Grupo Editor Latinoamericano, 1998.

35 Sergio Eissa, *Hielos Continentales. Las variables domésticas en la política exterior argentina*, Buenos Aires: Fundación Síntesis, 2005.

36 David Pion-Berlin (Ed.), Civil-Military Circumvention. How Argentine State institutions compensate for a weakened chain of command, in David Pion-Berlin (Ed.), *Civil-military relations in Latin America. New Analytical Perspectives*, Carolina del Norte: The University of North Carolina Press, 2001.

37 Sergio Eissa, *op. cit.*, 2015.

38 Raúl Alfonsín, *Memoria política*, Buenos Aires: Fondo de Cultura Económica, 2009, 255.

39 Ibid., 33.

40 Ibid., 45 and 47–48.

41 Horacio Jaunarena, *La casa está en orden. Memoria de la transición*, Buenos Aires: TAEDA, 2011, 32.

4. REFORMS IN THE NATIONAL DEFENSE, SECURITY AND INTELLIGENCE SYSTEM

The process of reform of the national defense system lasted from 1983 to 2006, while in police agencies it can be argued that the reforms only began in 1997 with advances and setbacks, without significant progress having been made to date. On the other hand, although the Intelligence System was reached by two laws, both the former SIDE and the current Federal Intelligence Agency (AFI) continue to be questioned by political and social actors for their lack of transparency and for the lack of control by the Legislative Power.

Although this analytical separation is carried out, the three systems (defense, internal security and intelligence) are considered to constitute a “systemic construct” that contributes to Argentina’s strategic security.

Synthetically, the construction of the “basic consensus”⁴² took place in three (3) stages: a) the executive between 1983 and 1985, b) the legislative between 1987 and 2001 and c) the executive between 2005 and 2010.

During the first stage, reforms were implemented at the doctrinal and organic functional level, aimed at strengthening the subordination of the Armed Forces to the new constitutional government. It had already been agreed with the last de facto president, Reynaldo Bignone, to abolish the three posts of commander-in-chief of the Armed Forces, thus concentrating “the functions that until then had been held by those in the President of the Republic” and it was established that the headquarters of the General Staff of each Force would constitute the highest echelon of the military hierarchy through Decree-Law No. 23,023/83.⁴³

Subsequently, other measures were defined to modernize the National Defense System and strengthen the role of the Ministry of Defense⁴⁴ and the Joint Chiefs of Staff, it should be noted:⁴⁵

- the strengthening of the role of the Joint Chiefs of Staff of the Armed Forces, insofar as it was conceived by the government as “the greatest link in establishing routines and institutional traditions in accordance with a democratic government”. To this end, the head of the Joint Chiefs of Staff became the highest ranking active officer and provided him with a structure that should be supplemented by the best personnel each force could offer. This was no longer regarded as a career punishment;⁴⁶
- the transfer of the “share package, public limited companies with majority state participation, state limited companies, public limited companies and mixed companies whose ownership, possession or holding is the responsibility of the armed forces” to the Ministry of Defense (Decree No. 280/83);⁴⁷
- the delegation to the Ministry of Defense of the power to appoint and reassign senior officers of the three Forces, “as well as decisions on the dismissal and withdrawal of officers from that hierarchy” (Decree No. 436/84).⁴⁸ One of the first steps taken was to reduce the number of senior officers by almost 50 %;⁴⁹
- the transfer of the National Gendarmerie and the Argentine Naval Prefecture from the Argentine Army and Navy respectively,⁵⁰ to the Ministry of Defense;
- strengthening the Ministry in budgeting; and
- the reduction of the budget from 4.7 % of GDP to 2.3 %, “which represented approximately the historic level of defense expenditure”.⁵¹

Although a Defense Bill was sent to Congress in 1985, which departed from the platform of the ruling party and was drafted by advisers to the Ministry and the Joint Chiefs of Staff,⁵² the reformist impetus ended with the death of Defense Minister Raúl Borrás in May 1985.⁵³

After the first military uprising and the electoral defeat of radicalism in 1987, it agreed with the Justicialist Party (PJ) on a legislative agenda that included the submission of a National Defense Bill.

The radical and renovating Peronist deputies⁵⁴ agreed not to discuss the project coming from the government and sought to “solve the urgent need for a defense law, through a shared effort of conceptual compatibility and proposals of the different aspects of national political thought”.⁵⁵

First, the adoption of a new Defense Law was considered urgent for at least two (2) reasons. On the one hand, it was necessary to promote a strong institutionalization in this area, which would mean closing any door to a new military intervention. On the other hand, it was considered necessary to promote a doctrinal change that would extirpate from the military sector the National Security Doctrine, on the basis of which military intervention in internal security matters and the execution of a brutal repression that led to massive violations of human rights had been justified. Such a bill would then have to agree on a definition of national defense among the different political and social actors. This convergence was achieved in 1988 and is what has been called the “basic consensus”⁵⁶ (see graph 2).

On the one hand, some Peronist advisers promoted a total rejection of the National Security Doctrine and a return to

42 The concept belongs to Marcelo Saín. Other works by this author include Marcelo Saín, *Los votos y las botas. Estudios sobre la defensa nacional and las relaciones civil-militares en la democracia argentina*, Buenos Aires: Prometeo, 2010.

43 Ernesto López, *Ni la ceniza ni la gloria. Actores, sistema político y cuestión militar en los años de Alfonsín*, Quilmes: Universidad Nacional de Quilmes, 1994, 73.

44 Horacio Jaunarena, *op. cit.*, 2011, 48 and 50.

45 Ernesto López, *op. cit.*, 1994, 74.

46 Herbert Huser, *Argentine Civil-Military Relations. From Alfonsín to Menem*, Washington DC: National Defense University Press, 2002, 58–59.

47 See also Sergio Eissa, *op. cit.*, 2015 and Horacio Jaunarena, *op. cit.*, 2011, 48.

48 The use of this decree was recovered by the Minister of Defense Nilda Garré in December 2005 and repealed by President Mauricio Macri (2015 to present) in 2016.

49 Horacio Jaunarena, *op. cit.*, 2011, 52 and 62.

50 Ibid., 53. Gendarmerie was transferred in July 1984 and Prefecture in October 1984. Both came under the Ministry of the Interior in 1996 and the newly created Ministry of Security in 2010. The National Aeronautical Police was removed from the Argentine Air Force in 2005 and became the Airport Security Police under the Ministry of the Interior in 2006 and since 2010 under the Ministry of Security.

51 Horacio Jaunarena, *op. cit.*, 2011, 53.

52 Sergio Eissa, *op. cit.*, 2015.

53 Gustavo Druetta, “Herencia militar y lucha parlamentaria”, *Nuevo Proyecto*, (5–6), Buenos Aires: Centro de Estudios Para el Proyecto Nacional, 1989 and Varas, Augusto, “Democratización y reforma militar en Argentina”, paper presented at the International Seminar “Autonomización castrense y democracia: dinámica del armamentismo y del militarismo en América Latina”, CLACSO-FLACSO-SERC, Santiago de Chile, 1985.

54 It was an internal line within Peronism in the 1980s that displaced in 1985 the so-called “orthodox” who sought to maintain alignment with former President María Estela Martínez de Perón.

55 Gustavo Druetta, *op. cit.*, 1989, 194 and 199.

56 A good description of how the agreement was reached is provided by Gustavo Druetta, *op. cit.*, 1989.

the National Defense Doctrine, in force during the first and second of Perón's governments. Some of these ideas had been worked out in the final stage of the magazine *Estrategia*, by General Guglielmelli and some of the colonels of the 33 Orientals.⁵⁷ Within the Army, this thought was accompanied by the most nationalist sector and professionals "not intoxicated by pro-Yankee liberalism", being "the workhorse" of the generation of lieutenants Licastro and Fernández Valoni, among others, during the 1970s. This group was accompanied by a sector of classical Peronism and the renovators, and was certain that "military participation in internal affairs was harmful both to the military and to democracy, since it implied a confusion of roles with the police for which the military mentality was not prepared."⁵⁸ The latter facilitated the agreement with sectors of radicalism, whether they were balbinists (José Manuel Ugarte, Andrés Fontana and Yuyo Gauna) or alfonsinists (Dante Giadone, Jesús Rodríguez, Federico Storani and Eduardo Estévez). The certainty that the military had to be removed from internal affairs because it was harmful to both defense and democracy, and the intention not to return to the past, also implied "the construction of a system of political leadership of internal security."⁵⁹

However, it was not only a question of preventing the recent history of Argentines from repeating itself. The advisers of both parties were well aware of the experience of the *Posse Comitatus Act*, in force in the United States since 1878, which prohibited the military from enforcing internal security (*law enforcement*), and of other countries, such as Spain and Germany – in particular, the concept of *Innere Führung*.⁶⁰ The case studies had convinced them that it was not only a question of subordinating the Armed Forces to civilian power, but also of making progress in the design of a defense policy and a military instrument in accordance with the democratic regime and the new regional reality.⁶¹ Finally, the national defense law was adopted on April 13, 1988.

In the face of the attempted guerrilla takeover of the army barracks in the town of La Tablada in the summer of 1989, the legal vacuum left by the National Defense Law became evident: who should act in the event of an attack on a military unit?

Although work had been done on this bill during Raúl Alfonsín's presidency in 1989, the events of La Tablada put an end to any attempt to move forward with it. Once Carlos Menem took over the presidency, a draft was sent to the Minister for consideration and then sent to the Chamber of Deputies. Despite the pressure from the Armed Forces and the legislators of the UCeDe, so that they could act in matters of internal security (*law enforcement*), the actors of the "basic consensus" insisted that the wording be expressly limited to situations in which the Armed Forces could intervene in internal security, regulating a power that the president had by himself, in accordance with the National Constitution. Law No. 24.059 on internal security was finally adopted on 18 December, 1991.⁶²

Also, during the administration of President Carlos Menem, one of the most important structural and symbolic changes in the Armed Forces took place. In September 1994, Law No. 24.429 on Voluntary Military Service was passed, as a consequence of the assassination of the conscript Omar Carrasco in March of that year in the Army's Artillery Group 161, in the city of Zapala, province of Neuquén. Although the government had no plans to end the compulsory conscription, and the opposition did not request it either, the criminal act accelerated some analyses that were already being studied

in the Ministry of Defense, due to the increase in desertion, the lessons of the Malvinas/Falkland war and the strategic defensive stance adopted by the country.⁶³

The third key rule was Law 24.948, which established the fundamental political, organic and functional bases for the restructuring of the Armed Forces. This was the result, firstly, of a project drawn up by the Restructuring Commission of the Armed Forces with representatives of the forces. Secondly, the former Minister of Defense, and then deputy for the Radical Civic Union Horacio Jaunarena, presented a project to restructure the Armed Forces, which was advised by some military personnel.⁶⁴ Thirdly, a series of public hearings were held to discuss national defense issues between 1995 and 1999. National government officials, especially from the Ministry of Defense and Economy, national deputies and senators, foreign guests, renowned national and foreign academics, and active and retired military personnel were present. These hearings had at least two effects: a) the National Senate approved a project of communication to the Executive Power to issue a National Defense Directive establishing the guidelines on defense matters, which materialized in Decree No. 1116/1996⁶⁵ which approved the first Defense Directive of Argentina; b) the consensus reached for the approval of the Defense and Internal Security laws on "a common body of ideas, built up over 15 years of democracy", facilitated the debate on a common project for the restructuring of the Armed Forces.⁶⁶ This was approved in 1998, but due to the recession that began that year, which did not allow the defense budget to be increased, and some definitions of the deployment and organizational structure, to which the military was opposed, the law was not regulated and, therefore, is not operational.⁶⁷

While Argentina became the leading country in the region in terms of the implementation of rules establishing civilian control of the Armed Forces, in terms of intelligence, our country was in arrears, mainly due to the opposition of the SIDE. Since the arrival of the radical Fernando de la Rúa in the government (1999–2001), the radical, Peronist and FREPASO advisers have agreed on a bill with this body. The idea was to replicate, in the first instance, the basic agreement reflected in the National Defense and Internal Security laws: to separate external

57 Peronist-inspired militants who opposed the 1976 coup d'état and played an important role in building the "basic consensus". See Clarín, "Los '33 orientales', hombres clave para las leyes de defensa", in *Clarín*, December 31, 2007, https://www.clarin.com/ediciones-antiores/33-orientales-hombres-clave-leyes-defensa_0_HkNeJtC0aYl.html

58 Sergio Eissa, *op. cit.*, 2015.

59 Ibid.

60 It is a concept developed in Germany after the Second World War to apply principles of democratic law to the armed forces. One of the main ideas is that the military are citizens who exercise the profession of arms.

61 Sergio Eissa, *op. cit.*, 2015.

62 Ibid.

63 Oscar Camilión, *Memorias políticas. De Frondizi a Menem (1956–1996)*, Buenos Aires: Planeta, 2000, 341–342.

64 A few months later the deputy of the FREPASO (center-left), Juan Pablo Cafiero, also presented his own project. Gloria Cecilia Manzotti, "Reestructuración de las FF.AA.: hacia la consolidación de una política de defensa y una cuestión presupuestaria", paper presented at the IV National Congress of Political Science, Sociedad Argentina de Análisis Político (SAAP), Rosario, 2003, 4, 8, 10.

65 This rule was repealed by Decree No. 1691/2006.

66 Pablo Martínez, *La reestructuración de las FF.AA. y el rol del Congreso. La experiencia argentina*, La Paz: Centro de Estudios Hemisféricos de Defensa, 2002, 122.

67 Sergio Eissa, *op. cit.*, 2015.

intelligence from internal intelligence. Despite the resistance of SIDE, the Ministry of Defense and the Armed Forces, Law No. 25.520 on National Intelligence was unanimously approved at the end of 2001.⁶⁸ In 2014, SIDE was dissolved and the Federal Intelligence Agency (AFI) was created by Law No. 27.126. Immediately after, a purge of the organization was initiated and, months later, Decree No. 1311/2015 was approved, which sought to modify the Argentine intelligence doctrine, professionalize the AFI as the governing body of the National Intelligence System and make it an institution capable of meeting the challenges of the 21st century in terms of the collection and analysis of strategic information for security and defense. This reform was interrupted when President Mauricio Macri (2015 to present) reincorporated the expelled spies and re-established the old model of functioning through the enactment of Decree No. 656/2016. To date, this intelligence agency remains a source of mistrust for society and human rights organizations, both because of its lack of transparency and its ineffectiveness. For example, SIDE was unable to alert the Israeli Embassy and the Argentine Israelite Mutual Association (AMIA) to the terrorist attacks that took place in 1992 and 1994, respectively.⁶⁹

From 2005 onwards, not only were the regulations approved in previous years,⁷⁰ made operational, but the institutional framework of the defense system was also completed, not to strengthen the civilian control of the Armed Forces, but rather to make the exercise of civilian defense government more effective.⁷¹ To this end, the Defense Law was regulated by Decree No. 727/2006; the Directive on the Organization and Functioning of the Armed Forces was approved by Decree No. 1691/2006, which made operational some of the provisions of Law No. 24.948; Decree No. 1729/2007, which established the “Defense Planning Cycle”; which launched the cycle and concluded with the adoption of the 2009 National Defense Policy Directive (Decree No. 1714/2009); and the Military Capacities Plan (PLANCAMIL 2011). Civilian functions, such as the National Meteorological Service, the Naval Hydrographic Service and air traffic control, were also demilitarized.

POLICE REFORMS

Regarding the police agencies, the authoritarian legacy is not limited to the last dictatorship either, but also to the formation of the Nation State.⁷² The design of the police in Argentina followed the so-called “French or continental model”, where the police emerged as part of the Armed Forces or militias, which depend hierarchically on the government and are not accountable to their respective communities. The main task of this police force is to “watch” over the enemies of the state. For example, the Argentine Federal Police (PFA) emerged as a necessity of the federal government to subordinate the provincial governments.⁷³ The rest of the current federal security forces (National Gendarmerie, Argentine Naval Prefecture and Airport Security Police) originated in the Armed Forces (Army, Navy and Air Force respectively), and were designed with a centralized and militarized structure; a feature that is still up to date in the National Gendarmerie. On the other hand, it can be argued that the provincial police were designed to monitor the population and the political opposition. The militarization and control tasks of the population and the political opposition were accentuated during the first half of the 20th century, especially during the first two governments of

Juan Domingo Perón (1946–1955).⁷⁴ Consequently, the legacy of the dictatorship was not to be reversed, but to become a long authoritarian tradition.

During the democratic consolidation between 1983 and 1990, the leadership of the provincial police was returned to the democratically elected governors. However,

the provincial governments had no incentive to make themselves devote political resources to the development of security as a public policy domain, especially since the attention of public opinion was clearly focused on the strengthening of civilian control over the military (...) For this reason, during the first democratic administrations, the provincial police forces maintained the organizational principles that had characterized them structurally since their emergence: corporatism and collusion with the political power in turn.⁷⁵

This is what Marcelo Saín has called “police self-government”⁷⁶ for the federal security forces; a concept that we consider applicable to provincial police forces.

Police reforms entered the public and governmental agenda based on two facts: the resolution of the military issue and the significant increase in the crime rate since 1991 in the Autonomous City of Buenos Aires and in the municipalities surrounding the city that make up the Buenos Aires Metropolitan Area. The trigger was the murder of the photographer and journalist José Luis Cabezas in 1997, who kicked off a series of reforms aimed mainly at the police of the Buenos Aires Province.⁷⁷ This police agency was reformed between 1997 and 1999 and between 2004 and 2007, but these reforms were reversed or paralyzed between 1999 and 2004 and from 2007 to the present date. The police in the province of Mendoza were reformed in 1998, the police in the province of Córdoba from 1995 onwards, while the police in the provinces of Santa Fe and Río Negro carried out partial

68 Pablo Martínez, Norberto Pascale, El parlamento y la defensa en la Argentina, in Gilda Follietti, Luis Tibiletti (Eds.), *Parlamento y defensa en América Latina. El papel de las comisiones. Volumen 1: Argentina, Brasil, Chile y Uruguay*, Buenos Aires: Red de Seguridad y Defensa de América Latina (RESDAL), 2004.

69 See Gerardo Young, *Side. La Argentina secreta*, Buenos Aires: Planeta, 2006; Gerardo Young, *Código Stiuso*, Buenos Aires: Planeta, 2015; and Marcelo Saín, *La Casa que no cesa. Infortunios y desafíos en el proceso de reforma de la ex SIDE*, Buenos Aires: Editorial October, 2016.

70 The National Defense Law passed in 1988 was only regulated in 2006. In Argentine law, such an administrative act means making a law operational. Except for Law No. 24,948 on the restructuring of the Armed Forces, which remains unregulated to date (2018).

71 Germán Montenegro, *op. cit.*, 2007. The concept of civilian leadership or civilian government of defense belongs to Marcelo Saín and implies the effective exercise of the political and strategic leadership of the Armed Forces. It is not limited to control and involves the implementation of third generation reforms. See Marcelo Saín, *op. cit.*, 2010 y Sergio Eissa, *op. cit.*, 2015.

72 Facundo Salles Kobilanski, *op. cit.*, no data, 8.

73 Laura Kalmanowiecki, Policing the people, building the state. The police-military Nexus in Argentina 1880–1945, in Diane Davis, Anthony Pereira (Ed.), *Irregular armed forces and their role in politics and state formation*, Cambridge: Cambridge University Press, 2008, 211 and 2013.

74 Laura Kalmanowiecki, *op. cit.*, 2008, 224.

75 Facundo Salles Kobilanski, *op. cit.*, no data, 2.

76 Marcelo Saín, *Seguridad, democracia y reforma del sistema policial en la Argentina*, Buenos Aires: Fondo de Cultura Económica, 2002.

77 This is the largest provincial police force in the country. While in 2004 it had 45,000 personnel, in 2015 it totalled 90,000. In 2014, the police force rate in Argentina was 749.9 per 100,000 inhabitants.

reforms.⁷⁸ The reforms had a common matrix: incorporating precepts related to the Community Policing Model. In opposition, the counter-reforms redirected the police towards a militarized, hierarchical model with the emphasis on saturation and repression, rather than on criminal intelligence and prevention.

Regarding the Federal Security Forces, both the National Gendarmerie and the Naval Prefecture have not undergone any reform processes and, in fact, their organic laws date back to the 1950s. As for the Airport Security Police, it was created as a fully civilian agency in 2006 by Law No. 26.102, based on the structure of the National Aeronautical Police, which depended on the Argentine Air Force. Finally, the responsibilities, structures and personnel of the Argentine Federal Police (PFA) in the Autonomous City of Buenos Aires were transferred to that jurisdiction in 2016; the City Police Force was set up on 1 January 2017. The remainder of the PFA would be transformed into an investigative police force in the manner of the *Federal Bureau of Investigation* (FBI); but no progress has been made by 2018.⁷⁹

CITIZENS' CONTRIBUTIONS TO THE TRANSFORMATION

Citizens contributed through specialized Foundations and NGOs that made their voices heard in Congress, which played a key role between 1987 and 2001. In a second phase, specialists from these civil society institutions, who had also set up research groups at universities, joined the Ministry of Defense between 2005 and 2010.

In the field of civil society, the debate about the mission of the Armed Forces and the need for military reform that would distance them from the National Security Doctrine was, as we said, rather limited. Some books were published in 1985 that sought to leave aside the National Security Doctrine and achieve the full insertion of the Armed Forces in a democratic society. Likewise, the Arturo Illia Foundation for Democracy and Peace initiated a series of publications in the mid-1980s, in which different issues related to defense policy and the armed forces were discussed.

On November 15, 1984, a group of ex-military personnel created the (Military Center for Argentine Democracy (CEMIDA) and in April 1987, they argued that “international conflicts – potential or real – that affect the Argentine Nation, constitute the exclusive and exclusionary subject of national defense. Other types of conflicts are alien to its essence, and their prevention and overcoming are matters that have nothing to do with it.”⁸⁰

For its part, the Argentine Association for Research on Armed Forces and Society, the Center for the Study of the National Project, the Arturo Illia Foundation for Democracy and Peace and the Latin American Faculty of Social Sciences held a Conference on the Armed Forces, the State, Defense and Society from October 26 to 28, 1988. At the Conference, civilians and the military discussed various aspects of defense policy. The debates were reflected in a book edited by Gustavo Druetta, Eduardo Estévez, Ernesto López and José Miguens in 1990.

The motivation of the conference was “the importance for our country of having professionally trained Armed Forces for their specific function, which is foreign defense.”⁸¹

The Center for Legal and Social Studies (CELS), founded in 1979 to promote and defend human rights, also played an important role in the debates that took place in the National Congress

and in the control of military promotions in the National Congress, especially since 2003, a task that continues to this day.

There were also positions against the “Basic Consensus” from civil society. For example, the political analyst Rosendo Fraga argued, through the Center for Studies for the New Majority, that “the defense bill limits the constitutional powers of the president of the Nation, which expressly empower him to use the Armed Forces for cases of internal commotion.”⁸²

For the above reasons, and as mentioned above, the Argentine Congress played an important role in defining key defense policy issues, not only because of the proactive attitude of some legislators and advisers, but also thanks to the contribution of the aforementioned civil society organizations. This process blocked, during the 1990s, proposals to re-engage the Armed Forces in issues of internal security and “new threats.” These actors, whether radical or Peronist, defended the basic consensus. To this end, they coalesced in the debates on the subsequent norms during that decade and/or through media interventions to amplify these attempts to militarize internal security on the public agenda.

When Dr. Nilda Garré became Minister of Defense in December 2005, she immediately formed a team comprised of defense specialists, most of whom came from the University of Quilmes, where the Research Programme on the Armed Forces and Society (PIFAS), directed by Ernesto López and co-directed by Marcelo Saín, had been working for several years, with Germán Montenegro and Sabina Frederic, among others, as researchers.

RESISTANCE TO REFORMS AND POLITICAL CHANGES

These were produced in two stages (1983–1987 and 1987–1990) and two different levels: public and clandestine.

Between 1983 and 1987, numerous opinions were heard from civilians and military personnel, both active and retired, who claimed that state terrorism was a crime and requested that those responsible for it be brought to justice. For example, the head of the Navy, Ramón Arosa, stated that “the war against subversion, which was neither sought nor provoked by the Armed Forces,

78 Eduardo Estévez, “Reforma de sistemas de seguridad pública e investigaciones judiciales: tres experiencias en la Argentina”, paper presented at the International Conference Crimen y Violencia: causas y políticas de prevención, Bogotá: Banco Mundial y Universidad de los Andes, 2000.

79 The Argentine Federal Police was created in December 1943 (from the structure of the Police of the Capital that operated between 1880 and 1944 in the city of Buenos Aires) and its organic norm is Decree-Law No. 333/58. Its personnel regime was established during the last dictatorship through Decree-Law No. 21.965 of 1979 and regulated in 1983. The Argentine National Gendarmerie was created by Law No. 12.367 of 28 July, 1938 and its current organizational norm is Decree-Law No. 19.349/1971. The Argentine Naval Prefecture was re-established in 1862 as Port Authority. It was renamed Maritime Prefecture in 1882 and finally under its present name from Decree-Law No. 18.398/1969. In 1970, the dictatorship of the time (1966–1973) sanctioned Decree-Law No. 18,711 which determined the missions, functions and jurisdictions of the National Gendarmerie, the Argentine Naval Prefecture and the Federal Police.

80 José García, Horacio Ballester, Augusto Rattenbach, Carlos Gazcón, *Fuerzas Armadas Argentinas. El cambio necesario: bases políticas y técnicas para una reforma militar*, Buenos Aires: Galerna, 1987, 119–120.

81 Gustavo Druetta, Eduardo Estévez, Ernesto López, José Miguens, *Defensa y Democracia. Un debate entre civiles y militares*, Buenos Aires: Puntosur, 1990, 9.

82 Rosendo Fraga, *La cuestión militar 1987–1989*, Buenos Aires: Editorial del Centro de Estudios para la Nueva Mayoría, 1989, 99.

had made it possible to continue living in a free country and not in one subjugated by ideologies alien to our nationality.”⁸³ Days later, in January 1984, retired General Luciano Benjamin Menendez stated that “we are being bombarded by the voices of the rearguard of the subversion, the mothers and relatives of those who were defeated by the Armed Forces and rejected by the Argentine people.”⁸⁴ Deputy Álvaro Alsogaray, of the Union of the Democratic Center (UCeDé), demanded an amnesty and denounced that the Mothers of Plaza de Mayo were supported by international Marxism. On the other hand, the Archbishop of La Plata, Antonio Plaza, called the trials “subversive revenge,” practically inciting a coup.⁸⁵

In the background, it should be noted that the so-called “unemployed labour force,”⁸⁶ which was part of the Task Forces during the last dictatorship, was responsible for bomb threats, kidnappings and threats to political and social leaders between 1983 and 1987.⁸⁷

During the second phase there were four (4) military uprisings against the governments of Alfonsín and Menem. The first took place in April 1987 in reaction to the ongoing trials, but also as a result of a confrontation between the senior officers and army chiefs and between the nationalist and liberal faction of that force. This uprising was led by Lieutenant Colonel Aldo Rico and they called themselves “carapintadas.”⁸⁸

This first military uprising crystallized a deep division within the Army, between the nationalists, who mostly responded to the “carapintadas,” and the “liberals” who were senior officers who occupied the leadership of the Force; and the “professionals” who sought greater efficiency in the Army through restructuring.⁸⁹

As a result, the Ministry of Defense and the new Army Chief⁹⁰ began to purge the strength of the members and/or supporters of the “carapintadas,” although they agreed that the army should claim state terrorism, while continuing to hear pressure to end the trials.

On 17 May 1987, Admiral Arosa insisted that a definitive solution be sought “that will dispel forever the ghosts of bloody confrontations.”⁹¹ Months later, retired General Ramón Camps maintained that “the national being is today under attack from a powerful enemy. That enemy is called Raul Alfonsín and the Coordinator.”⁹² On the other hand, middle-level army officials transmitted that “the Alfonsínist leadership is the continuation of the anarchist-student movement, of the reformist and destructive cubism lacking in projects, illuminated by the French, ideological sons of the Marxist pairing and of European socialism.” In October 1987, Priest Manuel Beltrán declared that “the military saved us from Marxism” and that the anti-military campaign had been “carried out in all parts of the country,” very well organized by “Marxism and Zionist Masonry.” In December 1987, retired General Diaz Bessone wrote that “the revolutionary, inspired by Marxist ideology, continues in Argentina, waiting for the opportunity to seize power [...]. For Christians, and for non-Communists in general, there are only two options: turn the other cheek and accept martyrdom and slavery, or fight or still combat.” In the first quarter of 1988, the retired general, Luciano Benjamin Menendez, argued that “subversion has not disappeared in our homeland [...] especially in the areas of education (to enter the minds of young people) and culture and the press (to influence the thinking of all) [...] to destroy our religious convictions [...] to distance ourselves from the West and to unite ourselves to the communist countries.”⁹³

The second uprising began as a result of the purges that had been carried out by the army chief, by order of President Alfonsín. On December 28, Caridi summoned Rico and asked him to apply for his retirement pass, which Rico refused to accept. Faced with this refusal, the Minister of Defense decided to “play the rest” and asked General Caridi to speed up the situation, so he “ordered the military judge Beltramino to turn Rico’s preventive pressure from attenuated to rigorous.”⁹⁴ As a result of the events reported, on Saturday, January 16, 1988, Aldo Rico led a new uprising carapintada. Unlike Easter Week, the mobilization of loyal troops made Rico’s situation unsustainable.⁹⁵ Finally, the troops gathered in Monte Caseros by Caridi, provoked the surrender of Rico. This fact ended up crystallizing that relationship of forces, unfavourable to the carapintadas and favourable to the liberal sector. At the end of 1988, about a hundred officers and non-commissioned officers were excluded from the army for “administrative reasons, not counting those who were under trial for the successive uprisings.”⁹⁶

83 Ramón Arosa, *De Constitución a Retiro. Reseña y reflexiones del Jefe de la Armada 1984–1989*, Buenos Aires: Instituto de Publicaciones Navales, 2008, 31 and 40.

84 Patrice McSherry, *op. cit.*, 2008, 126.

85 Guido Braslavsky, *Enemigos íntimos. Los militares y Kirchner. De la purga a los juicios. Crónica de una confrontación (2003–2008)*, Buenos Aires: Sudamericana, 2009, 259.

86 Some emblematic cases were those of Raúl Guglielminetti, Aníbal Gordon and Arquímides Puccio.

87 Sergio Eissa, *op. cit.*, 2015.

88 It is a mistake to think that the law of Due Obedience was the consequence of this uprising. Brigadier Panzardi recalls the events of that day, practically, as described by Alfonsín. He maintains that Aldo Rico treated Alfonsín as president of the Nation at all times. The first one related the reasons for the uprising and Alfonsín told him what had been done and what was going on, including the withdrawal of Ríos Ereñú and the submission of the Due Obedience Law bill. Alfonsín also informed them that they would be punished. In those days, Alfonsín sought at all times to avoid bloodshed and that the chain of command would not be further deteriorated. On the other hand, Gustavo Breide Obeid argues that there was no negotiation and that the attitude towards the commander in chief of the Armed Forces who had listened to his demands was simply put aside, because the generals had been lying to them, and because of the thousands of people who were on the street supporting democracy. This statement was reiterated in 2010, in a television program on America TV with journalist Mónica Gutiérrez. Sergio Eissa, *op. cit.*, 2015, 244 y Horacio Jaunarena, *op. cit.*, 2011, 166.

89 Ernesto López, *op. cit.*, 1994, 62–67.

90 General Ríos Ereñú was replaced by General Caridi, an opponent of the “carapintadas,” which also shows that there was no negotiation between President Alfonsín and the carapintada leader Aldo Rico.

91 Ramón Arosa, *op. cit.*, 2008, p. 236 y Raúl Alfonsín, *op. cit.*, 2009, 77.

92 The National Coordinating Board (JCN) was a center-left radical youth organization created in 1968 that approached the Movement for Renewal and Change of Raúl Alfonsín between 1971 and 1972. The Franja Morada (FM), created in 1967, is the university expression of the UCR. It is suggested to read the interview with one of the founders of JC and FM in Marcelo Larraquy, “La UCR y la década del ’70: ‘Cuando decíamos “elecciones libres, sin proscripciones ni condicionamientos”, se nos cagaban de risa””, in *Infobae*, April 16, 2018, <https://www.infobae.com/politica/2018/04/16/la-ucr-y-la-decada-del-70-cuando-deciamos-elecciones-libres-sin-proscripciones-ni-condicionamientos-se-nos-cagaban-de-risa/>

93 Sergio Eissa, *op. cit.*, 2015, 247 and 248.

94 Horacio Jaunarena, *op. cit.*, 2011, 229–231.

95 *Ibid.*, 223.

96 Ernesto López does not agree with this statement, since he understands that, unlike the previous uprising, the surrender modified the power relations within the army, which the government was unable to take advantage of. He insisted with his alliance with the liberal sector, which ended up provoking a new reaction in December 1988. Ernesto López, *op. cit.*, 1994 y Raúl Alfonsín, *op. cit.*, 2009, 91.

Another wave of bomb threats occurred in 1988, this time in public places such as theaters, embassies, supermarkets, churches and hospitals, among others.⁹⁷

In early December 1988, while Alfonsín was on tour in the United States, the Minister of Defense received confirmation that a prefectural command group, “Albatros”, had abandoned their unit with weapons and combat clothing. On the night of 2 December, the President was informed that Mohamed Ali Seineldin had risen in Villa Martelli. Alfonsín ordered Jaunarena not to negotiate and to repress the government.⁹⁸ The trigger seems to have been that the Army leadership would not have proposed Seineldin for promotion to general,⁹⁹ thus losing the last carapintada hope of placing one of their own in the generalate. The uprising persisted for almost a week both because of the attrition of the carapintadas, who already felt they had nothing to lose, and because of the inability of the Army’s leadership to re-establish discipline. To this must be added the profound attrition of the government, due to the electoral defeat and the growing deterioration of the economic situation. General Cáceres, in charge of the repression, contacted Seineldín – with the knowledge of the army chief – to try to reach an agreement.¹⁰⁰ The Pact of Villa Martelli, agreed between the leadership of the force and the “carapintada” leader, demanded “the anti-subversive struggle”, called for the resignation of Caridi and the restoration of the discipline and unity of the Force. Before resigning, the Army chief said that “it was absolutely reprehensible and unfair to accuse the members of the Armed Forces of being genocidal, since it was thanks to them that today there was democracy.”¹⁰¹ The government appointed General Gassino as head of the force, confirming that it would not accept the appointment of a similar officer to the Carapintadas.

In March 1990, President Carlos Menem and his Defense Minister Humberto Romero had appointed Generals Martín Bonnet and Martín Balza, respectively, to chief and deputy chief of the Army, with a view to a future uprising (both of whom had a harsh discourse against the “carapintadas”), despite the pre-electoral presidential promise to appoint Seineldín as army chief. On 28 November, the head of SIDE informed President Menem that a new military uprising would take place. On Monday, December 3, the “carapintadas” entered the 1st Patrician Regiment in Palermo, but the plan began to fail that same morning. On the one hand, Seineldin could not escape from San Martín de los Andes and, on the other hand, two loyal officers were killed in the 1st Patrician Regiment. Menem declared a state of siege and ordered the head of the General Staff of the Army to “completely extinguish” the uprising.¹⁰² The rebellion was defeated in less than 24 hours, resulting in 14 deaths (including four loyalists and three rebels) and numerous injuries.¹⁰³

LEGAL AND POLITICAL FRAMEWORK FOR CHANGES IN THE SECURITY APPARATUS TODAY¹⁰⁴

The convergence of interests and belief systems among the actors that make up the “basic consensus” allowed it to crystallize into three essential laws over three governments and thirteen years. We refer to Law No. 23.554 on National Defense, adopted in 1988; Law No. 24.059 on Internal Security, of 1992; and Law No. 25.520 on National Intelligence, adopted in 2001 and amended in 2014.

These rules are articulated around three basic principles that we consider to be introductory. These principles are:

- a/ The suppression of the hypotheses of conflict with neighboring countries that require the use of the Armed Forces;
- b/ The organic and functional separation between national defense and internal security; and
- c/ The civilian government of defense policy.

These principles are translated into a set of guidelines that guide national defense in Argentina.

Firstly, article 2 of Law No. 23.554 defines national defense as “the integration and coordinated action of all the forces of the nation to resolve conflicts that require the use of the Armed Forces, in a dissuasive or effective manner, to confront aggressions of external origin”. In this regard, regulatory decree No. 727/2006 of this Defense Law specifies in its first article that “the Armed Forces, a military instrument of national defense, shall be used against aggressions of external origin perpetrated by Armed Forces belonging to another state or states (...) against the sovereignty, territorial integrity or political independence of our country, or in any other way that is incompatible with the Charter of the United Nations.”

Secondly, article 4 of Law 23.554 on National Defense states that “the fundamental difference between National Defense and Internal Security must be taken into account at all times.”¹⁰⁵

Thirdly, the Directive on the Organization and Functioning of the Armed Forces (Decree No. 1691/2006) states that “the main mission of the Armed Forces, the National Defense Military Instrument, is to prevent and repel any external state military aggression, in order to guarantee and permanently safeguard the vital interests of the Nation”. Later, he adds that the following should be considered subsidiary missions of the military instrument:

- “Participation of the Armed Forces in the framework of the multilateral operations of the United Nations;
- participation of the Armed Forces in internal security operations provided for by the Internal Security Law No. 24.059;
- participation of the Armed Forces in operations to support the national community or friendly countries;
- participation of the Armed Forces in the construction of a Sub-regional Defense System”;

97 Sergio Eissa, *op. cit.*, 2015.

98 Sergio Eissa, *op. cit.*, 2015 and Raúl Alfonsín, *op. cit.*, 2009, 95.

99 “This man, who we promoted to colonel, knew that at that time in December ’88 we were not going to promote him to general; that is, he knew that his military career was reaching its culmination”. Horacio Jaunarena, *op. cit.*, 2011, 241.

100 Raúl Alfonsín, *op. cit.*, 2009, 100.

101 Eduardo Estévez, “Las Fuerzas Armadas en la transición argentina”, *Perfiles Liberales*, Bogotá: Fundación Friedrich Naumann, (17), 1990, 17.

102 Sergio Eissa, *op. cit.*, 2015.

103 Ibid.

104 July 1, 2018. Please, note that Decree No. 683 of July 23, 2018 altered the “Basic Consensus”. This change will allow the Armed Forces to participate in homeland security operations, such as the war against drug trafficking.

105 For this reason, regulatory decree No. 727/2006 states in its recitals that: “the defense system must be structurally and organizationally oriented towards the prevention of situations of external aggression perpetrated by Armed Forces of another state, in accordance with the provisions of Resolution 3314 (1974) of the United Nations (...) For this reason, all those conceptions that seek to extend the use of the military instrument towards functions totally unrelated to defense, usually known under the name of new threats, the responsibility of other state agencies organized and prepared for this purpose, must be emphatically rejected; since regular intervention in such activities would involve a severe and inexorable crisis in the doctrine, organization and functioning of a tool functionally prepared to assume responsibilities other than those typically associated with the police.”

- “participation of the Armed Forces in the planning, direction and execution of Antarctic logistic activity, in accordance with the National Antarctic Policy defined by the Ministry of Foreign Affairs and Worship; contributing to the sovereign presence of our country in that continent; and;
- participation of the Armed Forces in community assistance tasks and in coordination with other agencies of the National, Provincial, and Municipal State and/or of the Autonomous City of Buenos Aires.”¹⁰⁶

Titles V and VI of the Internal Security Law No. 24.059 are relevant. Article 27 establishes that the Ministry of Defense shall, at the request of the Crisis Committee, provide that “the Armed Forces shall support internal security operations by means of the affectation (...) of their stockpile, intendancy, health, veterinary, construction and transport services, as well as engineering and communications elements, for which purpose a representative of the Joint Chiefs of Staff shall be permanently posted in the Planning and Control Center of the Undersecretariat for Internal Security”. Let’s observe how the legislator has wanted to expressly write that “Armed Forces services” can be used in internal security operations, excluding the combat units of the three forces.

Articles 28, 29 and 30 refer to potential attacks on military units in peacetime. They establish that an attack on a military jurisdiction is a matter of internal security, clarifying that it is the primary obligation of the Armed Forces to preserve said jurisdiction and “the restoration of order within the aforementioned jurisdiction”, in accordance with the legislation in force.

Title VI specifically refers to “the subsidiary use of combat elements of the Armed Forces in internal security operations”. Article 31 establishes that, without prejudice to the provisions of article 27, “the Armed Forces shall be employed in the restoration of internal security within the national territory in those exceptional cases in which the system of internal security described in this law is insufficient in the opinion of the President of the Nation for the fulfilment of the objectives established in article 2”. In order for the President to make use of the powers granted to him by the National Constitution in article 86, paragraph 17, he must first declare a state of siege.

The legislator also wanted to establish, in article 32, that the use of the Armed Forces will be in accordance with the following guidelines:

- a/ The leadership of the Armed Forces, national and provincial security and police forces is the responsibility of the President of the Nation, advised by the crisis committees of the Law 23.554
- b/ An operational commander of the Armed Forces shall be appointed and all other security and police forces shall be subordinate to him/her exclusively within the territorial scope defined for that command;
- c/ Since the one referred to in this article is an exceptional form of employment that will only be developed in extremely serious situations, it will not affect the doctrine, organization, equipment and training of the Armed Forces, which will maintain the characteristics derived from the application of Law 23.554.

This implies that those primarily responsible for safety (*law enforcement*) lies with the governors, their provincial police and the provincial justice system. If the crimes are federal in nature (drug trafficking, human trafficking, terrorism, among others), the responsibility lies with the Federal Security Forces (the National Gendarmerie, the Argentine Naval Prefecture and the Airport Security Police), the Argentine Federal Police – which are conducted by the Ministry of Security – and the federal justice

system. But the Federal Security Forces, referred to in the theory as “intermediate forces”, collaborate in national defense in times of war and come to the aid of provincial governments to re-establish internal security. The Armed Forces act within the Internal Security System only in the three cases described above.

Fourthly, Law No. 24.948 states that a strategy of deterrence and self-defense is adopted, in accordance with article 51 of the Charter of the United Nations. The 2009 National Defense Policy Directive (NDDP) also rejects “unilateral procedures, interventionist practices and any international conduct that does not comply with the criteria of peace and security established by the United Nations Charter”. Within this context, a defensive strategic position and attitude is adopted as “an essential and authoritative criterion on which the entire defense system of the Argentine state is structured”. Furthermore, our country conceives its defense policy in a double dimension: autonomous and cooperative.

Fifthly, the Organization Directive (Decree No. 1691/2006) states that the Argentine Military Instrument must be structured doctrinaire, organically and functionally according to its main mission, “which is to conjure up and repel all external aggression perpetrated by the Armed Forces of another state.” Therefore, “the main mission of the Armed Forces must be (...) the main orientation of their entire force design, whereas any subsidiary mission of the military instrument must not affect the capabilities required for the fulfilment of that primary and essential mission”. Only multilateral operations within the framework of the United Nations and a Sub-regional Defense System will be considered in the design of both the minimum standards required for multilateral operations. This Directive also establishes that the design of forces will be carried out on the basis of the capability planning method, replacing the model based on conflict hypotheses.

Finally, the same standard considers that the Military Instrument will be suitable only if it is conceived as an integrated instrument “that is, as a joint action, even in those cases in which, due to the scope in which it is developed and/or to the characteristics of the operation in question, it must be executed by a specific force on an exclusive basis.” This standard defines joint action as “the coherent, coordinated and systematic use of all the means and resources at the disposal of each armed force in a specific manner”. It also provides that “the Operational Command shall be the body responsible for the execution of joint training, for the control of joint exercises, for the preparation of strategic operational planning and its corresponding execution and for military operations” and that the Army, the Navy and the Air Force shall only enlist, train and support the means made available to them. In this sense, regulatory decree No. 727/2006 also establishes that the Joint Chiefs of Staff of the Armed Forces “shall have functional control over the Armed Forces, with authority to issue orders, and may have such means at their disposal”.

LESSONS LEARNT AND RECOMMENDATIONS

The type of transition to democracy and its socio-political context influence the limits and scope of transformations.

Although the transition collapsed, the lack of agreement among the main political parties did not allow for a rapid resolution of the trial of those responsible for state terrorism in the military and

¹⁰⁶ The last two complementary missions were incorporated by the National Defense Directive 2014 (Decree No. 2645/2014).

for progress and setbacks in this area. Furthermore, this prevented the civilians involved in the dictatorship from being brought to justice and retaining a significant amount of power, allowing them to undermine the political power of the presidents, mainly Raúl Alfonsín and Cristina Fernández de Kirchner.

The economic course was also not agreed by the big parties in order to resolve the crisis inherited from the dictatorship. This provoked the economic and political crises from 1987 to 1989, and also allowed the policies of deindustrialization, financial valorization and indebtedness to be adopted again during democratic governments, producing the second most important economic depression since 1930, at the end of 2001.

The military rebellions were the result of the errors in the implementation of the trial of those responsible for state terrorism, but they were also the result of the factionalism introduced during the Dictatorship between the forces and, especially, in the army, and the defeat in the Falkland Islands. The military ceased to be a factor of power in 1990 due to the purging of the “carapintadas” during the Alfonsín government and the pardons and repression of the last military rebellion carried out by Carlos Menem.

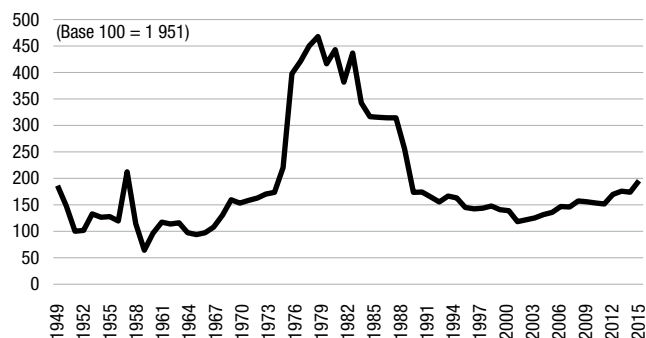
The only agreement reached between the majority parties is the so-called “Basic Consensus”. This was facilitated by three factors: a) the defeat of radicalism in 1987, b) the renewal within the Justicialist party and c) the “carapintada” rebellion of 1987. In this context, and based on the lessons of Argentine history and the historical experiences of the United States, Germany and Spain, it was decided to separate the military from the tasks of internal security. This agreement was made through a set of

laws through four (4) different governments and over a period of twenty (20) years. However, the political leadership and society as a whole are highly disinterested in defense and armed forces issues. This leads to undefined doctrines, deployment and design adaptation to the mission of preventing and repelling external state military aggressions, in addition to the absence of a correct budgetary allocation. This disinterest allows the Armed Forces to assign themselves missions, supported by the United States Southern Command, which violates current regulations; that is, the adoption of the so-called “New Threats” as a hypothesis for the use of the Armed Forces. All this despite the fact that international experience and the characteristics of problems such as drug trafficking and terrorism clearly demonstrate the futility of the use of military power. There were only serious attempts to adapt the Armed Forces to this mission between 1983 and 1985 and 2005 and 2013, although in such cases, for different reasons, the redesign was not accompanied by budgetary resources.

Finally, three debts to be taken into account in other processes of democratic transition persist in Argentina. Despite the enactment of two (2) intelligence laws, intelligence agencies remain without parliamentary control. Secondly, the Judiciary continues to function not only as it did during the Dictatorship – and with some officials of that time – but also as it did in 1862, although the 1853 Constitution ordered the implementation of an accusatory model with jury trials. Finally, the police continue to organize themselves under the logic of population control, repression and saturation, not criminal intelligence, crime prevention and citizen security.

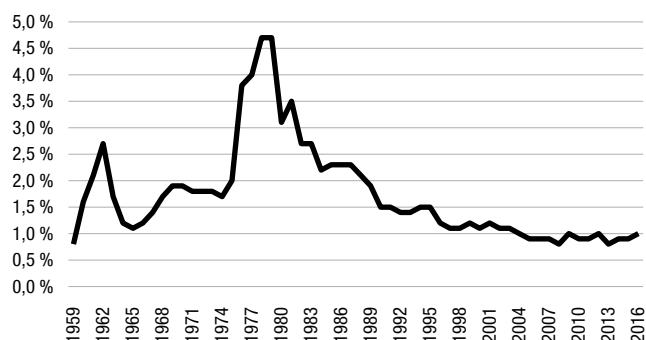
ANNEX 1: GRAPHS

GRAPH NO. 1: EVOLUTION OF DEFENSE SPENDING



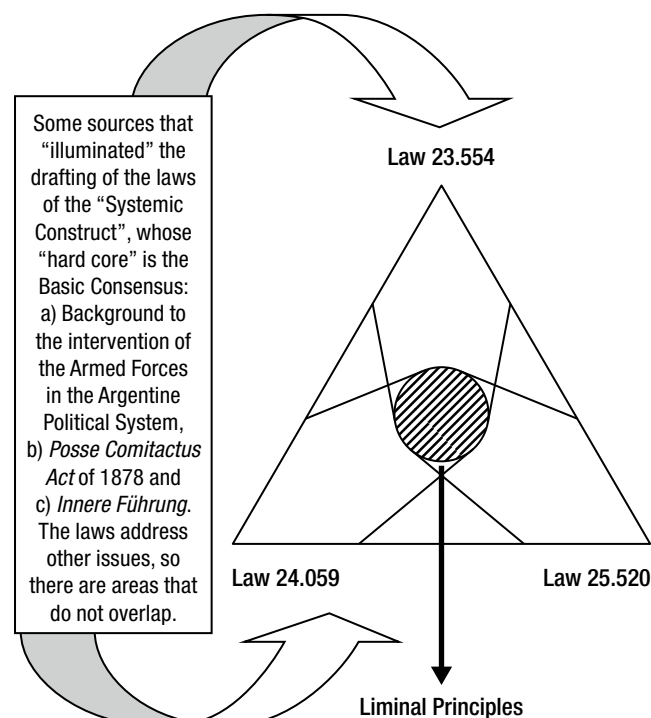
Source: (SIPRI: 2017). Year 1951: U\$S 3.153 million.

GRAPH NO. 3: DEFENSE EXPENDITURE AS % OF GDP



Source: Prepared by the authors on the basis of SIPRI data (2017).

GRAPH NO. 2: BASIC CONSENSUS



Fuente: own creation.

ANNEX 2: PRE- AND POST-DICTATORSHIP PRESIDENTS

Years	Presidents	Parties/Fronts
1973	Héctor Cámpora	Justicialist Liberation Front (PJ, People's Conservative, MID and a faction of Christian democracy)
1973	Raúl Lastiri (interim for resignation of the former – president of the Chamber of Deputies)	PJ
1973–1974	Juan Domingo Perón (3rd presidency)	Justicialist Liberation Front (PJ, People's Conservative, MID and a faction of Christian democracy)
1974–1976	María Estela Martínez de Perón (Vice-president in charge of the Executive due to the death of the president)	Justicialist Liberation Front (PJ, People's Conservative, MID and a faction of Christian democracy)
1976	Junta Militar	Dictatorship
1976–1981	Jorge Videla	
1981	Roberto Viola	
1981	Carlos Alberto Lacoste	
1981–1982	Leopoldo Galtieri	
1982	Alfredo Oscar Saint-Jean	
1982–1983	Reynaldo Bignone	
1983–1989	Raúl Ricardo Alfonsín	UCR
1989	Carlos Saúl Menem (completes term of office due to early resignation of the former)	Justicialist Liberation Front (PJ, PI, PDC and others)
1989–1995	Carlos Saúl Menem	Justicialist Liberation Front (PJ, PI, PDC and others)
1995–1999	Carlos Saúl Menem	Justicialist Liberation Front (PJ, PI, PDC and others)
1999–2001	Fernando de la Rúa	Alliance (UCR, FREPASO and PS)
2001	Francisco Ramón Puerta (interim for early resignation of the former and in the absence of a vice-president – president of the Chamber of Senators)	PJ
2001	Adolfo Rodríguez Saá (appointed by the Congress of the Nation to complete the previous term of office)	PJ
2001	Eduardo Camaño (interim for resignation of the former – president of the Chamber of Deputies)	PJ
2002–2003	Eduardo Alberto Duhalde (appointed by the National Congress to complete the term of office until 10/12/2003)	PJ
2003	Néstor Carlos Kirchner (completes term of office due to early resignation of the former)	Front for Victory (PJ, People's Conservative, Broad Front, PCCE, PI, PH, PDC and others)
2003–2007	Néstor Carlos Kirchner	Front for Victory (PJ, People's Conservative, Broad Front, PCCE, PI, PH, PDC and others)
2007–2011	Cristina Elizabeth Fernández de Kirchner	Concertation (Front for Victory, joined by former socialists and former radicals)
2011–2015	Cristina Elizabeth Fernández de Kirchner	Front for Victory joined by the Communist Party, former radicals and former socialists)
2015	Federico Pinedo (interim)	Cambiamos (PRO – UCR – CC – UceDé – People's Conservative)
2015 to date	Mauricio Macri	Cambiamos (PRO – UCR – CC – UCeDé – People's Conservative)

ANNEX 3: REFERENCES FOR READING

- Although the War of Independence ended in Argentina in 1820, the fall of Spanish power in South America occurred at the Battle of Ayacucho on December 9, 1824 in the current territory of Peru. Argentine troops participated in it.
- The term “security apparatus” should be understood as being made up of the National Defense System and the Homeland Security System, which both contribute to Argentina’s National or Strategic Security. The Internal Security System is made up of the Federal Security Forces or Intermediate Forces (Gendarmerie, Prefecture, Airport Security Police), the Argentine Federal Police and the provincial police. The National Defense System is made up of the Argentine Air Force, Army and Navy.
- Decrees/laws: these are rules dictated by the dictatorships in Argentina that have the status of law. Firstly, the legitimacy of the Argentine dictatorships was validated by the Supreme Court of Justice through the Agreed Statement of September 10, 1930, after the first coup d’état. Secondly, on 22 August, 1947, the Supreme Court of Justice established in the “Enrique Arlandini” case that “to the extent that it is necessary to legislate to govern a government it has legislative powers (...) The decree-laws issued by the de facto government are valid by reason of their origin and since they have the value of laws, they subsist even if they have not been ratified by Congress, as long as they are not repealed in the only way that they can be ratified, that is, by other laws.”
- CC: The Civic Coalition is heir to the Affirmation for an Equal Republic (ARI) party and was founded by Elisa Carrió in 2002 (changed its name in 2009), as a detachment from the UCR. It is a center party of social and liberal ideology.
- Popular Conservative: it is a center party that was founded in 1958 as a detachment of the National Democratic Party (1931–1955), which in turn was heir to the Conservative Party (1916–1930) and the historic National Autonomist Party (1874–1916). The latter were located in the center right of the Argentine political spectrum and is of a conservative tendency.
- FREPASO: It was an alliance between the PAIS (1994) and the Broad Front (1993) parties, both of which detached from the PJ in the face of the neoliberal orientation it had adopted between 1989 and 1999, and the PDC, the Democratic Socialist Party (PSD) and the Popular Socialist Party (PSP). It was located in the center-left of the political spectrum and is of a social-democratic and social-liberal ideology.
- MID: The Integration and Development Movement was founded by former President Arturo Frondizi, a former radical, in 1963. It is a center party with a social-liberal tendency.
- PCCE: The Communist Party of Extraordinary Congress was founded in 1996 as a detachment of the Communist Party (PC) which was founded in Argentina in 1918.
- PDC: The Christian Democratic Party was founded by Horacio Sueldo and Guido Di Tella, among others, in 1954. It is a center party with a social-Christian tendency.
- PH: The Humanist Party was founded in 1984 by Mario Luis Rodríguez Cobos and declares itself to be non-Marxist on the left.
- PI: The Intransigent Party was founded by former radical leader Oscar Alende in 1972, as a detachment from the MID. It is a center-left party of social democratic ideology.
- PJ: The Justicialist Party was founded on January 15, 1947 by Juan Domingo Peron. It is considered a “movement” and not a party. At least three ideological currents can be distinguished in its midst until 2015: popular conservatism, social Christianity and national left (non-Marxist).
- PRO: The Republican Proposal party is heir to the Commitment to Change party and was founded by Mauricio Macri on 5 August 2005 (name change on 3 June 2010). It is a center-right party with a conservative tendency. This is a traditional ideology in Argentina, which ruled that country between 1874 and 1916 (National Autonomy Party) and 1932–1943 (National Democratic Party), mainly. Between 1955 and 1983, some of the politicians who adhered to this ideology were officials of the dictatorships.
- PS: The Socialist Party was founded by Juan B. Justo and Alfredo Palacios, among others, on June 28, 1896. It is affiliated to the Second Socialist International. It suffered several divisions, the main ones between the PSD and the PSP until the unification produced in 2002.
- UCeDé: The Union of the Democratic Center was founded in 1982 by Alvaro Alzogaray, former U.S. ambassador to the 1963–1966 dictatorship. Center-right conservative-liberal party.
- UCR: The Radical Civic Union was founded by Leandro Alem and Hipólito Yrigoyen, among others, on June 26, 1891. It is a liberal party with a social democratic faction. Throughout its history it has been divided several times, the main ones being in 1928, 1957, 2001 and 2007.

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REGIME ARCHIVES

PAULA CANELO AND GABRIELA IPPOLITO-O'DONNELL

CONTENT OF THE SECRET SERVICE ARCHIVES

The main characteristic of the *archives of repression*¹ related to the last military dictatorship that ruled Argentina between 1976 and 1983 is fragmentation. Thirty-five years after the transition to democracy, the archives remain a disperse collection of heterogeneous and incomplete documents. Several reasons account for this fragmentation. Among these reasons, the nature of the repression carried out by the dictatorship (the so-called Process of National Reorganization, hereafter PRN), stands out. In contrast to the experience of other military dictatorships of Latin America, contemporaneous or previous to the PRN, in Argentina repression was extremely harsh, criminal, and clandestine.

The PRN privileged “illegal” over legal repression. Under legal repression the responsibility is entirely assumed by the corresponding repressive bodies of the state within a framework of previously established norms. Illegal repression by the PRN was based on clandestine actions by state agencies and on the organization and predominance of special “Tasks Groups” belonging to each of the three branches of the Armed Forces as well as to other security forces. State agencies and Tasks Groups worked in coordination, but without a centralized command. Illegal repression was complemented with the creation of a network of about 700 Centers of Clandestine Detention (hereafter CCD) distributed throughout the country and located, often, in military and police quarters. In the CCD, the victims of state terror were tortured and sexually abused, and in most cases killed and disappeared. It is estimated that between 15,000 to 20,000 persons were sent to these CCD, and about 90 percent of them were assassinated.²

The Armed Forces adopted an illegal and clandestine repression methodology for various reasons, but primarily because of the influence, in their training, of the USA Doctrine of National Security and of the French Doctrine of Revolutionary War. With the construction of the “subversive” internal enemy subject as the main hypothesis of military conflict, clandestine and criminal repression was considered an efficient method to defeat the enemy. This clandestine and criminal methodology also allowed the Armed Forces to avoid probable international sanctions, as well as to resolve intra-military conflicts.

The clandestine and criminal nature of repression had a deep impact on the types of records the perpetrators of repression elaborated, the urge to destroy them, as much as possible, once the transition to democracy began in 1982, and on the current availability of such records. In 1995, the former Interior Minister of the PRN dictatorship, General Albano Harguindeguy, cynically stated that “If people (the military) were acting illegally, they were not going to be stupid enough as to leave behind proof of that.”³

Another reason that explains the fragmentation of the archives of repression is linked to the collaboration that existed between the Armed and Security Forces: a “pact of silence” was

established among them, and is still very much in effect, about the crimes committed, the organization of repression, and the final destiny of the victims.

Repression was carried out by dividing the national territory in zones, subzones and areas. The Army had the operational responsibility while the Navy and the Air Force provided supporting resources; they all forged an alliance with a common goal. The security forces Gendarmerie (Border Force), Prefecture (Water Force), the Federal Police, and the Provincial Police, were under the operational command of the former.⁴

This organization with the participation of all forces in clandestine and criminal repression led inevitably to a pact of silence on the actions perpetrated and the absolute incompatibility to initiate any revision of them.⁵

The organizational profile of repression explains not only the convenience, but also the crucial need to destroy all available records on the acts of repression before handing power to the democratically elected government in 1983. The Armed Forces had the capability to order the destruction of most documents, since they had concentrated power in the Junta of Commanders (integrated by one member of each of the three forces) since the coup in 1976.

As a consequence, the primary source of information on the crimes committed by the Armed and Security forces during the dictatorship is not the archives of records produced by them.

The archives of repression are fragmented and of diverse origin. The information they contained has been gathered, produced and systematically organized throughout years of hard work by civil society and human rights organizations as well as by the implementation of various public policies after the inauguration of democracy in 1983.

1 Ludmila Da Silva Catela, El mundo de los archivos, in Ludmila Da Silva Catela and Elizabeth Jelin, eds., *Los archivos de la represión: Documentos, memoria y verdad*, España: Siglo XXI Editores, 2002.

2 Carlos Acuña, Catalina Smulovitz, Militares en la transición argentina: del gobierno a la subordinación constitucional, in VVAA: *Juicio, castigos y memorias. Derechos humanos y justicia en la política argentina*, Buenos Aires: Nueva Visión, 1995. Paula Canelo, “La politique sous la dictature argentine. Le Processus de réorganisation nationale ou la tentative inachevée de re-fonte de la société (1976–1983)”, in *Vingtième Siècle. Revue d’Histoire*, No. 105, janvier-mars 2010. Hugo Quiroga, *El tiempo del Proceso. Conflictos y coincidencias entre políticos y militares. 1976–1983*, Rosario: Homo Sapiens Ediciones, 2004. CELS, *Derechos Humanos en la Argentina. Informe 2017*, Buenos Aires: Siglo XXI, 2017.

3 Revista Gente, March 30, 1995.

4 Federico Mittelbach, Jorge Mittelbach, *Sobre Áreas y Tumbas. Informe sobre desaparecidos*, Buenos Aires, Sudamericana, 2000, 17; Paula Canelo, “Construyendo elites dirigentes. Los gobernadores provinciales durante la última dictadura militar (Argentina, 1976–1983)”, in *Anuario del Centro de Estudios Históricos “Prof. Carlos S. A. Segreti”*, Year 11, No. 11.

5 Paula Canelo, *El Proceso en su laberinto. La interna militar de Videla a Big-none*, Buenos Aires: Prometeo, 2008; Paula Canelo, *La política secreta de la última dictadura argentina (1976–1983): A 40 años del golpe de Estado*, Buenos Aires: Edhasa, 2016.

ATTEMPTS TO DESTROY THE OPERATION DOCUMENTS OF THE POLITICAL POLICE

The need to destroy all evidence on aberrant crimes and the capabilities to do so due to the concentration of power in the PRN Junta of Commanders fed the assumption that the Armed Forces had destroyed all, or mostly all, available records on the repression carried out between 1976 and 1983. The need to destroy all records became evident to the Armed Forces when an agreement with democratic opposition parties to avoid sanctions for the crimes committed failed. The transition to democracy in Argentina happened due to the collapse after the defeat in the Malvinas-Falkland war, which deepened the already mounting legitimacy crisis of the military government.⁶ About a month after the defeat in the War, in July 1982, General Bignone of the Army became President with the goal to negotiate an exit from power with opposition forces which would include, first and foremost, an agreement to stop any revisions to the actions carried out in the “fight against subversive groups.”⁷

The following year, the military Junta issued three important norms that reflect the end of negotiations with opposition forces on the matter. In April of 1983, the military Junta issued the report “Documento final sobre la Guerra contra la subversión y el terrorismo.”⁸ The report stated that the disappearances were due to the way “terrorists acted” and denied the existence of clandestine places of detention. Furthermore, the report affirmed that the information and explanations included in the text were the only ones available through the Armed Forces. In September, a few months before democratically elected President Raúl Alfonsín took office, the military Junta sanctioned Law 22.924 known as the Self-amnesty law that considered extinguished all penal actions related to crimes committed in the fight against terrorism from May 25, 1973 till June 17, 1983.⁹

In October of 1983, the military government sanctioned Decree 2726/83 that ordered the destruction of all documents referred to as “those documents about the fight against subversion.”¹⁰ The decree referred to the dispositions of Law 22.924 stating that “nobody could be interrogated, searched or call upon in any way in relation to crimes in the fight against subversion.” Furthermore, the decree stated that the spirit of pacification that should be primordial in the next phase of institutionalization in the country requires that the persons that come back to the community should not feel a negative conditioning about themselves. In sum, the decree stipulated the elimination of all information related to persons detained, or be readily available to the executive power by the exclusive authority granted in Article 23 of the National Constitution when the state of siege is in effect.¹¹

The Armed Forces have systematically denied the existence of archives on the “war against guerrilla groups”. Even though Decree 2726/83 denies the existence of any kind of clandestine record, later statements by the Armed Forces High Commanders confirm that during the last months of the dictatorship, most records on crimes committed were destroyed. For example, in 1991, former PRN Minister of Interior Albano Harguindeguy, stated that in his ministry “there was an archive with files of all (the disappeared) that were burnt during the times of General Bignone (the last President of the Junta).”¹² Later on, General Bignone confirmed that information.¹³

In 1995, while the democratically elected government of President Carlos Menem made available to the public the content of

PRN Decree 2726/83 on destruction of information,¹⁴ all military commanders unanimously expressed the inexistence of any records.¹⁵ By 1999, the Commander in chief of the Army Martín Balza denounced General Cristino Nicolaides, a member of the last military Junta, for having ordered in 1983 the destruction, integrally, of the archives of repression, an order Balza considered illegal and immoral.¹⁶

The official position expressed by the Armed Forces regarding the total destruction of any information related to the crimes committed, the repression, and the identity of the victims is in sharp contrast with the fact, that since 1983, there have been unexpected and very important discoveries of collections of documents in military and government agencies. The most important discovery is the *Actas Secretas de la Dictadura* (Secret Proceedings of the Dictatorship) found in the main building of the Air Force, the Cóndor Building, in 2013.

This finding questions the official version of the Armed Forces about the inexistence of records. Even though most records have not yet been found, the uncertainty of how many of them still exist, and if they can indeed be recovered continue to feed the expectations and hopes of great part of Argentina's society.

The controversy on the existence, or not, of more official documents related to repression continues to be a central theme in the never-ending agenda in search of Memory, Truth and Justice.¹⁷

PUBLIC CONTROL OVER ARCHIVES

As already mentioned, the archives of repression in Argentina come from several sources, and the Armed and Security Forces are not the main one. To the contrary, active civil society organizations are in charge of fighting against secrecy and silence over the repression.

Among these civil society organizations, human rights organizations stand out. These organizations can be differentiated between those linked to persons directly affected by the repression (such as Mothers of May Square, Family Members of Detained and Disappeared Persons for Political Reasons,

6 Guillermo O'Donnell, Philippe Schmitter, *Transitions from Authoritarian Rule. Tentative Conclusions about Uncertain Democracies*, Baltimore: Johns Hopkins Press, 1986.

7 Canelo, 2016.

8 La Nación Newspaper, April 29, 1983.

9 La Nación Newspaper, September 24, 1983.

10 Memoria Abierta, *Guía de archivos útiles para la investigación judicial de delitos de lesa humanidad*, Buenos Aires: Memoria Abierta and Unidad Fiscal de Coordinación y Seguimiento de las Causas por Violaciones a los Derechos Humanos cometidas durante el Terrorismo de Estado, 2011.

11 Annex 1 Decree No. 377/95, Boletín Oficial de la República Argentina, March 28, 1995.

12 Revista Noticias, December 8, 1991.

13 La Prensa Newspaper, February 24, 1992.

14 Decree No. 377/95, Boletín Oficial de la República Argentina, March 21, 1995.

15 Revista Microsemanario, Year 5, No. 189, March 25 to April 2, 1995.

16 La Nación Newspaper, April 24, 1999.

17 Paula Canelo, “La H es muda, pero habla. La palabra pública del represor Albano Harguindeguy entre 1976 y 2012”, paper presented at II Seminario de Discusión “Investigaciones y debates sobre la palabra pública de los represores”, Instituto de Desarrollo Económico y Social (IDES), September 7, 2018.

and Grandmothers of May Square), those confessional and pro-victim assistance (such as Service Peace and Justice and the Ecumenical Movement for Human Rights), or those providing legal support or systematization of information (such as The Permanent Assembly for Human Rights, the Center for Legal and Social Studies, or the Argentina League for the Rights of Men). More recently, these organizations have experienced a generational renewal, giving birth to new organizations linked to the descendants of the disappeared such as the organization Sons and Daughters for Identity and Justice against Forgetting and Silence (H.I.J.O.S).¹⁸

It was during the first months of the PRN dictatorship in 1976 that human rights organizations began to unfold an intense campaign on various fronts. They began the communication and public denunciation of repression and violation of human rights, at the domestic and international level, with the goal of obtaining solidarity and support in their fight against the military regime and to organize solidarity networks to assist, protect and help survive victims and their families.

Furthermore, human rights organizations undertook a fundamental role in the systematization of information on acts of repression. The accuracy of the information they gathered was later on confirmed by international organizations. This way, the first archive on disappeared persons was put together by APDH (The Permanent Assembly for Human Rights), an organization that in 1979 had documented 5,818 cases of abuses based on the information provided by family members of the victims and some survivors. In addition, in 1979, the Inter-American Commission for Human Rights of the Organization of American States received 5,580 claims.¹⁹ Claims on abuses were also submitted abroad to CLAMOR, United Nations, Organization of American States, the USA Congress, the French National Assembly, Amnesty International and others civil and religious organizations, especially in Europe and the USA.²⁰

It was also by way of these human rights organizations, many of them linked to intellectuals and academics who were organized in international and domestic research centers²¹ and who had survived repression that many of the new debates on the nature and consequences of the PRN dictatorship began.²²

Since their formation during the dictatorship, until the emergence of democracy in 1983, human rights organizations led the difficult task of document registration that included collecting testimonies, making lists and records, creating archives and centers of documentation, etc. This work created and consolidated an important collection of evidence that allowed for court claims. Once the transition began in 1982, these collections of information were used to put on trial those responsible for the dictatorship's crimes.²³

USE OF THE ARCHIVES DURING TRANSFORMATION

The process of transitional justice in Argentina entailed the implementation of a myriad of mechanisms to foster memory, justice, reparation and lustration.

This process was the result of both strategic innovations proposed by human rights organizations and by the implementation of state public policies.²⁴ In many ways, it was the constant struggles put forward by human rights organizations

and activists that set the pace of the transformation process in the country.

This became evident during the first phases of the transformation process initiated by the democratic government of President Raúl Alfonsín in 1983. The archives compiled by human rights organizations during the dictatorship provided crucial information to start the judicialization of human rights abuses by PRN.

In August of 1983, the Technical Commission for Gathering Data was created to consolidate all information compiled by human rights organizations on victims and perpetrators so as to make it available to the newly elected democratic authorities.²⁵ Beginning in 1984, this big data set was submitted to the *Comisión de Acuerdos del Senado* (Senate Commission for Promotions) in charge of approving military personnel promotions. This way, for the first time civilian control over military promotions became a tool to challenge those accused of severe human rights violations under the dictatorship.²⁶

As a first public policy to know the truth about crimes against humanity, the newly elected democratic government of President Raúl Alfonsín created the National Commission for Disappeared Persons (CONADEP – Comisión Nacional de Desaparición de Personas), a special commission established by a presidential decree on December 15, 1983.²⁷

CONADEP worked with human rights organizations, political parties and other political and social groups that were already involved in investigating state terrorism during the dictatorship to elaborate a special report. The report produced by the commission was titled NUNCA MAS (Never Again) and compiles in 50,000 pages a significant number of cases of human rights violations, torture, disappearances and murder and served as the basis for the trial of the military Juntas.²⁸ The report registered 8,961 disappeared persons and about 380 clandestine centers of detention and torture.

CONADEP functioned between December 15 of 1983 until September 20 of 1984 and it can be considered the first archive that centralized all claims on disappearances dispersed until then in the country and abroad.²⁹ The CONADEP archive has 4 types of

18 Carlos Acuña, Catalina Smulovitz, 1995.

19 Emilio F. Mignone, *Derechos Humanos y Sociedad. El caso argentino*, Buenos Aires: Ediciones Colihue, 1991.

20 Emilio Crenzel, "El archivo de la CONADEP. Una perspectiva desde una experiencia de investigación en Ciencias Sociales", in Memoria Abierta, *III Encuentro Regional de Archivos y Derechos Humanos*, "El Archivo y el testimonio", Buenos Aires, 21 and 22 of September, 2009.

21 Research centers played a very important political and intellectual role under the dictatorships in Latin America. Among them are CEDES and CISEA in Argentina, CIEPLAN in Chile, CLAEH in Uruguay, IUPERJ and CEBRAP in Brazil, CLACSO and FLACSO at the regional level. See Paula Canelo, 2016.

22 Eduardo Luis Duhalde, *El Estado Terrorista Argentino. Quince años después, una mirada crítica*, Buenos Aires: El Caballito, 1983; Daniel Frontalini, María Cristina Caiati, *El mito de la guerra sucia*, Buenos Aires: CELS, 1984.

23 CELS, *Acceso a la información sobre violaciones a derechos humanos durante la dictadura cívico-militar (1976–1983) en la Argentina*, Buenos Aires, CELS, August 2014.

24 Ibid.

25 Ibid.

26 Ibid.

27 Boletín Oficial de la República Argentina, December 13, 1983.

28 Code of Military Justice, Law 23.049, 9.2.1984, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/25000-29999/28157/norma.htm>

29 Crenzel, 2009.

evidence: oral testimonies, photographic collection, blueprints provided by survivors of clandestine centers of detention, and evidence collected in prisons, police stations, hospitals, cemeteries and morgues that could confirm the connection between the illegal and legal system of repression. The archives created by the information gathered by human rights organizations and by CONADEP were crucial to make advances in the judicialization of human rights violations in Argentina and, first and foremost, to judge all members of the military Juntas that ruled the country between 1976 and 1983.³⁰

Since the inauguration of democracy in 1983, there have also been some important advances in “genetic archives.” In 1987 by National Law Number 23.511 the *Banco Nacional de Datos Genéticos* (National Bank of Genetic Data) was created. An autonomous and autarchic institution, the Bank is a systematic archive of genetic material and biologic samples of family members of kidnapped and disappeared persons during the dictatorship that allows for the identification of any remains and of babies born in captivity and later appropriated by acquaintances of the armed and security forces. This “genetic archive” provides crucial information to bring to justice crimes against humanity.³¹ Until today (November of 2018), 128 babies born in captivity in CCD have been identified.

RIGHT TO ACCESS THE ARCHIVES

Access to information is a right recognized in several Articles of the National Constitution of Argentina (Art. 14, 38, 41 and 42). However, there is no National Law regulating access to public information: there is no unified set of norms that clearly establishes the subjects bound to provide information, under which provisions, through which procedures, terms, etc.

The only norm available similar to a National Law is presidential Decree No. 1172/03 (Annex VII) issued in 2003. The decree establishes that any physical or legal person, public or private, has the right to request, access and receive information in equal terms of timing, gratuity and informality. The decree also establishes that all information provided by the subjects bound to do so are presumed of being of public character, except in the cases foreseen by law or when it refers to personal data of sensitive content and whose publicity violates the right to intimacy or honor, among other motives.³²

All norms that somehow are related to access of information in Argentina have a limitation when the request refers to personal data. Data protection is regulated by Law No 25.326 sanctioned in 2000. This Law differentiates between personal and sensitive data. Data that disclose racial or ethnic origin, political opinions, religious, philosophical or moral beliefs, union affiliation, or information related to health or sexual preferences could not be provided without the agreement of the person in question.

In addition, another fact that precludes access to information and, concomitantly, to the archives is the inexistence of a National System of Archives throughout the country to systematize how to deal with documents and how to preserve or destroy them.³³

In this way, there is so far no public policy in Argentina, clear and comprehensive, aimed at the protection of the documental heritage of the State, neither are there agencies of accountability

regarding the obligations public institutions have about their archives. Even though the *General Archive of the Nation*³⁴ (Archivo General de la Nación, hereafter AGN) is the institution with the authority over archives, it is just an agency under the Minister of Interior, Public Works and Housing. The AGN has no independent budget and its bureaucratic structure is minimal.³⁵ This has negatively impacted academic work as well as the use of scientific knowledge in judicial cases.³⁶ In sum, the lack of an integral public policy of archives and access to them has been a major obstacle for the diffusion of the contents of the archives and for academic work.³⁷

As a consequence, all public decisions aimed at searching, recording, and opening the archives of repression have not necessarily implied a better access to them.³⁸ Just in the year 2010, the President sanctioned Decree No 4/2010 that ordered the declassification of information linked to the activities of the Armed Forces during the PRN dictatorship and all information or documents that, even though generated in another period, would be related to the actions of the Armed Forces during that time.³⁹

DECLASSIFICATION AND OPENING UP THE ARCHIVES

The advances, although still limited, in archive declassification established by Decree No 4/2010 have been related to the process of judicialization of human rights violations. In 2001, a renewed phase of judicialization of crimes against humanity began to emerge by the sequential removal of the legal obstacles to bring to justice the perpetrators of the PRN. A first step in this process was the sentence on the “Simon case” that established the unconstitutional status of the “pardon laws.”⁴⁰ On August 12, 2003, under the Presidency of Dr. Néstor Kirchner a new law (25.779) superseded the *Punto Final* and *Obediencia Debida* laws as well as any pardons issued.⁴¹ Starting in 2005, by a Supreme Court decision, any action framed under the figure of “state terror” became a crime against humanity and

30 See the chapter on *Investigation and Prosecution of the Crimes of the Regime* in this Guide.

31 CELS, 2014.

32 Ibid.

33 Ibid.; Memoria Abierta, 2011.

34 In Argentina the legal framework for public archives is Law 15.930 of 1961. The law gives AGN the task of gathering, ordering and preserving all documentation established by the law to communicate knowledge of sources of Argentina's history; Memoria Abierta, 2011, <http://www.agnargentina.gob.ar/>

35 CELS, 2014; Memoria Abierta, 2011.

36 Canelo, 2016.

37 Gabriela Aguila, “La dictadura militar argentina: interpretaciones, problemas, debates,” in *Páginas. Revista digital de la Escuela de Historia UNR*, Year 1, No. 1, 2008; Mariana Nazar, “Dictadura, archivos y accesibilidad documental. A modo de agenda,” in CELS: *Derechos humanos en Argentina. Informe 2007*, Buenos Aires: Siglo XXI, 2007.

38 Memoria Abierta, 2011.

39 CELS, 2014.

40 The case makes reference to the torture and disappearance of the couple Poblete/Hlaczik and the kidnapping of their daughter.

41 See the chapter on *Investigation and Prosecution of the crimes of the Regime* in this Guide. Also <http://servicios.infoleg.gob.ar/infolegInternet/anexos/85000-89999/88140/norma.htm>

imprescriptible. These decisions allowed many cases of human rights violations by the PRN to be reopened. President Néstor Kirchner also changed the extradition policy, allowing extradition for perpetrators prosecuted abroad but not facing charges in Argentina. In 2003, Argentina became a signatory of the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. A creative interpretation of the convention by the courts allowed them to circumvent the statutory limitations to crimes committed decades in the past, and also the *ex post facto* applicability of laws that were not in force at the time of the crimes.

Under the Kirchner's presidency this renewed judicialization was concomitant to the implementation of a series of politics of memory including a revalorization of the archives of repression not only as a primary source to bring perpetrators to justice, but also for research and teaching purposes.⁴²

The renewed phase of judicialization made evident the legal and political obstacles the courts faced, as well as the institutional weakness for the production, systematization and access to information. With the beginning of a new cycle of trials, finding new information and documentation on the Armed and Security Forces actions under the dictatorship became crucial. However, according to the Law of National Intelligence No 25.520 of 2001 a great part of all documents were classified, and to gain access to them, a decree for each claim presented by the courts had to be issued.⁴³ For this reason, in April 2010, President Cristina Fernández de Kirchner decided by Decree No 4/2010 a general declassification of all information related to the actions of the Armed Forces during the PRN dictatorship and of all other documentation linked to that.⁴⁴

An important measure also taken was the resolution No. 308/10 issued by the Ministry of National Defense that created "Teams" for the organization and analysis of all documentation with historical and/or judicial value. These Teams were part of the Human Rights and International Humanitarian Law agency of the Ministry of Defense, and worked extensively on the different archives and places gathering information about the Armed Forces to provide documentation to courts and other public agencies.

At the same time, since 2001 there has been a process of declassification of the dictatorship actions initiated by other countries. Human rights organizations asked the Argentine government to request declassification of documents to France and the USA. The declassification of diplomatic documents is underway with France, while the USA has already agreed to provide documents (of 14 state agencies) in three phases, between 2016 and 2017, and guaranteed public access online.⁴⁵

Furthermore, in 2017, the Archbishops Conference of Argentina announced the opening of a set of documents of their institutional archives, as well as of the Secretary of State of the Vatican that include claims received by the Catholic Church from family members of the disappeared. Access to this information is limited to victims, their families and higher rank members of the church in cases they are somehow linked to.⁴⁶

In spite of these advances in declassification of the archives of repression, obstacles remain due to lack of high quality archival management skills of state officers, overlapping of higher and lower ranking norms regulating the matter, absence of clear categories of types of information, and of mechanisms of declassification.⁴⁷

CURRENT STATUS

Nowadays Argentina has an institutionalized set of significant archives of repression⁴⁸ that contains diverse information from different sources.

In spite of the fragmentation that characterizes the archives, we can classify them as provincial archives, human rights organization archives, bureaucratic-governmental archives produced by the last dictatorship and general archives of the Armed Forces.⁴⁹

The recovery of the archives of repression in Argentina began in 1999, with the archive of the Intelligence Agency of the Police of the Province of Buenos Aires (*Dirección de Inteligencia de la Policía de la Provincia de Buenos Aires*, hereafter DIPPBA). Buenos Aires is the most important Province of Argentina. DIPPBA was created in 1956 with the name of Central Intelligence and was dissolved in 1998 in the context of a police reform. During the dictatorship it was a very important actor of state terrorism in control of the province. In December of 2000, the provincial government transferred the DIPPBA archive to the Provincial Commission for Memory (*Comisión Provincial de la Memoria*, hereafter CPM). The CPM is an autonomous agency whose members represent organizations of human rights, unions, the judiciary, the legislature, universities and different regions of the province of Buenos Aires. The goal of the CPM is to be an archive and a Center of Information with public access not only for those directly affected by human rights violations, but also for anyone interested in research and dissemination.⁵⁰ The program of Management and Preservation of the CPM has been incorporating data, such as the Section of Intelligence of the Naval Prefecture of the North Atlantic, or files of political prisoners in the province, among other information. The program provides information to those directly affected, their families, scholars, and institutions that make claims regarding compensation laws. Since 2006 it also records court cases of crimes against humanity in the province.⁵¹ The DIPPBA archive has been recognized by UNESCO as World Heritage in 2008.⁵²

After the pioneering experience of DIPPBA, other provincial archives of repression were established. Worth mentioning are:

a/ Archive of Memory of the Córdoba Province: created in 2006 by the provincial legislature Law No. 9.286. It is located in the building known as D-2, where the intelligence unit of the provincial police department functioned during the dictatorship.

b/ Archive of the Intelligence Department of the Province of Mendoza: The intelligence department was the most important

42 Memoria Abierta, 2009.

43 CELS, 2014.

44 Ibid.

45 CELS, 2017.

46 Ibid.

47 CELS, 2014.

48 Federico Lorenz, Archivos de la represión y memoria en la República Argentina, in Pérotin-Dumon, Anne, *Historizar el pasado vivo en América Latina*, 2007, <http://www.historizarelpasadovivo.cl/>

49 The list is not exhaustive and follows the criteria Memoria Abierta, 2011.

50 Law No. 12.642, March 2001.

51 CPM, El Archivo, "Gestión y Preservación de Archivos", <http://www.comisionporlamemoria.org/archivo/gestion-y-preservacion/>, September 25, 2018.

52 Ibid.

clandestine center of detention of the province. Comprised of more than 2,300 personal files, it is located in the National University of Cuyo. The archive is digitalized.

c/ *Archive of Memory of the Province of Santa Fe*: created by decree No 2775/2006. The main source of the collection is the provincial Direction of Information, which received information from various other state agencies between the years 1966 to 1984. Since 2011 the information is permanently available and its collections have been declared World Heritage by the Memory of the World program of UNESCO.

d/ *Museum of Memory of the City of Rosario in the Province of Santa Fe*: located in the former building of the Command of the II Division of the Army, it houses the Documentation Center “Rubén Naranjo” (an artist and militant). It has an extensive collection of magazines, newspaper clips, and archives of important court cases of human rights violations.

Among the archives created by human rights organizations the most important one is that of *Memoria Abierta* (Open Memory) created in 1999 by a coalition of several organizations. Its main goal is to coordinate the organization, and to catalogue and preserve the archives of the organizations members of the coalition.⁵³ The catalogue contains 28.000 entries. The oral archive of *Memoria Abierta* contains interviews with victims of state terror. All archives under *Memoria Abierta*’s custody are considered World Heritage and part of the Memory of the World program of UNESCO. Another important archive is the *Archivo Institucional del Centro de Estudios Legales y Sociales (CELS)*.⁵⁴ The Archive has 913 boxes, which covers from 1974 to today. The Archive has seven types of documents and for its relevance is registered in the program Memory of the World of UNESCO.⁵⁵

The National Archive of Memory (hereafter ANM) was created in 2003 by the President of the Republic. Today it is under the authority of the Secretary of Human Rights and Cultural Pluralism of the Ministry of Justice and Human Rights of the nation.

The main collection of ANM is the Archive of CONADEP. The archive also contains the archive of CONADI (the commission in charge of cases of kidnapping of minors), the full video of the trials of the military dictatorship Junta members and an Oral Archive. Access to the collections is restricted.⁵⁶

Besides these archives, significant information has been found in piecemeal fashion out of some of the “legal” agencies of the PRN dictatorship. The most important documents found are the before mentioned *Secret Acts of the Dictatorship*. In 2013, in the basement of the Cóndor Building belonging to the Air Force, 1,500 files were found. These include black lists, actions plans by the dictatorship, receipts of financial contributions, meeting agendas, front desk records, etc. The Secret Acts are in digital form and have public access in the Open Archives site of the Ministry of Defense.

After this finding in 2013, the Ministry of Defense ordered all military units to search for more documents. This led to the finding of 7,000 files of political prisoners at the ex-prison of the Armed Forces in Magdalena, province of Buenos Aires.

Other archives produced by the legal agencies of the dictatorship such as the Fund CAL (Advising Legislative Commission of the Dictatorship) and Fund Consufa (Supreme Tribunal of the Armed Forces) are publicly available through the Department of Intermediate Archive of the General Audit of the Republic (AGN).

In addition to these archives, the Army, the Navy and the Air Force each have their own archives about their personnel that could be eventually consulted.

This fragmentary panorama of the archives of repression improved by the politics of memory implemented since the year 2006 by the administrations of President Néstor Kirchner and President Cristina Fernández de Kirchner.

However, since 2015 the administration of President Mauricio Macri has reversed some of these advances by dismantling state agencies, programs, web sites, and team of experts working on recovering the archives of repression.

LESSONS LEARNT AND RECOMMENDATIONS

In 2011, the NGO *Memoria Abierta* (Open Memory) jointly with the *Unidad Fiscal de Coordinación y Seguimiento de las Causas por Violaciones a los Derechos Humanos cometidas bajo terrorismo de Estado de la Procuración General de la Nación* (Fiscal Unit of Coordination and Tracing of Court cases for Human Rights Violations of State Terror under the Office of the Attorney General of the Nation) carried out an investigation into the archives of repression that are used as source for court cases on crimes against humanity in the country.

The investigation warned that “the institutions (and the persons in charge of them) do not have the adequate expertise and skills to deal with the documents because of lack of public policies for training and professional development. As a consequence, there is a ‘diversity of archival realities’ in which voluntarism, common sense, and sometimes ignorance set the principles for documentation, instead of professionalism and norms.”⁵⁷

The investigation concluded that, according to several deficits surrounding the issue of the archives of repression in Argentina, political will to search for and disseminate these crucial documents in order to understand the recent past of the country, does not necessary entail effective public access to them.⁵⁸

Since the transition in 1982, many pending issues remain with the organization of the archives of repression; these issues have worsened lately by the public policies implemented by the current government of President Mauricio Macri (2015–2019).

After four decades of experience with archives of repression in Argentina we can draw several lessons and recommendations.

First, it is imperative to raise the status of all “archives of repression”, not only as a resource to promote justice against criminals who committed violations of human rights under the dictatorship, but also as a valuable primary source for historical, comparative, and journalistic research aimed at dissemination and teaching.

Second, the organization, description and systematization of the existing collections should be improved to effectively

53 *Memoria Abierta*, <http://memoriaabierta.org.ar/wp/organismos-integrantes/>, September 25, 2018.

54 CELS Archivo, <https://www.cels.org.ar/web/wp-content/uploads/2017/10/AR-CELS-Descripci%C3%B3n-Fondo-Archivo-CELS.pdf>, page 5, October 16, 2018.

55 Ibid.

56 CELS, 2014; Federico Lorenz, 2015.

57 *Memoria Abierta*, 2011.

58 Ibid.

democratize declassification and allow free access to all so as to deepen the process of Memory, Truth and Justice. Public policy should aim at establishing general and clear norms for access to the information provided by the archives and to instruct public authorities regarding those norms.⁵⁹

Third, we need to advance in norms to regulate the archives of repression especially regarding state obligations on their access and preservation, as well as on the authority of the state on preservation and destruction of data.⁶⁰

Fourth, we recommend the celebration of agreements with countries that are in the process of transitional memory and justice to speed exchange of information, to promote basic standards of preservation and access to archives, and to secure that

international organizations jurisprudence is respected to allow for greater impact in terms of access of information.⁶¹

Finally, we recommend decisively promoting the work of civil society organizations to demand accountability to authorities regarding all aspects of human rights, especially the conservation of archives of repression and access to them.

Argentina is an exceptional model in relation to the politics of Memory, Truth and Justice. However, we must be very aware that any achievements can be at anytime reversed.

59 CELS, 2014 and 2017; Memoria Abierta, 2011.

60 CELS, 2014; Memoria Abierta, 2011.

61 CELS, 2014.

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PURGING

SERGIO GABRIEL EISSA

INTRODUCTION

In the Argentine Republic, no administrative or legal purging mechanism was implemented. This was mainly due to the fact that, although the transition was brought about by collapse, it did not imply a total defeat of the military and the civilians who led the March 24, 1976 coup d'état. Likewise, and due to the characteristics of the transition, the trial of those responsible for crimes against humanity was limited by the "categorical imperative" defined by President Raúl Alfonsín (1983–1989): to hand over command to another democratically elected president. All the linked actions were subordinated to this great objective.

The first section analyses the situation during the fall of the authoritarian regime. Secondly, it describes the context in which the transition took place in order to understand why laws were not implemented to purge the state of the officials who had held positions during the dictatorship. Thirdly, the crimes of the Dictatorship were tried after a long process with advances and setbacks that continues to this day. Finally, the final reflections are presented.

TRANSITION FROM COLLAPSE?

Raúl Alfonsín (1983–1989) and his collaborators considered that the main objective of their government was to hand over the "presidential baton" to another civilian president, an unprecedented event that had not occurred since 1928, and that the Armed Forces were the greatest threat to the democratic transition.¹ In fact, the radical president considered before winning the elections that "the regime has not abandoned power, has abandoned the land and is entrenched in its last line of defense, where it is preparing to fight back."² In his opinion, the Armed Forces had made a "strategic withdrawal" leaving the country in a deep economic crisis, in an international scenario where the Cold War (1947–1991) had warmed up with the arrival of Ronald Reagan (1981–1989) to the presidency of the United States and where, in addition, the involvement of its Armed Forces in the so-called War on Drugs in Latin America had begun. Alfonsín therefore considered that it was impossible not only to judge all the military, but also his civilian accomplices. This context, plus the pardons granted by Carlos Menem (1989–1999), explains the absence of policies aimed at purging civilian and/or military officials who had been part of the state during the last dictatorship (1976–1983).

In fact, both Ernesto López³ and Patrice McSherry⁴ argue that the *Armed Forces, paramilitary groups, economic groups and the intelligence services retained an important veto power that made it impossible to fully prosecute those responsible for state terrorism and to implement policies aimed at modifying the functioning of military organizations*. Moreover, during the 18 months that the transition lasted until the assumption of the new civilian authorities on December 10, 1983, the Armed Forces controlled the process and acted ("veto power") to preserve certain prerogatives in the future constitutional and democratic government.

This was due to the fact that, among other factors, the political actors presented inconsistencies and hesitations to take advantage of the favourable moment that the defeat in the Malvinas/Falkland war (1982) meant. On the one hand, in the Justicialist Party (PJ) the position of accepting that the transition be commanded by the military prevailed. On the other hand, the Multiparty – formed by the main political parties in 1981 – agreed that the military government should establish "the bases and lead the process that would lead to the announcement of elections and the return to democracy."⁵ The Dictatorship presented a proposal for agreement on the basis of fifteen points – covering both economic and foreign policy issues – which was rejected by the Multiparty. In addition, the military wanted to close the issue of human rights violations through a final report and a self-amnesty law No. 22.924. Despite the pressure of public opinion, expressed in the march of December 16, 1982, asking for trial and punishment, the Multiparty remained in the position of only asking for the release of the political and union prisoners. The exceptions were Raúl Alfonsín in the Radical Civic Union (UCR) and the internal line of Intransigence and Mobilization in the PJ, which insisted on the need to repeal the self-amnesty and to judge the repressors.⁶

The only priority the military had after the radical Raúl Alfonsín won the elections, unexpectedly for some domestic and external actors,⁷ was to avoid judicial review of what had been done regarding human rights violations. Issues such as the application of lessons learned in the Malvinas/Falkland war⁸ to reform the Armed Forces were set aside by the inability to reach consensus among the forces. In other words,

"there was no agreement between civilians and the military, which means that there was no agreed transition (...), but neither was there a complete political defeat of the military and a complete occupation of the spaces and resources of power by

1 Sergio Eissa, *¿La irrelevancia de los Estados Unidos? La política de defensa argentina (1983–2010)*, Buenos Aires: Arte y Parte, 2015. For example, the then head of the Navy maintains in his memoirs that he perceived that the radical government "did not view the military with friendly or at least neutral eyes...". They wanted to make the military appear to be the only ones responsible or guilty of all the evils that have occurred in the country. See Ramón Arosa, *De Constitución a Retiro. Reseña y reflexiones del Jefe de la Armada 1984–1989*, Buenos Aires: Instituto de Publicaciones Navales, 2008, 31.

2 Patrice McSherry, *Incomplete transition. Military power and democracy in Argentina*, Lexington: Authors Guild Backprint.Com Edition, 2008, 108.

3 Ernesto López, *Ni la ceniza ni la gloria. Actores, sistema político y cuestión militar en los años de Alfonsín*, Quilmes: Universidad Nacional de Quilmes, 1994.

4 Patrice McSherry, *op. cit.*, 2008, 86.

5 Ernesto López, *op. cit.*, 1994, 43.

6 *Ibid.*, 45.

7 Just as an example, both the United States and the military preferred the victory of the Peronist candidate, Italo Luder. See also Patrice McSherry, *op. cit.*, 2008, 112.

8 Ministerio de Defensa, *Informe Rattenbach*, Buenos Aires: Ministerio de Defensa, 2012 [1982].

civilians that placed them in a solid position of domination and control over the military (...) the military led – even in the midst of growing political weakness – the process of democratic re-institutionalization to the end, which allowed them to withdraw in a more orderly and less costly manner (...): this gave a very special peculiarity to consolidation (...): a) a residual capacity for pressure in the Armed Forces and b) the persistence of the limitations of the conception and behavior of the civilian actors – which obviously did not magically evaporate with the arrival of consolidation–, conditions were created so that it had strong features of instability and unpredictability with regard to the evolution of civil-military relations.”⁹

In conclusion, this transition, despite being characterized as a “collapse”,¹⁰ allowed the military and its civilian allies to retain significant shares of real power with which they were able to effectively condition the new democratic government.

SOCIOPOLITICAL CONTEXT OF THE TRANSITION TO DEMOCRACY

The democratic transition took place during the overheating of the Cold War and, in this context, the United States, with Ronald Reagan in the presidency, put aside the human rights policy of President James Carter and focused once again on the fight against communism in Latin America. Based on the discrepancies raised by Alfonsín regarding U.S. policies in Central America in March 1985, that country once again strengthened its *bridges with the Argentine military*. Since then, various U.S. government officials have warned of the danger of the resurgence of the *montonero guerrilla* and that in Latin America there was an enemy that was fighting governments from the inside “employing communist subversion, terrorism or the production and trafficking of narcotics.”¹¹ They also insisted again on the Soviet threat in the region,¹² due to the signing of fisheries agreements by Argentina with the countries within the Soviet-dominated sphere. This heightened U.S. fears about possible control by the South Atlantic Soviet Union that would allow a network of drug traffickers and subversives to carry arms on fishing boats to the Chilean opposition to the dictator Augusto Pinochet. Argentine Foreign Minister Dante Caputo assessed that this set of statements meant that, while the U.S. had unplugged the military plug in Argentina, it could be plugged back in at any time.¹³ According to Verbitsky¹⁴ this meant that for the superpower democracy it was good, but it was better if it was controlled by the military.

Secondly, the economic policy implemented by the dictatorship had transformed the socio-economic structure of the country: it had put an end to the model of import substitution industrialization (ISI) (provoking the financialization, de-industrialization and reprimarization of the economy) and had left an external debt of US\$ 45,000 million dollars compared to US\$ 5,000million in 1975.

In order to face this economic crisis, Alfonsín tried to apply a Keynesian policy during the first two (2) years.¹⁵ In other words, they sought to design a gradual economic policy to reduce social costs, since the president believed that the application of recessive and *shock* recipes would affect the foundations of the nascent democracy.

Due to the failure of the approach outlined above, the “Austral Plan” was launched on May 14, 1985 with the aim of lowering

inflation and creating favorable conditions for deeper transformations. However, the success achieved in the short term hid the lack of structural measures to encourage recovery or growth.¹⁶ Thus, given the ongoing deterioration of the political situation, the military resistance to the transformations and the electoral defeat of the governing party in the 1987 parliamentary elections, the new economic plan, known as “Primavera,” was born without the necessary strength to control the ever-increasing inflation. In early 1989 – at the behest of Argentine economist and former dictator Domingo Cavallo – the World Bank and the International Monetary Fund announced that they were limiting their loans to the Argentine government. The run against the dollar (“from which some financial groups were no strangers”)¹⁷ and the lack of reserves in the Central Bank to intervene adequately in the exchange market, led the country from a situation of high inflation to a hyperinflation that precipitated the government’s early delivery to the Justicialist candidate triumphant in the presidential elections, Carlos Saul Menem.

THE UPS AND DOWNS IN THE TRIAL OF THOSE RESPONSIBLE FOR STATE TERRORISM AND ITS IMPACT ON PURGING

While the Justicialist Party (PJ) was in favour of self-amnesty, Raúl Alfonsín considered the trial of those responsible for state terrorism important for the construction of a democratic society. However, he was convinced that it was impossible to judge all military personnel in a transitional context and that they should be differentiated by levels of responsibility: 1) the head who gave the orders; 2) those who exceeded their orders; and 3) those who had merely carried out the orders. In addition, he believed that the unrestricted persecution of the military was unjust because various sectors of the Catholic Church, political parties, trade unions, businessmen, the media, among others, had been complicit in state terrorism. Nor did Alfonsín order the trial of the illegal state action of the Armed Forces, Security Forces and police, and the paramilitary organization, Argentinian Anticommunist Alliance (Triple A) during the Justicialist government of María

9 Ernesto López, *op. cit.*, 1994, 47–50. See also Patrice McSherry *op. cit.*, 2008, 86 and 118.

10 In the collapsing transition, “authoritarian rulers fail to control the agenda of the negotiation issues and the outcome of the negotiation”. In the agreed transitions, “the rulers of authoritarian regimes [...] tend to have a strong dominance (although declining over time) over the rhythms and agendas of the transition”. Huntington establishes a third category: transfer. In the latter, “democratization is brought about by the combined action of government and opposition”. See respectively Guillermo O’Donnell, “Transiciones, continuidades y algunas paradojas”, in *Cuadernos Políticos*, 1989, (56), 25, 26; and Samuel Huntington, *La tercera ola. La democratización a finales del siglo XX*, Buenos Aires: Paidós, 1995, 143.

11 Horacio Verbitsky, *Civiles y militares: memoria secreta de la transición*, Buenos Aires: Contrapunto 1987, 132, 229, 234.

12 Patrice McSherry, *op. cit.*, 2008, 213–2014, 360.

13 Sergio Eissa, *op. cit.*, 2015.

14 Horacio Verbitsky, *op. cit.*, 1987, 264–267.

15 Mario Rapoport, *Historia económica, política y social de la Argentina (1880–2000)*, Buenos Aires: Ediciones Macchi, 2000, 924 and Andrew McAdam, Viktor Sukup, Claudio Katiz, *Raúl Alfonsín. La democracia a pesar de todo*, Buenos Aires: Corregidor, 1999.

16 Mario Rapoport, *op. cit.*, 2000, 913–914.

17 *Ibid.*, 924.

Estela Martínez de Perón (1974–1976), because this could generate a “confrontation” with the PJ and he had no political margin to do so.

Based on this conceptualization, the main difficulties arose in its implementation.¹⁸

It is clear that Raúl Alfonsín never intended to try all the military and civilian accomplices, even if civil society and the military perceived exactly the opposite.¹⁹ This led to an increase in civil-military tensions, which resulted in four (4) military uprisings between 1987 and 1990.

President Carlos Menem opted for another approach that was in line with the Justicialist Party’s position in 1983. Although he was not interested in military issues, he knew that he could not ignore the military situation if he wanted to focus mainly on the economic front, which had got out of hand due to hyperinflation in February 1989. To this end, on 7 October 1989, President Menem issued the first pardon, comprising four decrees: 1002/89, 1003/89, 1004/89 and 1005/89. They reached military personnel involved in acts of state terrorism and the Malvinas/Falkland war, persons belonging to armed organizations, and officers, non-commissioned officers and civilians who participated in the military uprisings of 1987 and 1988. The last carapintada (painted face) uprising occurred on 3 December 1990. After the repression, President Carlos Menem granted a second pardon on December 29, 1990, through decrees 2741/90, 2742/90, 2743/90, 2744/90 and 2745/90. They reached the military juntas of the last dictatorship, former guerrillas and former Economy Minister José Martínez de Hoz.²⁰

After the repression of the last military uprising, it can be argued that full civilian control of the Armed Forces was established in the country. Throughout this process, which lasted throughout the 1980s, the Armed Forces ceased to be a relevant actor in the Argentine political system.²¹

Thus, in the context in which Alfonsín conceived and implemented his policy and the pardons decided by Carlos Menem, he made unthinkable any type of action to purge the state of the officials of the dictatorship. On the contrary, many soldiers – both those responsible for state terrorism and those who rebelled against the governments of Alfonsín and Menem between 1987 and 1990 – were able to stand as legislators, intendants and occupy positions in government. Moreover, the same happened with civil servants who were never subjected to any legal process until 2003, except for a few exceptions such as the former Minister of the Economy José Alfredo Martínez de Hoz.

The enactment of these laws and decrees of impunity prevented the prosecution of those responsible for state terrorism from 1989 onwards, with the exception of cases involving the abduction of newborns between 1976 and 1983.

In 1998, at the proposal of the daughter of Argentine writer Rodolfo Walsh, the National Congress repealed the “Full Stop” and “Due Obedience” laws. In this context, the Center for Legal and Social Studies (CELS) asked the courts to annul these rules. It was only in March 2001 that a first instance ruling declared these laws null and void and unconstitutional, and so the legal processes that had been closed in the 1980s began to be reopened in a completely different political context, in which the Armed Forces no longer constituted a factor of power in Argentine society. In 2003, when Néstor Kirchner (2003–2007) took over the presidency, there were already about “a hundred or so heads of the armed and security forces under arrest for the theft of babies, the looting of property and the reopening of cases.”²² It was only in 2003 that

these laws were declared insanely null and void and the Supreme Court of Justice ratified the first instance rulings in 2005.

Until 2003, relatives of the disappeared, human rights bodies and social scientists demanded that the Armed Forces, the Security Forces and the police grant access to their archives on the disappeared. However, since the last months of the dictatorship, they have claimed that they had been eliminated.²³ However, the Directives, Orders, Regulations and Plans were provided by the military themselves during the trials, as part of their defense, to justify that they had acted legally. On the other hand, the policy of impunity implemented by the Argentine government between 1989 and 2003 meant that the search for documentary material on state terrorism was completely neglected.

Néstor Kirchner’s assumption of the presidency (2003–2007) made it possible, in the context of the declaration of the nullity of the so-called Forgiveness Laws and the promotion of the trials of those responsible for state terrorism, to take initiatives to preserve private documents, which had been kept by individuals and NGOs, and to search for documents in state offices. Thus, the National Memory Archive (2003), the Provincial Commission for Memory in the Buenos Aires Province (2000) and the Instituto Espacio por la Memoria (Space for Memory Institute) in the Autonomous City of Buenos Aires (2002) were created.²⁴

In December 2003,²⁵ it was reported that in mid-1978 the 601 Intelligence Battalion counted a total of 22,000 people dead and missing from 1975 to that date. This document was part of “a dossier of 1,500 original pages obtained by the Argentine Justice System in the office and home of Arancibia in Buenos Aires, in November 1978. After years of retention in the court archives, the American journalist John Dinges obtained a copy of the invaluable five-volume compilation in January 2002 and sent it to the George Washington University National Security Archive.”²⁶

18 Jaunarena doubted that the Council would take up the task and argued that the entire trial would be unduly prolonged, which was detrimental to the democratic transition. He then proposed to apply the presumption that “under certain hierarchies, military personnel would be considered to have acted on orders”. Horacio Jaunarena, *La casa está en orden. Memoria de la transición*, Buenos Aires: TAEDA, 2011, 33, 35. See the chapter by Gabriela Ippolito O’Donnell and María Cecilia Alegre for more details.

19 Argentines thought the transition had ended with the presidential oath, while politicians aware of the military problem differed on that point. See Carina Perelli, *Legacy of transition to democracy in Argentina and Uruguay*, in Louis W. Goodman, Joanna S. R. Mendelson, Juan Rial, eds., *The military and democracy. The future of civil-military relations in Latin America*, Lexington: Lexington Books, 1990.

20 See the chapter by Gabriela Ippolito O’Donnell and María Cecilia Alegre for more details.

21 Eduardo Estévez, *Relaciones civiles – militares y política en la Argentina: de Alfonsín a Menem*, paper presented at the Seminar “Armed Forces and Democracy”, Academia Libertad y Desenvolvimiento, Friedrich Naumann Foundation – Stiftung, Sintra, 1991.

22 See Horacio Verbitsky, “Cuentas Pendientes”, in page 12, April 13, 2014, <https://www.pagina12.com.ar/diario/elpais/1-244021-2014-04-13.html>

23 Mariana Nazar, “Debate I. Dictadura, archivos y accesibilidad documental. A modo de agenda”, at the Centre for Legal and Social Studies (CELS) (Ed.), *Human Rights in Argentina. 2007 Report*, Buenos Aires: CELS.

24 Ibid.

25 “Según EE.UU., son 22.000 los muertos o desaparecidos víctimas de la represión entre el 75 y el 78 en Argentina”, in *DERF*, December 5, 2003, http://www.derf.com.ar/despachos.asp?cod_des=1770

26 Sebastián Penelli, “Documento con información oficial militar computa al menos 22.000 víctimas del Terrorismo de Estado”, in *Ámbito Financiero*, March 27, 2017, <http://www.ambito.com/877233-documento-con-informacion-oficial-militar-computa-al-menos-22000-victimas-del-terrorismo-de-estado>

On 5 January 2010, President Cristina Fernández de Kirchner (2007–2015) ordered (Decree No. 4/2010) the declassification of “all information and documentation relating to the actions of the Armed Forces during the period 1976–1983, as well as any other information or documentation produced during another period relating to those actions.”

In this new political context, the Argentine Foreign Ministry created the Association for the Recovery of Historical Memory and, in order to have technical assistance, signed an agreement with the Center for Legal and Social Studies (CELS) in June 2011.

On March 13, 2014, the Argentine Army handed over to the Ministry of Defense 7,000 folders (350 of civilians) of files from the Magdalena prison, where Jacobo Timerman and Mario Galli, among others, had disappeared.²⁷ In November of the same year, the Argentine Navy handed over to the Minister of Defense the Isaac Rojas documentary collection, mainly related to the dictatorship that ruled Argentina between 1955 and 1958. In addition, on October 31, 2016, the Head of the Argentine Air Force reported the discovery of documentation related to the operation of the Military Junta and the Legislative Advisory Commission between 1976 and 1983.²⁸

To this end, an area was created within the National Directorate of Human Rights and International Law of the Ministry of Defense for the digitization and preservation of such documents and the digitization and preservation of such documents.²⁹ In January 2018, workers and 500 civil and trade union organizations denounced the dismantling of the area.³⁰

Finally, on 24 March 2016, United States President Barack Obama announced during his visit to Argentina that a project would be launched to “review and declassify intelligence [and military] records on the coup d’état in Argentina and the subsequent repression”. The first round was delivered between August and December of that year, and the second, during Donald Trump’s administration in April 2017.³¹ In addition, the Vatican State announced in 2016 that it is arranging its own archives for the purpose of declassification.³²

In summary,

Beginning in 2006, courts across the country began issuing sentences for the crimes of the dictatorship. From then until December 2013, 494 convictions and 47 acquittals were handed down, that is, almost 10 per cent (...) The 541 trials concluded with a sentence accounting for only 26 per cent of the total number of cases that are ready for trial. All this shows that these are trials in which due process and the right of defense of the accused are respected and that no one is convicted without solid evidence against them.³³

LESSONS LEARNT AND RECOMMENDATIONS

As a result of these ups and downs in the trial of those responsible for state terrorism and the absence of purging laws, the denial of state terrorism persisted; the attempt to involve the Armed Forces in the internal order (for example, in the fight against drug trafficking); economic policies that follow the neoliberal matrix of the dictatorship; and judicial decisions that favored impunity for civilians and the military.

The main thing that stands out is the persistence of “entrenched authoritarian clauses”³⁴ in the intelligence and security

agencies, where – it could be argued – there has been no transition to democracy.

Regarding the national intelligence system, Decree No. 1311/2015 was adopted, which sought to modify Argentina’s intelligence doctrine, professionalize the Federal Intelligence Agency as the governing body of the National Intelligence System and make it an institution capable of meeting the challenges of the twenty-first century in the collection and analysis of strategic information for security and defense. The reform project begun in 2014 was interrupted and the government of President Mauricio Macri (2015 to present) restored the old operating model and reinstated the spies who had been thrown out of the organization.

Regarding the Federal Police (PFA), for example, Marcelo Saín³⁵ states “that this police institution, created in December 1943 and set up in January 1945, lays its institutional foundations on Law Decree 333/58 and its complementary norms”. This rule of the dictatorship of Eugenio Aramburu (1955–1958). As for the professional regime of the PFA, “it was established by Law Decree No. 21.965, promulgated in March 1979 by Lieutenant General Jorge Rafael Videla, and was regulated in 1983 by a decree signed by General Reynaldo Bignone (...) These rules and their amendments are in force, as are Law Decree No. 9,021/63 establishing the ‘Organic Law of the Argentine Federal Police Information’ and its regulations approved by Decree No. 2.322/67. By means of these norms, a true state-owned information and intelligence service was created and put into operation, not subject to any type of administrative, judicial or parliamentary comptroller.”

On the other hand, many former officials of the Dictatorship and former soldiers who rebelled during the government of

27 Victoria Ginzberg, “Papeles de la prisión”, in *page 12*, March 14, 2014, <https://www.pagina12.com.ar/diario/elpais/1-241786-2014-03-14.html>

28 At the same time, the Ministry of Defence declassified the Rattenbach Report on responsibilities in the conduct and operations of the Malvinas/Falkland war (1982) through Decree No. 200/2012, a task that was completed with the declassification of all documentation relating to the conflict (Decree No. 503/2015).

29 Argentine Republic – Ministry of Defence (2015), *Libro Blanco de la Defensa 2015*, Buenos Aires: Ministry of Defence, 278–281.

30 “Denuncian un ‘vaciamiento’ en la investigación de archivos de la dictadura”, in *Perfil*, January 18, 2018, <http://www.perfil.com/noticias/politica/denuncian-un-vaciamiento-en-la-investigacion-de-archivos-de-la-dictadura.phtml>

31 Fernando Barrio, “Trump entregó a Macri los nuevos archivos desclasificados de la Dictadura”, in *Perfil*, April 27, 2017, <http://www.perfil.com/noticias/perfil-usa/trump-entrego-a-macri-los-nuevos-archivos-desclasificados-de-la-dictadura.phtml>. By 2002, the United States had already declassified 4,700 secret State Department files. This was the result of a request made by the CELS, the Mothers and Grandmothers of Plaza de Mayo to the United States government in 1999. See Werner Pertot, “Nuevos secretos pueden salir a luz”, in *page 12*, March 18, 2016, <https://www.pagina12.com.ar/diario/elpais/1-294874-2016-03-18.html>

32 “El Vaticano también desclasificará sus archivos secretos sobre la dictadura argentina”, in *Infobae*, March 19, 2016, <https://www.infobae.com/2016/03/19/1798315-el-vaticano-tambien-desclasificara-sus-archivos-secretos-la-dictadura-argentina/>

33 See Horacio Verbitsky, “Cuentas Pendientes”, in *page 12*, April 13, 2014, <https://www.pagina12.com.ar/diario/elpais/1-244021-2014-04-13.html>

34 The concept is used by Manuel Garretón to refer to the transition to democracy in Chile. See Manuel Garretón, *Incomplete Democracy*, Chapel Hill: University of North Carolina Press, 2003.

35 Marcelo Saín, “Los intocables”, in *page 12*, January 26, 2010, <https://www.pagina12.com.ar/diario/elpais/1-139049-2010-01-26.html>

TABLE NO. 1	
Memory, Truth and Justice	Impunity
Decrees 157/1983 and 158/1983 order the trial of the guerrilla leaders and the dictatorship.	Full Stop Law No. 23.492: establishes the statute of limitations for criminal prosecution of those responsible for crimes committed during the last dictatorship.
Decree No. 187/83: creation of the National Commission on the Disappearance of Persons (CONADEP),	Due Obedience Law No. 23.521: establishes the criminal responsibilities of those involved in the genocidal plan between 1976 and 1983 according to the three-tier criterion.
Law No. 23.040: repeals Law No. 22.924 on self-amnesty.	Decrees No. 1002, 1003, 1004 and 1005 of 1989, and 2741, 2742, 2743, 2744, 2745 and 2746 of 1990: pardons to the former military leaders of the last dictatorship, former ERP guerrillas and Montoneros, to the commanders who led the Malvinas/Falkland war (1982), to the former Minister of the Economy, Alfredo Martínez de Hoz and to the military rebels who rose up against democracy between 1987 and 1988.
Law No. 23.049: modifies the Code of Military Justice, which allowed, inter alia, for appeals to the civil courts.	Decrees Nos. 1228, 1229 and 1230 of 2003: pardons for the former military officer who had risen up against democracy in 1989 and 1990, Mohamed Ali Seineldin, and for former guerrillas, including one of the leaders of the MTP and ERP, Enrique Gorriarán Merlo.
Defense of Democracy Law No. 23.077: increases the penalties for those who depose the public authorities and for those who participate in an armed organization that endangers the validity of the National Constitution.	
Law No. 23.952: repeals Laws No. 23.492 and 23.521.	
Law No. 25.779: declares Laws No. 23.492 and 23.521 insanely null and void.	
Law No. 26.475: declares extinguished the benefits obtained by officials of the last dictatorship and granted under special regimes or laws.	

Source: own creation.

Raúl Alfonsín and returned to office during the democracy can be highlighted: a) José María Lladós was an official of the General Secretariat of the Presidency during the dictatorship and again assumed the positions in the Ministry of Defense during the radical governments (1983–1989 and 1999–2001);³⁶ b) Domingo Cavallo was Director of the Central Bank (1982) and later Minister of the Economy (1991–1996 and 2001), Foreign Minister (1989–1991) and National Deputy (1987–1989 and 1997–1999); c) Oscar Camilión was Foreign Minister in 1981 and Minister of Defense during the democracy between 1993 and 1996; d) Antonio Horacio Stiusso was a spy for the Secretary of State for State Intelligence during the dictatorship (1972–1976), he became Director of Counterintelligence at the beginning of the 21st century and was only displaced in 2014; e) Francisco Miret was one of the investigating judges who rejected the *habeas corpus* of the relatives, he became a member of a chamber during the democracy until he was suspended by the Judicial Council in 2010; f) Aldo Rico was leader of the “carapintadas” uprisings in 1987 and 1988 and was Minister of Security of the Buenos Aires Province (1999–2000), National Deputy (1991–1995) and Intendant of the Municipality of San Miguel (1997–2003); g) Juan José Gómez Centurión was a military rebel “carapintada” in 1987 and 1988 and was appointed head of Customs (2015–2017), vice-president

of the Banco de la Nación Argentina (2017–2018) and president of the same body since May 2018;³⁷ and f) Christian Von Wernich was police chaplain of the Buenos Aires Province and convicted of crimes against humanity. He was expelled from the police force in 1985 but continued serving in Bragado (Buenos Aires Province) and in Chile until he was arrested.

The possibility of implementing norms to purge the state of authoritarian government officials will depend on the type of transition and its socio-political context and requires political agreement among the main political parties, which did not occur in Argentina in 1983. Firstly, because the parties perceived the transition differently and, secondly, because many of the members of those parties – mainly radical and other smaller parties – held positions during the dictatorship.

36 See Paula Canelo, *La política secreta de la última dictadura argentina (1976–1983)*, Buenos Aires: Edhasa, 2016, 153.

37 Radicalism has appointed “ex-carapintadas” and military officials who were objected to by human rights bodies in the Ministry of Defence between 1999 and 2001 and from 2015. See Alejandra Dandan, “Militares retirados que se reciclan en cargos de defensa”, in *page 12*, February 1st, 2017, <https://www.pagina12.com.ar/diario/elpais/1-291548-2016-02-01.html> and Horacio Verbitsky, “Nuevas/Viejas Amenazas”, in *page 12*, undated, <https://www.pagina12.com.ar/2001/01-02/01-02-25/pag11.htm>

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INVESTIGATION AND PROSECUTION OF THE CRIMES OF THE REGIME

MARÍA CECILIA ALEGRE AND GABRIELA IPPOLITO-O'DONNELL

INTRODUCTION

From 1976 to 1983 Argentina experienced the most brutally repressive dictatorship of its entire history: the *Proceso de Reorganización Nacional* (Process of National Reorganization), as the military named the authoritarian experiment.¹

During the seven years that the dictatorship lasted, a carefully designed strategy of repression was put into effect. This strategy included forced disappearances, torture in clandestine centers of detention, kidnapping children, expropriation of private property, and murder of those considered opponents to the regime. The *Proceso de Reorganización Nacional* (hereafter PRN) aimed at the eradication of left-wing guerrilla groups, as well as of all political and social groups committed to democracy. In addition to sheer repression, the PRN implemented a neoliberal economic program aimed at entirely changing the political economy of the country and, in so doing, disciplining workers and lower class citizens by reversing previously acquired social rights.

In 1982, economic mismanagement and the mobilization of human rights organizations, parties and unions led the dictatorship to embark on the Malvinas/Falkland war against Great Britain in a desperate attempt to regain some legitimacy. Two days before Argentina invaded the Malvinas/Falklands Islands, the dictatorship faced a massive mobilization and a general strike. The demise of the Malvinas/Falkland war on June 14 of 1982 precipitated the collapse of the dictatorship and triggered a rapid transition to democracy.

THE 1983 ELECTION AND THE LEGAL CONDITIONS OF INVESTIGATION OF POLITICALLY MOTIVATED CRIMES

After a very short period of liberalization,² the PRN convoked the celebration of national free and fair elections on October 30 of 1983. Before the elections, on March 23 of 1983, and in the absence of a broad agreement of PRN with opposition forces to manage the transition process, the military passed Law 22.924, which exonerated them from all responsibilities for human rights violations. This law is known as the Self-Amnesty Law (*Ley de Autoamnistía*). The military also enacted a secret decree that ordered the destruction of records and other evidence of their past crimes.

During the electoral campaign, human rights violations committed by the PRN became a central issue of debate. The two main candidates running for the presidency Raúl Ricardo Alfonsín of the UCR (Unión Cívica Radical) and Italo Luder of the PJ (Peronist Party) adopted very different positions on the issue. One month after the PRN announced the Self-Amnesty Law, on April 25 of 1983, the UCR candidate Raúl Ricardo Alfonsín denounced the law, claiming that it was part of a broader impunity

pact between the military and union leaders closely linked to the Peronist Party. Even without proof of such a pact, the position expressed by Italo Luder, the Peronist Party Presidential candidate, stressing that the Self-Amnesty Law “was irreversible”, seemed to confirm its very existence. In September of 1983, in a crowded political meeting at the Ferro soccer Club Stadium, the UCR presidential candidate Alfonsín promised that, once in government, he would declare null the Self-Amnesty Law.

CRIMINAL PROSECUTION OF THE CRIMES OF THE PREVIOUS POWER: THE RETURN OF DEMOCRACY

The UCR candidate Raúl Ricardo Alfonsín won the election with a 52 % share of the votes on October 30 of 1983 and took power on December 10. As promised during the campaign, the new government began to deal with the issue of human rights violations by revising the activities of the dictatorship. As soon as President Alfonsín assumed power, he repealed the Self-Amnesty Law and reformed the Military Code (with the agreement of Congress) expecting the military themselves to give an account of past human rights abuses by way of military tribunals, something that did not occur. The military commanders argued that they had followed orders to exterminate the left-wing guerrilla, orders that had been signed by the democratic constitutional government of President Isabel Perón in 1975, before the military coup of 1976. As a consequence of the military's resistance to give an account of their actions through military tribunals, the newly elected democratic government undertook an unprecedented task: to establish a National Criminal Court of Appeals, and put the top commanders of the PRN on trial. The trials were made possible due to a comprehensive investigation carried out by the National Commission for Disappeared Persons (CONADEP – Comisión Nacional de Desaparición de Personas), a special commission established by a presidential decree on December 15, 1983.³

The CONADEP commission was formed by a plural broad-based group of personalities among them Eduardo Rabossi, Gregorio Klimovsky, Hilario Fernández Long, Marshall Meyer, Ricardo Colombres, Monsignor Jaime de Nevares, Magdalena Ruiz Guiñazú, René Favaloro, and Carlos Gattinoni. World-known writer Ernesto Sábato chaired the commission.

The CONADEP worked with human rights organizations, political parties, and other political and social groups, which were already involved in investigating state terrorism during

1 For a comprehensive review of those years see Guillermo O'Donnell (2008).

2 O'Donnell et al. 1986.

3 Comisión Nacional sobre la Desaparición de Personas, Decree 187/83, 15. 12. 1983, <http://www.derechos.org/ddhh/arg/ley/conadep.txt>

the dictatorship, to elaborate a special report. The report produced by the commission was titled NUNCA MAS (Never Again) and compiles (in 50,000 pages) a significant number of cases of human rights violations, torture, disappearances and murders, and served as the basis for the trial of the military Juntas.⁴ The report registered 8,961 individuals who were disappeared and 380 clandestine centers of detention and torture.

On April 22 of 1985, the trial of the military Juntas began. The main prosecutors were Julio César Strassera and his assistant Luis Moreno Ocampo. The trial was presided over by a tribunal of six judges: León Arslanián, Jorge Torlasco, Ricardo Gil Lavedra, Andrés D'Alessio, Jorge Valerga Aráoz, and Guillermo Ledesma. Prosecutors presented 709 cases, of which 280 were heard. A total of 833 witnesses testified during the cross-examination phase, which lasted until August 14. After several months of allegations, it became clear that the PRN had implemented a systematic and well-design repression plan. For this reason, the members of the three first military Juntas that had governed the country were found guilty.⁵ Sentencing was issued on December 9. General Jorge Videla and Admiral Emilio Massera were sentenced to life imprisonment; General Roberto Viola to seventeen years; Admiral Armando Lambruschini to eight years; and General Orlando Agosti to four and a half years. Omar Graffigna, Leopoldo Galtieri, Jorge Anaya and Basilio Lami Dozo were acquitted, but later the three were court martialed for malfeasance in waging the Malvinas/Falkland war of 1982.

The Argentina military Juntas trial is the only case of transitional justice undertaken by civilian courts in Latin America. Also, it was the first major trial held against military commanders since the Nüremberg Trials in Germany following World War II. It is worth noting, that in contrast to the Nüremberg Trials, in Argentina, the process did not involve the participation of any foreign power.

The CONADEP report, allegations during the Juntas trial, and the Self-Amnesty law being repealed, opened the possibility to extend the trials to lower ranking officers involved in PRN repression. In 1986 new trials began to unfold, which generated a state of rebellion among lower ranking military officers. President Alfonsín had to confront three separate military upheavals between 1987 and 1988. This forced the new government to propose to Congress two new Laws to limit the number and scope of trials, and settle the matter once and for all: the *Punto Final* and the *Obediencia Debida* laws.

The *Punto Final* law (Final Point Law 23.492)⁶ was passed on December 24 of 1986, and mandated the end of investigation and prosecution of individuals accused of political violence during the dictatorship, up to the restoration of democratic rule on December 10, 1983. It was passed after only a 3-week debate. The *Obediencia Debida* law (Due Obedience Law 23.521)⁷ was passed a year later and exempted subordinates from prosecution when they were carrying out orders. Both laws were very controversial and hurt the legitimacy of the government, but they decreased unrest in the military and prevented a democratic breakdown.

DEMOCRATIC CONSOLIDATION AND THE ENDLESS STRUGGLE FOR TRUTH, MEMORY AND JUSTICE

Between 1989 and 1991, under the Presidency of Dr. Carlos Saúl Menem of the PJ (Peronist Party), civic-military relationships

would change drastically. President Menem sanctioned ten decrees to grant pardons to all participants involved in actions of state terror during the dictatorship. Furthermore, in 1998 the *Punto Final* and the *Obediencia Debida* laws were repealed.⁸ The military were totally demobilized by these decisions.

On August 12, 2003, under the Presidency of Dr. Néstor Kirchner of the PJ (Peronist Party) a new law (25.779) superseded the *Punto Final* and *Obediencia Debida* laws as well as the pardons previously issued by President Menem.⁹ Starting in 2005, by a Supreme Court decision, any action framed under the figure of “state terror” became a crime against humanity and imprescriptible. These decisions allowed many cases of human rights violations by the PRN to be reopened. President Néstor Kirchner also changed the extradition policy, allowing extradition for people prosecuted abroad and not facing charges in Argentina. In 2003, Argentina became a signatory of the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. A creative interpretation of the convention by the courts allowed them to circumvent the statutory limitations to crimes committed decades in the past, and also the *ex post facto* applicability of laws that were not in force at the time of the crimes.

Today the trials continue. In 2016, a court convicted 15 officials of conspiring to kidnap and assassinate dissidents during the US-backed Operation Condor, which killed 60,000 to 80,000 people in six Latin American nations from 1975 to 1989. As recent as November of 2017, a court sentenced 29 former soldiers for crimes against humanity, 19 of them received between 8 and 25 years, 6 were acquitted. Two of the officers received life sentences for piloting the so-called death flights, in which individuals were tortured, then drugged, and then killed, by being thrown out of airplanes into the river or sea. Among the victims were two French nuns abducted in December of 1977.

However, the most resonant recent cases are those of Alfredo Astiz, known as the “Blond Angel of Death,” and Jorge Acosta, nicknamed “The Tiger,” who also received life sentences for several crimes, including the 1977 disappearance of the 17-year-old Swedish citizen Dagmar Hagelin. Courts had already sentenced both men to life in prior trials. In spite of these achievements, in early 2017 the Supreme Court decreased jail time for human rights abuses, awakening fears of a regression.

It is worth noting as a way of closing, that the courts have begun to deal with the civilian accomplices of the PRN. A former Ford factory director and an ex-security officer are accused of conspiring with security forces to target workers at Ford’s suburban factory, north of the Argentine capital in 1976. According to the prosecution, they provided names, ID numbers, pictures and home addresses to military officials who then abducted 24 factory employees and union members. The victims were allegedly

4 Code of Military Justice, Law 23.049, 9. 2. 1984, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/25000-29999/28157/norma.htm>

5 The PRN had four military Juntas, but only the first three were set to trial.

6 Final Point Law 23.492, 23. 12. 1986, <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=21864>

7 Due Obedience Law 23.521, 8. 6. 1987, <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=21746>

8 See Law 24.952, 25. 3. 1998, <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=50364>

9 See Law 25.779, 21. 8. 2003, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/85000-89999/88140/norma.htm>

subjected to hours of torture, electric shocks and interrogation on the factory premises in the suburb of General Pacheco before being hauled off to military prisons.¹⁰

LESSONS LEARNT AND RECOMMENDATIONS

In the field of transitional justice, Argentina is an exceptional case. Never before in the history of the country, or any country in Latin America, has a civilian court put on trial military commanders accused of crimes against humanity. The experience of Argentina has not been one of reconciliation, but one of truth, memory and justice. For this reason, even today, the trials continue here and there. The identification of the perpetrators by their victims and their families is an ongoing process. Democratic institutions, fragile as they still are in many respects, have endured the many attempts by the perpetrators and their ideological supporters to stop the process of investigation and prosecution of state terrorism. It has not been an easy process; advances and setbacks are intertwined.

There are several lessons to learn from Argentina's transitional justice process. There are three aspects to take into account for an evaluation of the process as a whole: leadership, political opportunities, and organization.

First, it is clear that much of what has been achieved in terms of truth, justice and memory has depended upon the commitment of leaders, especially of Presidents, to the cause of human rights. President Alfonsín and President Kirchner were

definitely committed to condemn state terrorism. But leaders do not act in a vacuum; the political opportunities they face are also part of the equation of their eventual success or failure. This is a second aspect to take into account. President Alfonsín faced a very complex political environment to fully implement a policy of investigation and prosecution of crimes; he had to sustain some important setbacks. The military still had, at the time, significant power of retaliation. This contrasted sharply with the most favorable environment President Kirchner faced to reverse the policies implemented in favor of the military by President Menem, and make further advances in search of memory, truth and justice.

Third, leadership and favorable political opportunities are not the only factors that count for the successful implementation of a transitional justice strategy. As the case of Argentina shows, a dense civil society, highly mobilized for the cause of human rights, is a crucial aspect for success. Human rights organizations, domestic and international, as well as individual advocates have been fundamental in establishing synergies with other groups in government (all three branches, Executive, Judicial and Legislative) and in society to sustain collective action against impunity. The main recommendation is thus to consider these three aspects when designing a strategy of transitional justice.

10 Natalie Muller, "Argentina: Ex-Ford executives on trial for aiding 1970s dictatorship torture", in *Deutsche Welle*, 19. 12. 2017, <https://www.dw.com/en/argentina-ex-ford-executives-on-trial-for-aiding-1970s-dictatorship-torture/a-41857423>

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REHABILITATION OF VICTIMS

SOFÍA DEL CARRIL

INTRODUCTION

Rehabilitating the victims of Argentina's *Proceso de Reorganización Nacional*¹ was not at the top of the agenda when the transition took off in 1983. Almost 35 years later, however, the country has amassed a broad legal framework to rehabilitate the victims and their families, with a focus on economic reparations.²

Yet this has not followed a linear path, and to understand the legal framework and its implementation we need to take into account political, social and economic factors. Especially important are the challenges faced and the decisions taken at the political and judicial level, which are covered in other chapters of this study on the Argentina case.

This chapter will explore the scope and typology of rehabilitation, as well as its historical context. A second section will detail the reparation's legal framework in chronological order; the focus is on economic reparations. Information about the implementation and social satisfaction will be provided, when available. We will then briefly describe the Argentine human rights movement. Finally, we will draw lessons learnt and make recommendations for similar situations around the world.

At all times, this chapter should be read along with other sections of the Democratic Transition Guide, especially the Transformation of the Political System, Investigations and Prosecutions of the Crimes of the Regime, and Education and Preservation of Sites of Conscience chapters.

SCOPE AND TYPOLOGY OF REHABILITATION

During the 20th century, political violence in Argentina left a large amount of victims. For the purpose of this report, we will focus on the violence which occurred in the 1970s and early 1980s.

After the military defeat of the Malvinas/Falkland war, the country slowly started its transition. Raul Alfonsín, a candidate from the Radical Party, won the 1983 presidential election by 52 % of the votes; his campaign platform included measures to address the atrocities of the past.

Shortly after his December 10, 1983 inauguration, President Alfonsín issued decree 187/1983 mandating the creation of a sixteen-member commission, the National Commission on Disappeared Persons ("CONADEP" in Spanish). An extra judicial body, the CONADEP was tasked with "shedding light to the facts relating to the *disappearances* of people in Argentina."

It is important to note that its central mandate pertained to enforced disappearances, but not all crime committed by the Junta. Also, that the CONADEP was contested by social and political actors, which pushed for other alternatives.

Following an extensive investigation, which included several thousand testimonies, numerous interviews, and site-visiting, on September 18, 1984 the CONADEP released its final report,

Nunca Más ("Never Again"). Needless to say, the Commission faced several dilemmas and made crucial interpretative decisions.³

The CONADEP estimated an "open" number of 8,960 disappeared, based on complaints and information cross-checked with national and international human rights organizations. The Never Again report was also a milestone because it shed light on the institutional and systematic character of enforced disappearances, identified those responsible making reference to other actors besides the *Junta* and recommended an exhaustive investigation on others, who were not high-rank leaders.⁴

The final report made four key recommendations pertaining to justice and the enactment of new legislation. In particular, it recommended:

*"[t]hat the appropriate laws be passed to provide the children and/or relatives of the disappeared with economic assistance, study grants, social security and employment and, at the same time, to authorize measures considered necessary to alleviate the many and varied family and social problems caused by the disappearances."*⁵

Only two days after the report was presented, the Undersecretariat of Human and Social Rights was created, under the orbit of the Ministry of the Interior.⁶ It would be a key player, following and systematizing the information exposed in the *Nunca Más*, being the custodian of the CONADEP archives and receiving new complaints.⁷

DEFINING THE UNIVERSE OF VICTIMS

First and foremost, in this document we will mainly refer to the victims of the crimes perpetrated by the *Military Junta* – the dictatorship that ruled Argentina from March 24, 1976 to December 9, 1983. That is, to victims of State-sanctioned atrocities.

1 From March 24, 1976 to December 10, 1983. Also referred in this chapter as the Junta, the Military Junta, the Dictatorship.

2 María José Guembe, "La experiencia argentina de reparación económica de graves violaciones de derechos humanos", CELS, 1994, 1.

3 Emilio Crenzel, "Veinticinco años de democracia en Argentina, un balance desde los derechos humanos", in *Naveg@américa. Revista electrónica de la Asociación Española de Americanistas* [online], 2011, vol. 6, 7.

4 Emilio Crenzel, Ideas y Estrategias ante la violencia política y las violaciones a los derechos humanos en la transición política en Argentina, in Claudia Feld, Marina Franco, eds., *Democracia, hora cero. Actores, política y debates en los inicios de la postdictadura*, Buenos Aires: Fondo de Cultura Económica, 2015, 106.

5 *Nunca Mas* Report, CONADEP, 1984. English version available at: http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain_000.htm

6 Guembe, 2.

7 Ibid. As the author notes, the Undersecretariat changed its rank over time. Shortly after its creation it was transformed into a national direction. Nowadays, the Secretary of Human Rights and Cultural Pluralism is part of the Ministry of Justice and Human Rights.

There are other victims, such as those of the para-police organization Triple A (prior to the 1976 military coup), and of guerrilla organizations such as Montoneros and ERP. The acknowledgment and treatment, and the status of these victims are a widely debated issue in Argentina, then and now. As we will see in the next section, certain victims prior to the beginning of the Dictatorship have slowly started to receive compensations.

The Military Junta produced numerous types of victims. In this report, we will focus on certain crimes. Firstly, assassinations by State forces, often in “fake” confrontations, whose remains have been identified and returned to their families. Secondly, *desaparecidos* or disappeared, individuals assassinated by the government, but whose bodies have never been found. It must be noted that the concept of disappeared also includes individuals that were held prisoners at Centros Clandestinos de Detención (*clandestine detention centers*), but were later freed.

Prisoners were overwhelmingly subject to torture and inhumane treatments. Another grave crime was the appropriation and identity substitution of babies born to women held as prisoners. Finally, the Junta also applied labor-related sanctions to political opponents, such as layoffs and suspensions.

The notion of *victim* is a social and historical construction,⁸ and the legal framework helps settle the contours of such construction, from the State’s standpoint. Besides ‘direct’ victims, it must be noted that families and other relatives were strongly affected. In this sense, the CONADEP report included a section called “The family as a victim”:⁹

It is a feature of the disappearance syndrome that the stability and structure of the family of the person who disappears is profoundly affected. The arrest (generally carried out in the presence of the family or of people connected to the family); the anxious search for news at public offices, law courts, police stations and military garrisons; the hope that some information will arrive, the fantasy of a bereavement that is never confirmed; these are factors that destabilize a family group just as much as the individual members. Behind each disappearance, there is often a family that is destroyed or dismembered, and always a family that is assaulted in what is most intimate: its right to privacy, to the security of its members, and to respect for the profoundly affectionate relations that are the reason for its existence.

LEGAL FRAMEWORK OF THE REHABILITATION¹⁰

1984–1987: THE BEGINNING: LABOR-RELATED MEASURES

With the democratic transition, a series of laws were enacted with the aim to resolve the situation of workers that had been fired during the Dictatorship.¹¹ As María José Guembe notes, specific groups, independent from public opinion pressure, enacted this first set of laws upon direct pressure.¹² In 1984, two laws were enacted. Passed in February, Law 23.053 mandated the re-incorporation of Foreign Service employees that had been suspended.¹³ Later, a similar law was enacted applying to state companies’ workers that had been laid off.¹⁴

Between 1985 and 1987, several laws were further enacted, pertaining to teachers and bank employees.¹⁵ In September 1985,

Law 23.2781 was passed, with important effects. The law mandated that the “inactivity period” due to the dictatorship (being suspended, fired or forced to quit, or being forced to exile) should be counted for retirement purposes.¹⁶

As Guembe notes, in that time, political detainees began bringing their cases to justice, seeking reparations.¹⁷ This led to the first discussion on general reparations within the judiciary power and the human rights movement.¹⁸

1986: PENSIONS FOR FAMILIES OF THE DISAPPEARED

In late 1986, Congress approved Law 23.466, creating a package of benefits for families of those disappeared before December 10, 1983, in line with CONADEP recommendations. This benefited underage children as well as spouses or partners and other close family members, which were in charge of the disappeared. The ‘package’ included a pension of approximately USD \$200 per month and medical coverage.¹⁹

Pablo de Greiff points out that the law was aimed more at responding to the situation of widows and children of the disappeared, rather than satisfying legal criteria on proportional compensations to the damages suffered by them.²⁰ As Guembe notes, this had to do with the financial problems that human rights organisms were suffering, since before 1986, they were the main providers of resources to the families of the disappeared.²¹

1991: COMPENSATIONS FOR POLITICAL PRISONERS

The late 1980s found Argentina coping with the effects of the *Juicio a las Juntas*, with military coup attempts and the enactment of norms that limited the scope of transitional justice, namely the *Punto Final* and *Obediencia Debida* laws.

As De Greiff notes, the situation made no place for a focus on reparations.²² Along the same line, María José Guembe argues that the priority was the search for *truth and justice*.²³ Further, at the end of this decade, an acute economic and political crisis shook Argentina, and President Alfonsín had to call for early presidential elections. He was replaced by Carlos Menem, of the Peronist Party.

Several reasons, on the domestic and regional level, pushed Argentina’s executive and legislative power to grant reparations.

8 Emilio Crenzel, “Verdad, justicia y memoria. La experiencia argentina ante las violaciones a los derechos humanos de los años setenta revisada”, in *Telar*, 2015, vol. 13–14, 63.

9 *Nunca Mas* Report.

10 Legal framework will focus on national level norms. Argentina has a federal system, and several provinces have enacted specific laws.

11 Guembe, 3.

12 Ibid.

13 In Spanish, “declarados prescindibles.”

14 Law 23.117 (1984).

15 Laws 23.238 (1985) and 23.523 (1987).

16 Guembe, 3.

17 Ibid., 3 and 4.

18 Ibid.

19 Pablo de Greiff, “Los esfuerzos de reparación en una perspectiva internacional: el aporte de la compensación al logro de la justicia imperfecta”, in *Revista Estudios Socio-Jurídicos*, 2005, vol. 7 (Esp), 166.

20 Ibid.

21 Guembe, 5.

22 De Greiff, 167 and 168.

23 Guembe, 5.

First, as is covered in other chapters of this study, between 1989 and 1991, when President Menem issued a series of decrees pardoning military officers and former guerrilla members.

In this context of impunity, human rights organizations and families brought their cases to the Inter-American system, where Argentina's state responsibility was contested. This pushed President Menem, himself a former political prisoner, to issue decree 70/91 in January of 1991. The decree granted compensations to individuals, which were detained by authorities before December 10, 1983 and which had started a judicial process against the State before December 10, 1985.²⁴

The benefit was calculated according to the number of days the prisoner spent detained. The reparation was of approximately USD \$27 per day at that time.²⁵ It also stipulated a one-time compensation for the families of political detainees that died while in prison and for those detainees that suffered "grave" injuries (approximately, USD \$46,275 and USD \$34,492 respectively).²⁶

Later that year, in November 1991, Congress passed Law 24.043, which considerably expanded the reparations granted by decree 70/91.²⁷ The law granted economic reparation per day of detention to people detained under the custody of the Executive power or civilians detained by virtue of military tribunals' decisions. It was granted to political detainees between November 6, 1974 (when the *state of siege* was declared under the presidency of Isabel Martínez de Perón) and December 1983.²⁸ As De Greiff points out, the structure of the reparations was similar to the decree's, yet the economic benefits were larger.²⁹ Reparation per day of detention jumped to USD \$74.50 and reparations for individuals which died or suffered grave injuries in prison were set in USD \$136.254 and USD \$94.490 respectively.³⁰

Victims and their families were given until 1998 to make filings, although this was later extended. 13,600 requests were received, and approximately 7,800 were granted.³¹ Further, Law 24.043 introduced a new payment method: Argentine sovereign bonds.³²

1994: COMPENSATIONS FOR ENFORCED DISAPPEARANCES AND ASSASSINATION VICTIMS

In 1994, Argentina's constitution was reformed and several human rights declarations and treaties were granted "constitutional" level. Further, in mid-1994, the general assembly of the OAS approved the Inter-American Convention on Enforced Disappearance of Persons.

Later that year Congress passed Law 24.411 which established compensation for victims of enforced disappearance and of assassination by armed security, and any other paramilitary forces. De Greiff explains that the law was not a product of the pressure of civil society and was passed without much debate.³³ Yet, Law 24.411's wording lacked operative clauses, and thus three years later, in 1997, it was amended, after an intense debate, by Law 24.823.³⁴ One of the key contentious points had to do with the *status* of the disappeared.

The law had ample scope, granting compensation for individuals that had been victims of enforced disappearances (at any point in time), and that were still disappeared at the moment the law was promulgated (May 23, 1997),³⁵ and also for those assassinated by security forces, in both cases before December 10, 1983.

The reparation was tied to the monthly salary of the highest level in the administration, by a coefficient; this was approximately

USD \$220.000 at that time.³⁶ Filings were made for 3,151 assassinated and 8,950 disappeared individuals.³⁷ Again, the reparations were issued in sovereign bonds.³⁸

Although covered in other sections of this report, it must be noted that in the mid-1990s a legal maneuver by human rights group started to succeed. *Abuelas de Plaza de Mayo's* lawyers argued that because the crime of kidnapping minors, and changing their identities, had not been covered by amnesty laws, they could be brought to justice.³⁹ *Junta* leaders Videla and Massera were detained for charges connected with these crimes. Both the impunity granted to the Military Junta and the character of minors as victims were again a subject of discussion.

CURRENT STATUS: NEW SOCIAL ACTORS AND EXPANSION OF REPAIRS

The early 2000 saw new judicial developments, with the landmark case Simón, later ratified by the Supreme Court. In 2003 Néstor Kirchner was elected president, and he quickly incorporated the human rights discourse into his platform.

Enacted in 2004, Law 25.914 established reparations for individuals born during their mother's captivity and to minors detained with their parents before December 10, 1983. As in other laws, in exchange, beneficiaries could not sue the State for damages in connection with these crimes. Further, the law mandated special compensation for those individuals whose identity had been changed. These victims would receive a compensation equivalent to the one granted by law 24.411 for disappeared and assassinated individuals.⁴⁰ Law 25.914 beneficiaries received their compensations in cash.

It is important to note that in 2004 the Supreme Court ruled a case and interpreted the concept of *detention*.⁴¹ In this sense, the Court linked restrictions to freedom of movement, with the notion of *ostracism* associated with exile. Thus this reparation is also available to those individuals, which were forced to exile.

24 De Greiff, 169.

25 Ibid.

26 Ibid.

27 Ibid., 170.

28 As amended in 1997 by Law 24.906.

29 De Greiff, 170.

30 Ibid.

31 Ibid., 171.

32 Ibid. Águeda Goyochea, Mariana Eva Pérez, Leonardo Surraco, "Definiciones del universo de víctimas desde el Estado post0-genocida: la invisibilidad de los hijos de desaparecidos y asesinados como sujetos de derechos", working paper, 2011, 11.

33 De Greiff, 172.

34 Ibid.

35 Thus, it excluded as beneficiaries those individuals which were disappeared but later were freed, among others. See De Greiff, 173.

36 Emilio Crenzel, "Veinticinco años de democracia en Argentina, un balance desde los derechos humanos", 13. Economic reparations were not welcomed by some key players of the Human rights movement, namely the Mothers of Plaza de Mayo Association. See Goyochea, Pérez and Surraco, 14. Compensations were often split among the disappeared children.

37 Crenzel, "Veinticinco años de democracia en Argentina, un balance desde los derechos humanos", 13.

38 De Greiff, 173.

39 Kathryn Sikkink, *The Justice Cascade. How Human Rights Prosecutions are Changing World Politics*, New York: Norton, 2011, 77.

40 It also included more reparations in the case of injuries, for example.

41 Argentine Supreme Court, case *Vaca Narvaja de Yofre*, 2004.

In 2009, Law 26.564 expanded the benefits of Laws 24.043 and 24.411 to individuals that were detained, disappeared or assassinated between June 16, 1955 and December 9 1983. June 16, 1955 marks the beginning of the *Revolución Libertadora*, a coup, which ended with Juan Perón's second presidential mandate.

Finally, in 2013 Congress passed Law 26.913, granting a *pension* to individuals that have been detained due to political, labor or student-related causes, until December 1983. The law was implemented in 2014. Nowadays, the monthly sum is of approximately USD \$480.

SOCIAL SATISFACTION

Victims and their families have widely made use of the legal framework described above, although public information regarding this is not available. As of 2016, over 27,000 case files based on the legal framework described above were reportedly being processed by the Human Rights Secretariat.⁴²

It is important to note several criticisms reparations and its implementation have drawn:

- **High costs of the process:** Both at the economic and symbolic level. As Goyochea, Pérez and Surraco note with regard to the reparations granted by Law 24.411, in order to obtain them, families needed to start both a judiciary and an administrative process.⁴³ To do this, families had to hire lawyers and, in many cases, brokering agents, since reparations were paid in sovereign bonds.
- **Sovereign bonds as payment:** Families were affected by sovereign bonds' loss of value during Argentina's frequent economic crisis,⁴⁴ especially when the national currency was abruptly un-pegged from the US dollar in 2001.
- **Reluctance to accept economic reparations:** Some organizations such as *Madres de Plaza de Mayo* have criticized economic reparations and refused to cash them.⁴⁵ They strongly reject "setting a price to the lives of our daughters and sons."
- **Limits of economic reparations:** Often, economic reparations were not enough to rehabilitate victims, many of them coping for example with trauma effects.⁴⁶
- **Scope of reparation to minors:** Reparations to minors have been questioned, and for instance Goyochea, Pérez and Surraco argue that they should be granted not only to those directly affected by the repression as Law 25.914 mandates.⁴⁷

ORGANIZATIONS OF FORMER VICTIMS

As its history of political violence goes back in time, the country has human rights organizations dating back to the early 20th century, such as *La Liga Argentina por los Derechos del Hombre*. At the beginning of the Dictatorship, it also had other organizations such as the Permanent Assembly for Human Rights and the Ecumenical Movement for Human Rights (both dating from the mid-1970s).⁴⁸

Yet the majority of the organizations were founded after the coup in 1976.⁴⁹ As Kathryn Sikkink writes, after failed solitary searches for their loved ones, family members of the disappeared created new human rights organizations.⁵⁰ In 1977, *Madres de Plaza de Mayo* and *Abuelas de Plaza de Mayo* were created. Along with these two groups, another set of groups started developing, or increasing, their activity over time, such as CELS, SERPAJ

and the Permanent Assembly of Human Rights.⁵¹ All of these groups faced repression, and some of their members were even disappeared – such as *Madres'* founder Azucena Villaflor – or imprisoned.⁵²

As Sikkink notes, human rights groups started developing connections with international organization, such as Amnesty, regional bodies like the Inter-American Commission, and foreign governments such as the United States under Jimmy Carter's administration.⁵³ They were especially active pushing for and cooperating with the landmark country visit by the Inter-American Commission in 1979.

Argentina's human rights movement played a key role in the country's transition, activating mobilization, making complaints, and advocating to national and international actors. As Elizabeth Jelin puts it, the most relevant feature of the human rights movement during the early years of the transition was its ability not only to accept or reject, but to *create and build* political opportunities.⁵⁴

Among the most important human rights organizations, we can identify:

- *Liga Argentina por los Derechos del Hombre* (1937)
- *Asamblea Permanente para los Derechos Humanos* – APDH (1973)
- *Servicio Paz y Justicia* – SERPAJ (1974)
- *Movimiento Ecueménico por los Derechos Humanos* (1976)
- *Familiares de Desaparecidos y Detenidos por Razones Políticas* (1976)
- *Madres de Plaza de Mayo* (1977)⁵⁵
- *Abuelas de Plaza de Mayo* (1977)
- *Centro de Estudios Legales y Sociales* – CELS (1979)
- *Hijos e Hijas por la Identidad y la Justicia contra el Olvido y el Silencio* – H.I.J.O.S. (1995)

LESSONS LEARNT

After tracing and evaluating the politics of reparations in Argentina, we can draw several lessons. First and foremost,

42 Alicia Panelo, "Terrorismo de Estado: La reparación en números", in *Adelanto24*, March 14, 2017, <http://adelanto24.com/2017/03/14/terrorismo-de-estado-la-reparacion-en-numeros/>

43 Goyochea, Pérez and Surraco, 14 and 15.

44 Ibid.

45 See: Madres de Plaza de Mayo, platform. Available in Spanish at: <http://madres.org/index.php/consignas/>

46 Goyochea, Pérez and Surraco, 18.

47 Ibid., 21.

48 Elizabeth Jelin, *Certezas, incertidumbres y búsquedas: el movimiento de derechos humanos en la transición*, in Claudia Feld, Marina Franco, eds., *Democracia, hora cero. Actores, política y debates en los inicios de la post-dictadura*, Buenos Aires: Fondo de Cultura Económica, 2015, 197 and 198.

49 Hilda Sabato, "Los organismos de Derechos Humanos", in *Derechos Humanos en Argentina. Informe 2004*, CELS, 572, <https://www.cels.org.ar/web/wp-content/uploads/2016/10/IA2004-Dossier-2-Los-organismos-de-derechos-humanos.pdf>

50 Sikkink, 63.

51 Ibid.

52 Ibid.

53 Ibid., 63 and 64.

54 Jelin, 197.

55 The organization has a spinoff called *Madres de Plaza de Mayo – Línea Fundadora*.

the rehabilitation of victims must be a state policy. Reparations must be carefully considered and planned.

In Argentina's case, the victims were broadly compensated (especially in economic terms), but this was not the product of a straightforward public policy. Rather, it was constructed incidentally along the last three decades. In fact, there was no clear order, and the measures were taken due to several factors – including demands by affected groups, such as unions and victim's organizations or, the product of domestic and international litigation against the State. Putting the task to push for reparations on victims is re-victimizing *per se*. Thus, a political and social consensus on the necessity of granting remedies and reparations to the victims is adamant.

Second, along with the political decision to rehabilitate victims, the financial dimension must be incorporated, calculating and delivering the reparation in a timely manner and format. The use of sovereign bonds, in the case of Argentina with its economic history, has not facilitated the process for victims and families. The use of bonds created barriers of access to reparations, as well as a loss of value that the families had to bear.

Further, we can argue that economic compensations have limitations, and that we should explicitly incorporate other types of reparations. In this regard, the “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”⁵⁶ adopted by the UN General Assembly in December 2005 provides interesting input.

On the other hand, the Argentine case shows the importance of a strong, vibrant and proactive human rights movement. Civil society was crucial before and all along the transition, pushing the agenda at its lowest moments – such as after the amnesty laws were enacted in the late 1980s and early 1990s. Countries in transition and the international community in general should

aim for a robust civil society, channeling funds and giving them voice and recognition.

Finally, an important lesson, which can be drawn is an ample definition of “victim.” Although there is still a strong debate on the scope,⁵⁷ in the Argentina case families and relatives were considered central from the beginning. This has led to the 2004 *Ley de Hijos* and to the reparations in cases of exile.

RECOMMENDATIONS

- 1/ Make rehabilitation of victims a state policy, backed by a political and social consensus.
- 2/ Create or empower a centralized State organism in charge of rehabilitations. This organism must be highly-ranked, well-funded and adequately staffed.
- 3/ Include several dimensions in the reparations, not only the economic. In this sense, recent UN principles and guidelines on remedy and reparations are useful.⁵⁸
- 4/ Incorporate victims and families in a participative process of designing and implementing reparations.
- 5/ Adopt a wide criterion of proof for establishing crimes, since valid proofs for many of them such as enforced disappearances are nearly impossible to obtain.
- 6/ Ensure legal, social and psychological assistance to the victims and their families, both broadly and in connection with the process to obtain reparations.

56 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly, December 16, 2005, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

57 See footnote 48.

58 See footnote 57.

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EDUCATION AND PRESERVATION OF SITES OF CONSCIENCE

MARÍA CECILIA ALEGRE AND GABRIELA IPPOLITO-O'DONNELL

INTRODUCTION

How newly democratized nations deal with their authoritarian past is a crucial aspect of a successful political transition. The construction of a collective memory to make visible past human rights violations is a difficult, but a fundamental task in the consolidation of democracy. There are many instruments transitional societies can use to recover the memory of state terror atrocities and to strengthen a democratic culture, among these education and preservation of sites of conscience stand out. In spite of a long history of military coups, conflicts and political violence during the 20th century, Argentina had never developed national policies aimed at preserving sites of conscience.

It has been rather recently, starting with the transition to democracy in 1983, that the preservation of memory has become an issue of public debate and of policy design and implementation aimed at uncovering the truth about the experience of state terror under the last military dictatorship that ruled Argentina from 1976 to 1983. However, we are still a long way away from consolidating a process of memory building by the implementation of a comprehensive and systematic set of public policies to preserve sites of conscience and promote democratic education. This is a process still very much in the making in Argentina, and not exempt from potential reversals.

HISTORICAL BACKGROUND

With the return of democracy on December 10, 1983, under the Presidency of Dr. Raúl Ricardo Alfonsín of the Radical Party (UCR – Unión Cívica Radical), the State began to deal with the issue of human rights violations by revising the activities of the dictatorship that governed Argentina for seven long years (1976–1983). Under the President Alfonsín administration, the chief members of the military Juntas, from that time, were put on trial. This was made possible due to a comprehensive investigation carried out by the National Commission on the Disappearance of Persons (CONADEP – Comisión Nacional de Desaparición de Personas), a special commission established by presidential decree.¹

The CONADEP commission worked with human rights organizations, political parties and other political and social groups that were already involved in investigating state terrorism under the dictatorship to elaborate a special report. The report was titled NUNCA MAS (Never Again) and compiles a significant number of cases of human rights violations, torture, disappearances and murder, which served as the basis for the trials of the military Juntas.²

Later on, Congress passed two laws to settle the matter: *Punto Final* (Full Stop Law 23.492, 1986)³ and *Obediencia Debida* (Due Obedience Law 23.521, 1987).⁴ These two laws were in response to the military resistance to the trials. It is important to mention

that at the time these laws were passed, the military still had significant political veto power and had threaten to oust the democratically elected government of President Alfonsín.

Between 1989 and 1991, under the Presidency of Dr. Carlos Saúl Menem of the PJ (Peronist Party), 10 (ten) decrees were issued to grant pardon to all participants involved in actions of state terror under the dictatorship. As a result, late in 1998 the *Punto Final* and the *Obediencia Debida* laws were finally repealed.⁵

By the turn of the century, however, official policy on this matter shifted once again. On August 21, 2003, under the Presidency of Dr. Néstor Kirchner of the PJ (Peronist Party) a new law (25.779) superseded the *Punto Final* and *Obediencia Debida* laws as well as the pardons previously issued by President Menem.⁶

Starting in 2005, by a Supreme Court decision, any action framed under the figure of “state terror” became a crime against humanity and imprescriptible.

One of the most interesting examples paralleling this shifting political environment with regard to memory policies is the changing criteria for the commemoration of March 24, a key date for building collective memory against state terrorism. In effect, March 24 is a landmark in Argentina history; it is the day of the military coup of 1976 that inaugurated the most brutal dictatorship the country had ever experienced. After the return to democracy in 1983, the first mobilization to remember the military coup was on March 24 of 1986, three years after the transition. This mobilization was organized by the Mothers of Plaza de Mayo (Madres de Plaza de Mayo), the group of mothers of the disappeared by the dictatorship, which eventually turned into the most salient human rights social movement of the country. There were no official commemorations of March 24 in 1984 or 1985, even though citizens did mobilize to support the Mothers.

In place of an official commemoration, on March 24, 1984, the Mothers of Plaza de Mayo published in the *Clarín* newspaper their position regarding President Alfonsín's policies on state terror. The Mothers demanded: 1) forced disappearances be considered a crime against humanity; 2) the establishment of a bicameral Congressional commission to investigate state terror; and 3) trials through civil courts and not through especial military courts.

A year later, in 1985 a commemoration of March 24 was convoked in the City of Cordoba, organized by the Movimiento de

1 Comisión Nacional sobre la Desaparición de Personas, Decree 187/83, 15. 12. 1983, <http://www.derechos.org/ddhh/arg/ley/conadep.txt>

2 Code of Military Justice, Law 23.049, 9. 2. 1984, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/25000-29999/28157/norma.htm>

3 Punto Final Law, 23.492, 23. 12. 1986, <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=21864>

4 Obediencia Debida Law 23.521, 9. 6. 1987, <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=21746>

5 Law 24.952, 17. 4. 1998, <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=50364>

6 Law 25.779, 21. 8. 2003, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/85000-89999/88140/norma.htm>

Juventudes Políticas, and several human rights organizations; about one thousand participants attended the event.

In short, since the beginning of the transition, the way of remembering, keeping memory, and making memory, not only constantly changed, but was also disorganized, and sometimes even violent. These mobilizations were not organized by the state, but instead by various human rights organizations.

The crucial year for institutional inertia to change was 2001. For the first time in history direct action was organized by the State: March 24 became “Día Nacional de la Memoria por la Verdad y la Justicia” (National Day of Memory, Truth, and Justice). A year later, on August 1 of 2002, Congress sanctioned Law 25.633,⁷ which declared March 24 a non-working day; a year later in 2005 it was also declared a non-working day, a national holiday and non-changeable in the calendar.⁸ This decision was first resisted by human rights organizations, which wanted to avoid the day becoming a national holiday, but to no avail. In 2017, the government of President Mauricio Macri tried by decree to change March 24 to a movable commemoration date, but civil society organizations mobilized and aborted the initiative, so March 24 continues to be celebrated as established in 2005.

ORAL HISTORY AND MEMORY

As the previous section shows, building collective memory is not an easy task, and the instruments available for doing so are of various kinds. The process is anything but linear. In addition to attempts by human rights organizations, and the state, to preserve memory, several historians tried to contribute to the process through their academic work. Among academic contributions, it is worth mentioning the field of “Oral History”, through the work of the Institute of Oral History, housed in the Department of Philosophy at the University of Buenos Aires since 1995 (Instituto de Historia Oral, Facultad de Filosofía y Letras, Universidad de Buenos Aires).

Several historians of the Institute worked to transform oral history into a vehicle to give voice to the voiceless victims of state terror, and to change the official story of how the events unfolded under the dictatorship.

Within the framework of oral history, the testimonies of the victims of state terror are considered crucial to understand the truth of what really happened under the dictatorship. Some of the testimonies were collected during the dictatorship, but the bulk after the return of democracy. Memory acts in the present to represent the past. That representation of the past is complex, and not just a simple reproduction of events; it entails an interpretation. Memory as a historical document has a peculiar character since it is retrospective and highly fluid. It does not exist as “pure memory,” but as reminiscence because memory always starts in the present toward the past.⁹

BUILDING MEMORY OF STATE TERRORISM IN 21ST CENTURY ARGENTINA THROUGH SITES AND MONUMENTS

Argentina had to wait until the beginning of the 21st Century for the state to design and implement a public policy systematically aimed at building memory of the experience of authoritarianism

and state terror. In this newly designed policy, “sites of memory” and “monuments of memory” have a very important role.

Following the criteria of the Institute of Public Policies for Human Rights of Mercosur (IPPDH – Instituto de Políticas Públicas en Derechos Humanos del Mercosur), sites of memory are considered places where serious violations of human rights were committed, or where those violations were resisted, or places that victims, their families and communities associate with those violations and are used anew to recover, rethink and transmit traumatic processes and/or commemorate or provide reparation to the victims.¹⁰

The year 2003 is a landmark for building memory with the creation of the Memory Archive (Archivo de la Memoria).¹¹ This Archive is complemented with the archives of several human rights organizations, of CONADEP, of University of Buenos Aires (UBA), and of other Universities throughout the country.

Later on, in 2011, under the administration of President Cristina Fernández de Kirchner, the passing of Law 26.691¹² was a turning point in the history of the preservation of memory and of the events that occurred under state terrorism between 1976 and 1983. The National State in agreement with Provincial governments, municipalities and human rights organizations decided that the motto “Memory, Truth and Justice” would become national public policy to precisely preserve the memory of that time.

This new “Memory, Truth and Justice” national public policy was to be carried out through the preservation of the sites used by the dictatorship as clandestine centers of detention and torture, or where emblematic events of illegal repression developed until the return of democracy in 1983. With the passing of Law 26.691, the state together with human rights and social organizations surveyed the sites mentioned in the CONADEP report by human rights organizations and by the organization *Family Members of Detained and Disappeared Person for Political Reasons* (Familiares de Detenidos y Desaparecidos por Razones Políticas) as places of detention, torture, disappearance and murder of persons in the entire country. In this way, a national network of “spaces of memory” became established. This network includes military sites, health centers and even private housing. The map of sites or “spaces of memory” at the national level can be consulted through the official web site of the government, which includes a catalog of all sites of memory and related themes.¹³

The City of Buenos Aires, the capital of Argentina, is where the most important space of memory is located: *Space for Memory and Promotion and Defense of Human Rights-ex-ESMA* (Espacio para la Memoria y para la Promoción y Defensa de los Derechos

7 Law 25.633, 1. 8. 2002, <http://servicios.abc.gov.ar/docentes/efemerides/24marzo/htmls/presentacion.pdf>

8 Non-changeable date means it cannot be celebrated on a Friday or Monday to extend the weekend.

9 Dora Schwarzstein, “Historia Oral: memoria e historias traumáticas”, in *HISTORIA ORAL*, 4, 2001, 73–83, <http://arpa.ucv.cl/articulos/memoriaehistoriastraumaticas.pdf>

10 IPPDH-Mercosur: *Principios fundamentales para las Políticas Públicas sobre Sitios de Memoria*, 2012.

11 Decree 1259/2003, 16. 12. 2003, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/90000-94999/91115/norma.htm>

12 Law 26.691, 29. 06. 2011, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/180000-184999/184962/norma.htm>

13 Map of sites of memory, <https://www.argentina.gob.ar/sitiosdememoria/mapacentrosclandestinos>

Humanos – Ex ESMA). This location is considered the most important space of memory due to the number of testimonies of detained persons that point to this site.

The space is located in the ESMA, Naval School of Mechanical Engineering (Escuela de Mecánica de la Armada), on Libertador Ave. 8100, in the upper class north side of Buenos Aires. In 1924, the Buenos Aires City Council gave the land to the Ministry of Navy to be used as a training camp for its forces. With the military coup of 24 March 1976, ESMA became a center of operations to implement a systematic plan by the dictatorship to repress, torture, disappear and murder people. A clandestine maternity ward also operated at ESMA where babies of detainees were born, and later appropriated by families of the perpetrators of state terror.

Today, the National Archive of Memory is located within ESMA, in the building where the School of Navy War used to function. As already mentioned, it was created by Law in 2003 to “preserve and classify the documents related to violations of human rights in Argentina, the testimonies recorded by CONADEP, and all testimonies that the Secretary of Human Rights of the country still receives.”¹⁴

The Museum of Malvinas e Islas del Atlántico Sur (Malvinas and Islands of the South Atlantic) has also been located at ESMA since June 2014. This site is not related to state terrorism directly, but aims to recognize the value and history of the Malvinas war in 1982, which was initiated by the military dictatorship against Great Britain to maintain legitimacy. The defeat in the war precipitated the transition to democracy. Many abuses by the military were committed during the war against regular soldiers, showing the various ramifications of state terror. This Museum has no heritage but it has the important goal of promoting thinking and reflection of the recent past. The fact that this museum, created by a Presidential decree, has no heritage is a favorable point: it allows the museum to be “a live museum” that grows up with donations, and calls upon citizens to think about its true meaning.¹⁵

The City of Buenos Aires has other important sites of memory; the “Space for Memory and Promotion of Human Rights: Automotores Orletti” (Espacio para la Memoria y la Promoción de los Derechos Humanos: Automotores Orletti) is located in the Floresta neighborhood on the west side of the City at Venancio Flores Street 3519/21. This site, located inside an old car-repair garage, was a clandestine center for detention, torture, disappearance, and murder of persons. The site was rented and refurbished by the Secretary of Intelligence SIDE (Secretaría de Inteligencia del Estado), and became the headquarters of Argentina “Operation Condor” (Operativo Condor), an Operation run in agreement with various intelligence and security forces of the Southern Cone countries of Latin America. Since 2006, by Law 2112 of the City of Buenos Aires Legislature, subject to expropriation and recovery, the site was declared a public use site. In 2009, it was transformed into a site of memory, and starting from 2014 is under the administration of the National Secretary of Human Rights. By Presidential decree 1762/2014 it has also been established as a “National Historical Site.”¹⁶

Another site of memory worth mentioning in Buenos Aires is “Athletic Club” (Club Atlético), which was under the command of the Air Force during the dictatorship. This site of memory shows how the three military branches, the Army, Navy and Air force, colluded between them the actions of state terrorism. Athletic Club is located in the south of the city, in the historic San Telmo

neighborhood at Ave. Paseo Colón, between Cochabamba and San Juan Streets, under the Highway Autopista 25 de Mayo. This location under the Highway was a late attempt at deleting its very existence. Law 1794 of the City Legislature declared it a “Historical Site”; and decree 1762/2014, a “National Historical Site.”¹⁷ Passing by, underneath the Highway, one can see that the memory is very much alive, viewing the decorations and signs placed on the site.

Yet another site of detention, this one under the control of the Federal Police was “Virrey Cevallos” (Virrey Ceballos Street 628/30). This site is emblematic, because it was recovered by the collective action of neighbors of San Cristobal where it is located. Organized under the “Association of Neighbors of San Cristobal against Impunity” (Asociación de Vecinos de San Cristóbal contra la Impunidad), neighbors, families, human rights and civil society organizations denounced the site, and in 2004, achieved City Legislature sanctioned Laws 1.454 and 1.505, which declare the site a “public use, subject to expropriation and historical site”. Since 2014, it became a “National Historical Site” by Presidential decree 1.762.¹⁸

Another site of memory, difficult to imagine, is the Church of Saint Cross (Iglesia de la Santa Cruz, Estados Unidos Street 3150), it unfortunately became so because it was where several of the founding members of Mothers of May Square were kidnapped, together with two French nuns that were helping them, between December 8 and 10 of 1977. The forced disappearances occurred during a, now well-known, military operation commanded by the Navy.

Finally, in the City of Buenos Aires memory has become embodied in the natural environment: the Río de la Plata coastal line is a symbolic space, in whose waters many Argentines were drugged after being tortured and dropped still alive from planes into the river. The *Park of Memory and Monument for the Victims of State Terror* (Parque de la Memoria-Monumento a las Víctimas del Terrorismo de Estado), is located at Costanera Norte, Rafael Obligado St. 6745. This site of memory was designed in 1997 from a proposal of several human rights organizations. In 1998, Law 46 of the City of Buenos Aires ordered its construction, and an international bid was put forth for the several sculptures that are central to the landscape of the Park. In 2001, on August 30, during the International Day of the Detainees and Disappeared persons, the square that serves as main access to the Park was inaugurated. The Park was finally inaugurated in 2007 and since 2014 has become a “National Historical Monument,” and its sculptures “a public good of historical interest.”¹⁹

OTHER SITES OF MEMORY

Laws and Decrees issued by initiative of the state, cities, social organizations, families of the victims, or the victims themselves, are not the only representations of the memory of state terror

14 *Espacios de Memoria en la Argentina*, Ministerio de Justicia y Derechos Humanos de la Nación, Secretaría de Derechos Humanos, Buenos Aires, 2015.

15 Ibid.

16 Ibid.

17 Ibid.

18 Ibid.

19 Ibid.

being constructed in Argentina. Other actions forming the building blocks of a collective memory are leaving an imprint on the urban landscape, without being a site of memory, a museum, or a monument. An example of this is the work organized by the association “Coordination of Neighborhoods x Memory and Justice” (Coordinadora Barrios x Memoria y Justicia) in the City of Buenos Aires, and in others cities throughout the country. This association was created at the end of 2005 to make visible popular activists detained, disappeared, and murdered by state terror, right before and during the last dictatorship in neighborhoods all over Argentina. The organization’s aim is to reconstruct the life history of those grassroots activists in their neighborhoods and, in this way, give proof of their existence in the streets they used to walk around. This is being done by the installation of tiles with their names and dates of disappearance on the sidewalks. These cement tiles transform the materials in live history and memory, and allows the socialization and communication of personal sentiments as public and collective signifiers. In doing so, they make visible, the invisible, for those who were unaware of what was happening during those years in their own neighborhoods. The first activity of “Coordinadora Barrios x Memoria y Justicia” was held on December 2 of 2005 at Saint Cross Church, where the first cement tiles were installed on the sidewalks in memory of the twelve persons kidnapped and disappeared in 1977.²⁰

NETWORKS OF SITES OF MEMORY

Up to now, we have made reference to “sites of memory,” “monuments of memory,” and “Memory Tiles” located in the City of Buenos Aires. But it is important to remember at this point that the jigsaw puzzle of building collective memory began to take form very slowly with the first testimonies collected by human rights organizations, mainly by the “Permanent Assembly for Human Rights” (APDH – Asamblea Permanente por los Derechos Humanos). During the dictatorship this organization formed by a broad multi-party constituency had the capacity to record testimonies and take action against state terror through requesting the legal figure of *habeas corpus*. As we have also shown, since 2014 with a series of new laws, a survey of “sites of memory,” allowed drawing a national map to locate most of them.²¹ This process of building memory has developed slowly through the years and is still in the making.²²

It is important to stress that until 2015, the sites of memory were referred as to “spaces of memory,” but since then it is preferred to use the term “sites of memory” following international classifications, including the one proposed by Mercosur (Common Market of the South) we have already mentioned above.²³

SITES OF MEMORY AND EDUCATION

All sites of memory, including the monuments and memory tiles, have an intrinsic pedagogic goal. The sites of memory, since their original denomination by the Decree 1762 of 2014, which instituted them as “official” sites of memory at the national level, are “spaces of memory and promotion of human rights”. This promotion of human rights entails the idea of education on human rights, for children and adults likewise. By reading the documents of Mercosur’s Institute of Public Policy

and Human Rights (Instituto de Políticas Públicas de Derechos Humanos), we observe the deep pedagogic character of sites of memory, besides their primary goal of keeping memory of past atrocities. This pedagogic or educational character has a formal side based on the Ministry of Education of Argentina and an informal side based on the multiple actions undertaken by the sites of memory themselves.

In the case of the formal institutional environment, starting in 2014 the sites of memory gained political leverage since the government decided to give them status of state policy. The sites of memory became an integral part of the “Education and Memory Program” (Programa Educación y Memoria) of the National Ministry of Education for secondary schools.

By the National Education Law, secondary education is mandatory in Argentina and one of the main axes of action of the Ministry of Education.²⁴ The relevance of secondary education made it a crucial environment to further develop a comprehensive program to link education and memory. Since 2003, the National Ministry of Education began to develop an education policy of memory whose goal would be to facilitate the difficult task of teaching in schools the recent past. This policy is based on the National Education Law 26.206 and as it says in article number 3: “Education is a national priority and a state policy to build a more just society, consolidate national identity and deepening the exercise of democratic citizenship, the respect of human rights and basic freedoms and strengthen the economic and social development of the nation.”²⁵

Within this framework, the Program of Education and Memory (Programa Educación y Memoria) targets three fundamental themes: 1) State Terror: memories of the dictatorship; 2) Malvinas: memory, sovereignty and democracy; and 3) Teaching of the Holocaust and other genocides.

LESSONS LEARNT AND RECOMMENDATIONS

Without a doubt, since the transition to democracy in 1983, the road to building memory has been a long and winding one. The process has not been linear; there have been many advances and a few setbacks. The past 35 years have been years of learning. The experiences of state terror recovered by the creation of various sites of memory have had the pedagogical value of showing that democracy, even with its flaws, is the most preferable political regime. As a result, democracy has endured in spite of military coup attempts, economic crises and low quality governments. Democratic institutions are stronger, and the construction of a collective memory a continuous process. In many ways, the sites of memory are an achievement of democracy and, at

20 Nahuel Gallotta, “Día de la Memoria: Homenaje a los desaparecidos: ya hay más de 1.200 baldosas que los recuerdan en Capital”, in *Clarín*, 23. 3. 2018, https://www.clarin.com/ciudades/homenaje-desaparecidos-200-baldosas-recuerdan-capital_0_HkjEzem9G.html

21 Map of sites of memory, <https://www.argentina.gob.ar/sitiosdememoria/mapacentrosclandestinos>

22 Sites of Memory, <https://www.argentina.gob.ar/derechoshumanos/sitiosdememoria>

23 IPPDH-Mercosur: *Principios fundamentales para las Políticas Públicas sobre Sitios de Memoria*, 2012.

24 “Lugares de Memoria”, Equipo Programa de Educación y Memoria, Ministerio de Educación de la Nación, Ciudad Autónoma de Buenos Aires, 2015.

25 Ibid.

the same time, one of its main sources of legitimacy. In these sites, memory and education are intertwined and complement each other. The sites of memory linked to education programs, formally and informally, are a pedagogic creative practice to re-think new forms of learning at school and in everyday life. In a nutshell, they contribute to understand the past to improve our lives in the present and avoid the same mistakes. As the experience of Argentina shows:

1/ It is crucial to secure the sites of memory and the concomitant educational programs through national legislation to avoid any regressions or nostalgia of the authoritarian past.

2/ It is also crucial that civil society groups work closely with government officials to demand accountability of all actors involved in the creation and administration of the sites.

3/ The previous recommendations are a way to shield the construction of collective memory from short-term changes in governments' ideological preferences.

It is a moral imperative to remember those who suffered the atrocities of state terror and transmit this memory to the new generations by way of education, so as the Prosecutor of the Military Juntas Dr. Julio César Strassera expressed at the end of the trials, this NEVER AGAIN! (NUNCA MAS!) happens in Argentina.

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TIMELINE OF THE MAJOR EVENTS

SOFÍA DEL CARRIL

March 1973	General elections held. Hector J. Cámpora of the Partido Justicialista wins with over 49 % of the vote
July 1973	President Cámpora and Vice President Solano Lima resign. General elections called
September 1973	General elections held. Juan Domingo Perón wins with over 61 % of the vote; María Estela Martínez, his wife, runs as his Vice President. Shortly after, Jose Rucci, a main ally of Perón, is assassinated by Montoneros, although the group does not acknowledge responsibility
November 1973	The <i>Alianza Anticomunista Argentina</i> (known as <i>Triple A</i>), a state-sponsored parapolice group surfaces with a high-profile assassination attempt
July 1974	Juan D. Perón dies. Vice President María Estela Martínez becomes the new head of state
November 6, 1974	President Martínez de Perón establishes the <i>state of siege</i> in the Argentine territory
February 1975	President Martínez de Perón sanctions Decree 265, mandating the armed forces to neutralize or annihilate subversive forces in the northern province of Tucumán. <i>Operativo Independencia</i> is launched, involving national and subnational security forces and targeting PRT-ERP and Montoneros guerrilla groups
October 1975	On October 5, Montoneros attacks a military garrison in Formosa. The next day, decree 2772 extends the mandate of Decree 265 to the entire Argentine territory
December 1975	ERP attacks a military base in Provincia de Buenos Aires
March 24, 1976	Coup d'état. President Martínez de Perón is forced out of government and detained. The Military Junta rises to power, under the command of members of the army, air force and navy
1976–1978	Peak years of the repression with numerous CCD (clandestine centers of detention) active all over the country
September 1979	The Inter American Commission for Human Rights visits Argentina. The Commission receives 5580 complaints. In 1980, the Argentina Report is published
December 1980	Human rights activist Adolfo Perez Esquivel of SERPAJ wins the Nobel Prize
April 2, 1982	Argentina launches a military operation to recover the Falkland Islands
June 14, 1982	Argentine forces surrender the island to UK forces. The Falklands War ends, leaving 649 Argentine soldiers, 255 British soldiers and 3 civilians dead
September 1983	Auto-amnesty law enacted by the Military Junta
October 1983	Democratic elections held in Argentina. Raul Alfonsín of the Union Cívica Radical-UCR wins with 52 % of the vote
December 10, 1983	Alfonsín is inaugurated as president
December 1983	Presidential decrees 157 and 158 order the prosecution of the ERP, Montoneros and the Military Junta's leaders. Subsequently, a new decree creates an extra-judicial entity, the CONADEP, whose mandate is to investigate enforced disappearances
April 1985	The Federal Appeals Court begins the <i>Junta Trials</i>
December 9, 1985	The Federal Appeals Court condemns the former commanders of the Military Junta
December 1986	Congress passes the <i>Ley de Punto Final</i> , which limited the possibility to further investigate crimes
April 1987	Military rebellion to protest and stop prosecutions against military officers
May 1987	Congress enacts the <i>Ley de Obediencia Debida</i> , which protected low-ranking military officers from prosecutions, based on the fact they “received orders” under a military hierarchy
January 1989	Attack by the Movimiento todos por la Patria-MTP to a military garrison in La Tablada
1989	Within a context of acute economic crisis, including hyperinflation, President Alfonsín calls for early general elections

May 1989	Carlos Menem of the Partido Justicialista wins and in July is inaugurated as President
October 1989	President Menem pardons military officers and guerrilla members
1990	Last military uprising. President Menem dictates new decrees pardoning Junta leaders, among others
1991	Congress passes Law 24.034 on reparations for political detainees
1994	Inter American Convention on the Forced Disappearance of Persons approved by the OAS General Assembly. Argentina's constitution is reformed. Congress passes Law 24.411 on reparations for enforced disappearances and assassinations prior to December 10, 1983
1998	The newly autonomous City of Buenos Aires creates the Parque de la Memoria, a memorial of the victims of State terrorism located along the shore of the river
2001	Federal judge declares amnesty laws (<i>Ley de Punto Final</i> and <i>Ley de Obediencia Debida</i>) invalid and unconstitutional
2003	Congress annuls amnesty laws
2004	Congress passes law on reparations to minors affected by the repression, known as <i>Ley de Hijos</i> . Former clandestine detention center ESMA is transformed into the <i>Espacio para la Memoria</i>

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MEMORY OF NATIONS

Democratic Transition Guide

[The Cambodian Experience]



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AUTHORS

PECHET MEN

Pechet Men has worked with the Documentation Center of Cambodia (DC-Cam), Phnom Penh, for almost a decade from a Volunteer to Field Investigator and has published extensively on Khmer Rouge survivors' accounts and articles, locally and internationally.

KOSAL PATH

Assistant Professor of Political Science at the Brooklyn College of The City University of New York, USA. Researcher for the Cambodian Genocide Program at Yale University and the Documentation Center of Cambodia (1995–2000). His main teaching and research interests are international relations, genocide, human rights and transitional justice.

BERND SCHAEFER

Senior Scholar with the Woodrow Wilson International Center's Cold War International History Project (CWIHP), Professorial Lecturer at George Washington University; both in Washington D.C. Visiting Professor at the Pannasastra University in Phnom Penh, Cambodia.

SAVINA SIRIK

PhD candidate in Peace and Development Research at the School of Global Studies, University of Gothenburg, Sweden. She joined the Documentation Center of Cambodia (DC-Cam) in 2004 and since then she progressed from working as a Field Investigator to a Director of Museum of Memory (2013) and a Team Leader of the Transitional Justice Program (2016–2017). She is the author of the monograph *Everyday Experience of Genocide Survivors in Landscapes of Violence in Cambodia* (DC-Cam, 2016).

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TRANSFORMATIONS OF POLITICAL SYSTEMS

BERND SCHAEFER

INTRODUCTION

With the exception of Thailand, after 1945 all gradually emerging new states in Southeast Asia were post-colonial countries (Brunei, Burma/Myanmar, Cambodia, Indonesia, Laos, Malaya splitting into Malaysia and Singapore, the Philippines, Vietnam). They had all shed their imperialist rulers and patrons (France, Great Britain, Netherlands, United States) in more or less bloody, or more or less protracted, struggles for independence. In 1949, the largest and most populous country in Asia had turned into a socialist one-party state following the Soviet model and calling itself the People's Republic of China (PRC). This new China was supposed to wield ever growing influence on local Southeast Asian communists, and thus most Southeast Asian countries, before it became a financial and economic giant in Asia, with an exponentially oversized impact on everyone's investment and trade relations.

Cambodia obtained its independence from France in 1953 under Norodom Sihanouk (1922–2012) as the country's King (over the course of later history he also figured as Head of State, Prime Minister, ruler in exile, and again King). Norodom Sihanouk, like all Cambodian rulers after him, be it as President (Lon Nol, 1913–1985), “Brother Number One” (Pol Pot, 1925–1998), or Prime Minister (Hun Sen, born 1952), wanted to stay in power indefinitely, once they had attained it, temporary tactical power-sharing arrangements notwithstanding. All of them were, respectively are, disinclined to lose power through coup d'états, uprisings, wars, or as a result of elections. While only Hun Sen succeeded in this regard, all the rulers of Cambodia were always fully aware that survival in power required control over a regime's armed units, this is the military, special forces and guards, the police, and the intelligence apparatus.

With the exception of the period of internationalization of Cambodian politics following the 1991 Paris Agreement, and the aftermath of the United Nations (UN) intervention of 1992/1993, the country did not transition from a one-party to a multi-party democratic system based on shared acceptance of potential regime change as a result of elections. However, despite the absence of regime change, after 1993 the country went through partial democratization and developed features that differentiated it from patterns of authoritarianism in other Southeast Asian states.

The dynamics culminating in the 1992/1993 UN presence in Cambodia were a late result of the experience and aftermath of the utter devastation of the country with up to 1.7 million killed and dead Cambodians during the reign of the Communist Party of Kampuchea (CPK) under its leader Saloth Sar, who called himself Pol Pot, between April 1975 and January 1979.

DEMOCRATIC KAMPUCHEA [DK] (1975–1979)

Democratic Kampuchea (DK) replaced the Cambodian Republic under President Lon Nol after the complete military victory of its forces, with the occupation of Phnom Penh on 17 April 1975. Immediately afterwards, the CPK began with an evacuation of

Cambodian cities, which it viewed as brewing places of “bourgeois” habits and the most important obstacle to the implementation of true communism. Exiled leader Norodom Sihanouk was lured from Beijing into Phnom Penh later in 1975 as ‘Head of State’ and used for one speech and a visit to the UN, before he disappeared into house arrest for the duration of DK.

In 1976 a Four-Year-Plan was promulgated that enforced collectivization and organized the entire population into CPK-run “Work Groups” to toil in hard manual labor for the production of rice and other crops. Ever afraid of infiltrations of “spies” and “enemies”, in December 1976 Pol Pot decried a “sickness in the party” that led to never-ending, cascading chain effects of denunciations, arrests, torture, and executions. During the entire DK period, as results of malnutrition, exhaustion, and politically motivated killings, about 1.7 million Cambodians died or were executed.

The end of the DK came about as a result of external events and foreign military intervention. The PRC, the patron and partner of the DK in an anti-Vietnamese alliance, had hosted a DK delegation in October and a delegation of the Socialist Republic of Vietnam (SRV) in November 1977. As a result of these visits, PRC–SRV relations broke down into open hostility and the DK felt emboldened in late 1977 to go ahead with attacking the SRV to expand Kampuchea's borders. The DK and the SRV terminated mutual diplomatic relations and were in a de facto state of war with each other.

The Kampuchean incursions and the Vietnamese counterattacks temporarily occupying DK territory fostered a Vietnamese national security doctrine regarding Cambodia: Never can any anti-Vietnamese government be allowed to rule in Phnom Penh. From early 1978, Vietnam pursued a course of regime change in the DK: Plan A, as the preferred solution wanted to manage the overthrow from within the country with Cambodian forces, Plan B was SRV military intervention from outside. While Plan A began to fizzle due to a lack of sufficient numbers of Cambodian cadres and forces to overthrow the DK regime militarily, the SRV was afraid of Chinese military intervention, both into the DK and simultaneously into Northern Vietnam in case of an implementation of Plan B. Ultimately seizing on Chinese domestic political distraction through the highly important December 1978 Third Plenum of the Chinese Communist Party in Beijing, the SRV invaded the DK during this month and captured most of the country until early January 1979. China did not intervene militarily on the side of the DK, as Pol Pot had hoped. Instead, the PRC engineered the flight of CPK leaders and fighters to the Cambodian/Thai border region and brought Norodom Sihanouk back to Beijing into exile.

PEOPLE'S REPUBLIC OF KAMPUCHEA [PRK] (1979–1989)

Former Cambodian CPK cadres, who had defected to the SRV since 1977, and anti-CPK Cambodian exiles from Vietnam, formed the nucleus of the new Cambodian government, installed in Phnom Penh under SRV guidance and supervision. Following the Vietnamese political model, a “People's Republic

of Kampuchea” (PRK) was supposed to emerge, and was tied to the SRV through an official Treaty of Friendship early in 1979.

It was a dilemma, however, from the perspectives of the Vietnamese advisers and their Cambodian allies that building up socialism SRV-style required the creation of a new all-controlling Marxist-Leninist Cambodian party basically from scratch. With the CPK gone, few non-compromised former Pol Pot supporters were left, and overall weariness to join another communist party in a widely ruined country, the efforts of the new Kampuchean People’s Revolutionary Party (KPRP) fell mostly flat. It took two years until the first official Party Congress was held in 1981, followed by a 2nd, and what turned out to be the last Party Congress in 1985. Cadre recruitment and training was constantly deficient, membership numbers remained insufficiently low. It was not just that Kampuchea was infertile ground for another communist party after the DK experience. Party problems were also due to the fact that in the eyes of most Cambodians the KPRP was suffering from a “national deficit”: It was viewed as a SRV-managed political entity, and accordingly treated as a Vietnamese appendix by friends and foes alike.

Furthermore, from its onset the PRK suffered from an anti-Vietnamese and anti-KPRP insurgency. Remnants of Pol Pot forces, the former DK leadership, and Cambodian refugees from the Northwestern part of the country were equipped with arms and other means by Chinese, Thai, and American efforts. Together with forces loyal to exiled Norodom Sihanouk, in 1982 a Coalition Government of Democratic Kampuchea (CGDK) was formed that operated in parts of the country with bases near the Thai border. Its military wings created disarray and disruptions in the country through sabotage and tenacious guerrilla fighting. The new PRK Army and the Vietnamese started counter-offensives and mined the country. For most of the 1980s, Cambodia experienced protracted civil war within its borders. It took both sides painful experiences of exhaustion, before realizing that there would not be any decisive military solution in the cards for either side to end this Civil War.

The situation in Cambodia would not have changed without changes in the Soviet Union (“Perestrojka” or “Reform”) from 1986 and subsequent changes in the SRV beginning in the same year (“Doi Moi” or “Renovation”). In the shadow of Vietnamese domestic preoccupation and open debate within the Vietnamese Workers Party about the costs and worthiness of SRV engagement in Cambodia, the PRK leadership under Hun Sen began from 1987 to propagate national reconciliation with non-CPK forces of the Cambodian opposition with the intention of marginalizing and isolating Pol Pot and his supporters. In December of 1987 Hun Sen met Sihanouk for talks in Paris, followed by further two- and multi-party meetings during subsequent years including the DK. At the same time, the KPRP began to correct Marxist-Leninist “errors” from the doctrinal Party Congresses of 1981 and 1985. It allowed for limited pluralism and debate without touching One-Party-Rule for now, but the PRK began to change gradually and soon significantly from the model of the other four communist states in Asia (China, Vietnam, Laos, North Korea).

STATE OF CAMBODIA [SOC] (1989–1993)

Four-Party talks between Hun Sen, Sihanouk, Son Sann, and Pol Pot representatives to resolve the Cambodian civil war and allow for a Vietnamese military withdrawal continued in Jakarta

in July 1988 and February 1989, culminating in extended Four-Party talks in Paris throughout July and August 1989. However, it turned out there was no solution possible if brokered exclusively by Cambodian parties. Foreign disengagement (Vietnam, China, USA) from the Cambodian conflict was needed first, and a final breakthrough was to be realized only through an internationalization of Cambodia peace talks mediated by the United Nations.

In the meantime, Hun Sen had undertaken measures at the home front that made a Cambodian solution more conducive. On 1 May 1989 the PRK was officially replaced by a new “State of Cambodia” (SOC) with a new flag and anthem. The Hun Sen government invited exiles from previous Cambodian regimes to return to the country, capitalist investment was encouraged, Buddhism officially recognized, minority rights were acknowledged. The complete withdrawal of the large Vietnamese military forces from Cambodia was arranged for December 1989 (though some undercover residual forces stayed behind).

After the fall of communism in Eastern Europe and the transformation of the Soviet Union, the years of 1990/1991 witnessed an international euphoria to solve all remaining global conflict spots through multilateralism. Cambodia became an early and prominent showcase in this regard. It was Australia that official proposed an UN role on site in Cambodia during a period of transition. The United States and China withdrew their support for the former Pol Pot government as the official Cambodian UN representation. After many rounds of negotiations, on 23 October 1991 the Paris Peace Agreement (Framework for a Comprehensive Political Settlement of the Cambodia Conflict) was signed by the four domestic factions (Hun Sen, Sihanouk, Son Sann, Pol Pot), the members of the UN Security Council, and the members of the Association of Southeast Asian Nations. A Supreme National Council (SNC) was to be formed in Cambodia during a transition period leading to free elections.

As a direct consequence of the agreement, in 1992/1993, an international peacekeeping United Nations Transitional Authority in Cambodia (UNTAC) was established to pacify the country and to prepare for elections in May 1993. UNTAC was the biggest and most ambitious UN mission ever: It was tasked with establishing a ceasefire, disarmament, repatriating refugees, supervision of a democratic political process and the drafting of a new Cambodian constitution and the preservation of human rights. This agenda was too ambitious to meet all expectations, but it achieved most of its objectives. Hun Sen and his Cambodian People’s Party (CPP), renamed in 1991 after the end of the KPRP, displayed only limited cooperation with UNTAC, and the remaining Pol Pot forces were non-cooperative to openly hostile, boycotted the parliamentary elections, and turned out to become the future losers. What the massive international effort by UNTAC had paradoxically achieved, however, was the final “de-internationalization” of Cambodian domestic politics. For the first time in its history, Cambodian political factions were no longer an instrument of outside players (Vietnam, China, United States), but from now on they had to solve, or fight out, their differences by and on their own.

KINGDOM OF CAMBODIA (SINCE 1993)

In UNTAC-supervised elections between 23 and 28 May 1993, almost 90 % of Cambodians turned out to vote. In the 120-member Cambodian National Assembly, the royalist party “United National Front for an Independent, Neutral, Peaceful, and

Cooperative Cambodia” (Funcinpec) under Prince Norodom Ranariddh, a son of Norodom Sihanouk, won 58 seats (45.5 %), Hun Sen’s CPP 51 (38.2 %) and 11 seats went to different parties. The CPP disputed the results and, after much haggling and threats of violence and secession, a compromise was brokered with Norodom Sihanouk featuring Sihanouk, first as Head of State and, from September 1993, again as King. Ministries were divided evenly between Funcinpec and CPP, with Ranariddh serving as First, and Hun Sen as Second Prime Minister. Relations between both sides were contentious from the beginning, and in July 1997 CPP armed groups, especially Hun Sen’s Bodyguard Unit, staged a conflict with Ranariddh’s networks. In a violent coup they arrested opponents and ousted Funcinpec from the government. Ranariddh fled into exile and returned for the 1998 Cambodian elections, where the CPP won an absolute majority of 64 seats while gaining 41.7 % of the national vote.

In 1997 rivalries broke out among the remaining former DK leaders in their remote holdout. After Son Sen and his family were murdered, Pol Pot was arrested and tried by his former comrades. He died in house arrest in 1998 facing deportation, while his decimated former fighters ultimately surrendered after several military defeats and defections. For the first time since the 1960s, Cambodia was free of violent conflict and the government in full control of Cambodian territory within its internationally recognized borders.

In subsequent elections, the CCP gained absolute majorities in 2003 (73 seats / 47.4 %), 2008 (90 / 58.1 %), and 2013 (68/48.8). In that last election, the opposition Cambodian National Rescue Party (CNRP) led by Sam Rainsy and Kem Sokha came close and won 55 seats. The latter protested the vote count and weren’t seated in parliament until a compromise was signed with Hun Sen in July 2014. In 2016 Sam Rainsy was forced into exile again, a year later Kem Sokha was arrested and the CNRP stripped of its assembly seats and dissolved by Cambodia’s Supreme Court in November 2017. The next national assembly elections were scheduled for July 29, 2018. They featured Hun Sen’s CPP and a large number of smaller, if not dubious parties. With just token opposition, the CPP won with 78 % of the vote claiming all 125 seats in the National Assembly. The ruling party’s nervousness over low turnout and significant numbers of invalid ballots before the election gave way to the CPP’s elation afterwards of having the country turned into a de facto one-party-state. With Prime Minister Hun Sen in power for a time of his choosing, future trends to observe include the role of the military and dynastic politics in terms of the roles for Hun Sen’s sons Hun Manet and Hun Many.

LESSONS LEARNT

The geographical location of Cambodia with its neighbor, the one-party, nominally communist Socialist Republic of Vietnam (SRV), plus its proximity to the one-party, nominally communist People’s Republic of China (PRC), has determined, to very high degree, Cambodia’s foreign relations and political systems since the 1950s. Relations between Cambodia and Vietnam on the one hand, and with China on the other hand, were always asymmetric in military and political terms. After 1993, and especially so during the recent decade, the economic disparity between Cambodia and China, as well as with Vietnam, has grown enormously and is ever widening. According to 2015 numbers, China’s ‘poorest’ province alone (Yunnan in the Southwest north of Laos) has a higher GDP per capita than the three poorest members of ASEAN combined (Cambodia, Laos, and Myanmar). Vietnam’s GDP per capita, with a much larger population, is now double the GDP of Cambodia, after both countries were on comparably low levels about 25 years ago. This economic gap and corresponding dependencies are providing both China and Vietnam with leverage over Cambodia, with Chinese influence growing, and now dominating at the expense of previous Vietnamese influence.

All Southeast Asian countries organized in ASEAN have a solid history of authoritarian one-party systems with a high aversion to, and skillful avoidance of, peaceful regime change through elections. Only the Philippines, Thailand once in a while, Indonesia after 1998, and Malaysia in May 2018, have gone through such an experience. After 1993, Cambodia had for the first time a two-party-system with relative freedom of expression. However, this turned out as unsustainable by as early as 1997. With China and Vietnam encouraging, the United States disengaging after 2016, and members of ASEAN non-interfering, if not understanding, the CCP was able to cement Cambodia de facto as a one-party state with a lifelong ruler.

Cambodia’s weak economic and political foundations, in combination with a widespread system of patronage, corruption, and coopted elites, did not prove solid enough to establish a multi-party democracy with regime change options through elections. Throughout the entire history of Cambodia after 1953 the respective government in power wanted to stay so permanently. The current CCP government under Prime Minister Hun Sen, the longest serving ruler in Asia, and for now basically 37 years the leading figure in Cambodian politics, is so far the only government in Cambodian history that has succeeded in this quest.

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CONSOLIDATING THE STATE SECURITY APPARATUS

KOSAL PATH

POSITION AND STRUCTURE OF THE STATE SECURITY APPARATUS PRIOR TO THE TRANSFORMATION

When the Vietnamese invaded Cambodia in December 1978, 180,000 Khmer Rouge forces fled to seek refuge in camps in Thailand, and remobilized to wage war against the Vietnamese occupying forces and the pro-Vietnam People's Republic of Kampuchea (PRK). In post-genocide nation building in Cambodia, the Vietnamese Communist Party (VCP) and Government immensely assisted the PRK in building the structure and foundation of its security forces and training PRK officers. The Vietnamese government established four special committees to oversee the building of the PRK government, namely B68 (in charge of building political bodies of the party and machinery of the government), A40 (economic advisers), Unit 478 (military experts), and K79 (public security experts). The PRK security apparatus was controlled by military officers, some of whom were former Khmer Rouge cadres. The current state security apparatus of the Royal Government of Cambodia mainly consists of the national gendarmerie, the national police, the prime minister body-guard unit, and the intelligence and counter-terrorism units of the Ministry of Defense.

THE ROYAL KHMER GENDARMERIE

The establishment of the gendarmerie as a militarized policing force with jurisdiction over both civilians and military personnel was envisaged in the July 1993 government decree, encouraged by the United Nations Transitional Authority in Cambodia (UNTAC), supported by King Norodom Sihanouk, and largely financed by France. However, Prime Minister Hun Sen managed to transform the supposedly politically neutral gendarmerie into the CPP-controlled armed forces. As a unit of the PRK security forces, Regiment 70 was military police and had jurisdiction only over military personnel, while civilian policing was under the jurisdiction of the Ministry of Interior. The Royal Khmer Gendarmerie (GRK) has institutional origins in Regiment 70, which was dissolved in October 1991 at the time of the Paris Peace Accords (PPA). The GRK was formally inaugurated in November 1993, under the command of General Keo Samuon, with General Sao Sokha as his sole deputy. In May 1994, former Regiment 70 commander Kieng Savut, who also served as Deputy Chief of Military Council's Political Department and Head of the Phnom Penh Military Command during the PRK, replaced Keo Samuon as the head of the gendarmerie. A government sub-decree issued in December 1994 widened its jurisdiction to cover crimes committed by military personnel and civilians alike. The 2007 Criminal Procedure Code of the Royal Government of Cambodia reaffirmed the GRK's powerful authority over civilian and military matters nationwide. In May

1999, General Sao Sokha, a close ally of Prime Minister Hun Sen, was appointed head of the national GRK and has built the national gendarmerie into a powerful 10,000-member security force spreading across the country.

PRIME MINISTER BODY GUARD UNIT

In October 1994, a year after the first democratic general election sponsored by the United Nations, an elite body guard unit, also formerly known as Brigade 70, was set up to protect the country's political leadership in addition to national defense duties. In its early stage, Brigade 70 consisted of five units including a light-armored squadron, totaling 2,262 men under the command of Lieutenant General Mao Sophan.

POLICING FORCES

As Vietnam completed its withdrawal of Vietnamese troops from Cambodia in 1988, the police fell under the expanded jurisdiction of the Ministry of Interior under the control of Party secretary Chea Sim and his brother-in-law Sar Kheng. By the mid-1980s, there were more than 10,000 police officers, and increased to 36,038 officers in 1986. In 1991 when the Paris Peace Accords was signed, which paved the way for the first democratically elected government in 1993, the Ministry of Interior oversaw the "defense of political security" all over the country with a total force of 70,000 nationwide. The total police force was reduced to, according to Minister of Interior Sar Kheng, 54,700 members in 2001 and the government planned to cut a total of 24,000 [ghost] police posts. In 2005, the police force only slightly dropped to 44,000. In 2007, Cambodia's national police had a combined force of 52,000 officers. Ever since, the police's expansion of its force has been steady. Just before the July 29, 2018 elections, the Cambodian government claimed to deploy 80,000 security forces. This figure marked a notable rise from the 50,000 personnel deployed in the commune elections and 70,000 personnel deployed in the 2013 national assembly elections.

Of the 80,000 security personnel deployed to provide public security at the July 2018 polling stations across the country, 20,000 are citizen guards (*pro-chea ka-pea* in Khmer), a new addition to the state security forces. These citizen guards are actually village guards; they fall under the framework of the Ministry of the Interior, but officially they are not part of the state security forces and not in the government payroll. They are just citizen volunteers from their villages or communes who are chosen by the local council to help monitor security. In reality, these citizen guards receive selective gifts from the ruling Cambodian People's Party (CPP), and are used by the ruling party to address a twin problem of beefing up local security in the absence of active and competent local state police and monitoring political opposition's activities without

the appearance of intimidation. While providing village security against thefts more effectively than the state police, these citizen guards units can act as the eyes and ears of party leaders in charge of those districts.

REACTION TO THE POLITICAL CHANGES

In response to the growing threat his political rival Prince Norodom Ranariddh's security force buildup posed to his power, Hun Sen built up his own personal security forces under the command of his most reliable allies within the CPP-controlled security apparatus in the mid-1990s. In July 1997, Hun Sen's loyal generals mounted a successful coup against the royalist FUNCINPEC headed by Prince Norodom Ranariddh. The reluctant party president Chea Sim, who was Hun Sen's political rival within the CPP, was sidelined during the coup. Simultaneously, through his trusted generals, secret negotiations with the outlawed Khmer Rouge commanders under Hun Sen's "Win-Win Policy" – an amnesty-for-peace strategy – were also fruitful. Hun Sen's "the Win-Win Policy" guaranteed Khmer Rouge guerrilla personal security, employment, and ownership for their defection. As much as this policy ended the civil war between the government and the Khmer Rouge rebels, it also enabled Hun Sen to undercut Prince Ranariddh's plot to lure the 40,000–50,000-strong Khmer Rouge soldiers and integrate them under the command of FUNCINPEC military wing.

The rise of Hun Sen's generals to the top of the security force pyramid today can be traced back to Hun Sen's three-pronged victory in 1997–98, which paved the way for his consolidation of power – that is, defeated the Khmer Rouge outlaw, clipped the military wing of the FUNCINPEC political opponents, and neutralized his intimate political rival, the Chea Sim faction, within the ruling CPP. The coup in July 1997 marks a critical turning point in Cambodia's security apparatus – thanks to Hun Sen's decisive victory over the Royalist FUNCINPEC. Hun Sen then elevated his loyalists, who put their life on the line to help Hun Sen stage the coup against Prince Ranariddh's faction, to the upper echelon of the state security apparatus, while purging all security commanders loyal to the prince. In the military, in 1996–97, Co-Defense Minister Tea Banh, General Pol Saroeun, and General Sao Sokha outmaneuvered FUNCINPEC generals in striking a peace deal with the Khmer Rouge rebels; they played a key role in conducting negotiations with Khmer Rouge commanders and convincing them to integrate with the Royal Cambodian Armed Forces (RCAF) under Hun Sen's "Win-Win Policy." These generals significantly helped Hun Sen put an end to the Khmer Rouge political and military organization by 1998, while bringing the majority of Khmer Rouge armed forces under Hun Sen's control.

Since the July 1997 coup, the Ministry of Interior has been under the control of Sar Kheng as deputy prime minister and minister. However, the national police chiefs have always been under the command of Prime Minister Hun Sen's loyalists and family members, General Hok Lungdy, who was appointed National Police Supreme Director in August 1999, and General Neth Savoeun, who replaced Lundy after he died in a helicopter crash in November 2008. Neth Savoeun, who is Hun Sen's nephew-in-law and one of Hun Sen's ardent loyalists within the police force, is currently national police chief; his deputy is General Dy Vichea, who is Lundy's son and Hun Sen's son-in-law; Dy is married to Hun Sen's eldest daughter Hun Mana. In July 1994, Neth

Savoeun played a key role in foiling an attempted coup against Hun Sen by CPP elements dissatisfied with his domination of the party. According to Human Rights Watch, through Neth Savoeun and Hok Lundy, Hun Sen subverted the formal national police chain of command, almost totally bypassing FUNCINPEC police officers and also marginalizing CPP Minister of Interior Sar Kheng, his party rival who had been implicated in the failed coup in the mid-1990s.

Today the official police chain of operation command over municipal, provincial and other local police formations had been short-circuited to bypass Sar Kheng. Instead, the chain of command goes from Hun Sen as prime minister to these forces via a designated secretary of state at the ministry. Sar Keng's authority is largely reduced to oversight of government at the provincial level. This account is corroborated by Sar Kheng's own statement. In 2001, he told a *Phnom Penh Post* reporter in an interview: "My major responsibility is to control administration of authority at the provincial, district, and commune level in pursuit of the decentralization policy. I am also involved in drafting the law about the control of the provinces, the districts and the commune level decentralization." By his own statement, he did not fail to take direction from Hun Sen. When asked about his work consultation with the Prime Minister, Sar Kheng replied, "I share some of the Prime Minister's workload by handling certain documents, I cannot tell you how many times I call the Prime Minister – some days I call him 10 times. My relationship with the Prime Minister is conducted in three main ways: first by letter, second by telephone, and third by face-to-face discussion."

A December 1993 RGC sub-degree (an official order that has the force of law) restructured the security forces at the Ministry of Interior, creating a Supreme Directorate of National Police, which exercised considerable authority over a number of Central Directorates. One of these was the General Information Unit, placed under the Security Central Directorate. This unit name was then changed back to Intelligence Directorate under the command of General Sok Phal. According to HRW, Sok Phal's directorate was one of the most powerful center-level security force units in Cambodia. Hun Sen used it to assert his authority over not only FUNCINPEC, but also the CPP Minister of Interior Sar Kheng, whom Hun Sen did not trust. On July 11, 2003, Hun Sen promoted Sok Phal to be Chairman of the Security Central Directorate. In 2005, he was awarded another top police position as a Deputy Supreme Commissioner of National Police, and joined the CPP Central Committee at the same time as other Hun Sen's top security force commanders like Kun Kim and Neth Saveoun.

Thus far Prime Minister Hun Sen has successfully coopted Minister of Interior Sar Kheng. Speaking at a ceremony on May 16, 2016 to mark the 71st anniversary of the national police, Kheng toed Hun Sen's call on the leaders of state security forces to preempt the "color revolution", referring to massive popular uprising, staged by the opposition. In January 2018, Dy Vichea, Hun Sen's son-in-law, was promoted to deputy National Police chief after already replacing Sok Phal as Chairman of the Interior Ministry's powerful Central Security Directorate in August 2014. In a National Police document dated February 28, 2018, Dy Vichea's security portfolio was further expanded and now he is in charge of central security and combatting money laundering and terrorism financing. As part of an inter-clan arrangement, Sar Thet, Interior Minister Sar Kheng's nephew, was promoted to be in charge of the order police, a national-level unit that focuses on anti-demonstration activities.

FORMS OF TRANSFORMATION OF THE SECURITY APPARATUS

At present, the entire security apparatus is controlled by the ruling Cambodian People's Party (CPP), and in turn the CPP is dominated by Prime Minister Hun Sen's family. Notably heads of these security agencies are members of the CPP Central Committee and close allies of Prime Minister Hun Sen, who also serves as the head of the CPP. In February 2015, the ruling CPP added at least 80 commanders and senior officers from the country's security forces to its expanded Central Committee consisting of 545 members. At the January 2018 CPP Congress, 64 military officers were added into the Central Committee.

Within the security apparatus, the prime minister bodyguard unit, officially known as the Bodyguard Headquarters (BHQ), with a force of at least 3,000 soldiers and 100 tanks is Hun Sen's most trusted security force. Hun Sen's two sons and son-in-law sit atop of spy agencies, armed forces, and the national police. As of 2014, the total number of police in Cambodia was officially said to be 52,000. In February 2016, Hun Sen ordered the recruitment of 4,500 new police officers to replace those who left the police force in 2014, citing the need to "keep public order" and for "society's security." As of 2017, the official figure for police nation-wide was 58,198, of whom 17,897 were center-level.

In 2018, Cambodia's defense and internal security expense makes up approximately 16 percent of the national budget, at close to US\$ 973 million, and has risen with an annual 15 percent in the past three years, according to the Cambodian Finance Ministry figures. China now is the main source of military aid to Cambodia; one month before the controversial elections on July 29, 2018, China pledged US\$100 million during Chinese defense minister Wei Fenghe's visit to Cambodia in June. In May, just a month earlier, Chinese public security minister Zhao Kezi visited Cambodia, according to Prime Minister Hun Sen's personal secretary Eang Sophalleth, to "strengthen cooperation on law enforcement and security" between China and Cambodia. During Zhao's visit, China and Cambodia signed an MoU on fighting terrorism and cybercrimes within the broader goal of close cooperation in matter of law enforcement and internal security. Kezi also met with General Hing Bun Heang, the commander of the Prime Minister's Bodyguard Unit, but the content of that meeting is not revealed to the public. China has been more assertive in ensuring the survival of its ironclad ally, the CPP. Since the dissolution of the main opposition party in Cambodia, there has been closer cooperation between the CCP-controlled security apparatus and China's Ministry of Public Security.

LEGAL AND POLITICAL FRAMEWORK OF THE CHANGES OF THE SECURITY APPARATUS

Since his takeover as the sole prime minister of the Cambodian government in 1998, plots to assassinate Hun Sen and "color revolutions" – popular uprising – to overthrow the Hun Sen's regime has been the main driving force for the Prime Minister's decision to build up personal security forces under his direct control. On August 23, 1998, a crowd of 10,000 people from the capital and the countryside attended the opposition-organized protest against the results of the July 26 elections allegedly rigged in favor of the CPP. On September 7, 1998, three grenades were thrown at Hun Sen's unoccupied former residence in central Phnom Penh.

According to the UN's assessment, the attack was likely orchestrated by national police chief Hok Lundy, Hun Sen's reliable ally, in order to create a pretext for suppressing opposition protest and back up Hun Sen's narrative of the opposition attempting a "real revolution or coup." In a speech to security forces in February 2011, Hun Sen stressed: "Peace, security, social order and stability are fragile, and can become chaotic at any time without an advanced prediction." Hun Sen's paranoia and fear of losing power is central to his decision to continue to build up his personal security forces.

Prime Minister Bodyguard Unit (BHQ) has been under the Prime Minister Hun Sen's direct control since its creation in 1995. It was formed as a distinct force from Brigade 70, but a government directive in September 2009 moved it out of Brigade 70. This special force unit has the duty to protect the safety of the government's top leaders and institutions and follow the policies of the legal government that was created by the election. However, its commander General Hing Bun Heang, a senior CPP military official who earned Hun Sen's trust for his role in the July 1997 coup, has long pledged his loyalty to Hun Sen. And the Prime Minister has the authority to order the Ministry of Defense to recruit and train more security personnel to expand the PMBU. For instance, a decree signed by the Prime Minister on July 21, 2016 instructed the Ministry of Defense to recruit 500 soldiers, of which 350 designated as personnel for the PMBU.

By the controversial elections in July 2018, Cambodia is a new one-party dominant state backed by the CPP-controlled security forces, and sitting atop of this power pyramid is the Hun family. General Hun Manith, Prime Minister Hun Sen's second son, was promoted in 2015 to be Director of the Military Intelligence Department under the Ministry of Defense; under his leadership, this spy agency has grown rapidly powerful in terms of its human resources and broad jurisdiction over national security affairs. In October 2017, Hun Manith was promoted to a three-star general continuing his rise through the ranks of the armed forces and ruling party. He is widely believed to have played a key role in generating the "evidence" of the CNRP's conspiracy to plot a "color revolution" against the government, which provided the legal basis for the Supreme Court's dissolution of the main opposition on November 16, 2017. With Manith in charge of the nation's top spy agency, Hun Sen can exercise close surveillance of hostile forces, domestic and foreign, and enable him to monitor his top generals' activities.

Emerging as a national hero after commanding Cambodian troops in the battle with Thai army over Preah Vihear Temple in 2010–2011, Prime Minister Hun Sen's eldest son, Hun Manet, was on a rapid rise to become one of the top military commanders and his father designated successor after the July election of 2018. In July 2018, just two weeks before the elections, Lieutenant General Hun Manet was promoted to a four-star General and Deputy Commander-in-Chief of the Royal Cambodian Armed Forces. Two months later, in September, the 41-year-old Hun Manet was promoted again to the rank of Commander of the RCAF – the second most powerful position in the Kingdom's military. In October, Prime Minister Hun Sen openly spoke of General Hun Manet as his potential successor

REACTION OF THE CITIZENS TO THE TRANSFORMATION

Cambodian citizens are divided along partisan lines, with pro-CPP voters seeing the CPP-controlled security forces as

a necessary bulwark against hostile domestic and foreign forces and the guarantor of political stability, which is crucial to continued economic development. Supporters of the ruling CPP believe in the singularity of truth that only their party has the human resources, institutional capabilities, and the vision to lead the Cambodian nation to greater prosperity, a modern version of national salvation built on its legacy of liberating Cambodian people from the Pol Pot genocidal regime in January 1979. This unique “truth,” they believe, can be attained by steering Cambodian youth into a conscious accordance with the CPP’s continued rule. CPP supporters who refuse to bow to the party line risk being labelled vacillators or deviationists.

On the contrary, the pro-change population has come to see these CPP-controlled forces merely as repressive tools of the ruling party to prolong their rule in Cambodia, as well as a major obstacle to the promotion of democracy, rule of law, and social justice. CNRP supporters were either suppressed or forced to exercise self-censorship before the July 2018 elections. While repeated threats of violent crackdown on popular uprising by Hun Sen’s security forces have succeeded in striking terror into the heart of the opposition, the ruling party’s economic achievement have given renewed hope for a better future. Fear and hope has offered Hun Sen’s flawed victory a refuge after the July 2018 elections, and prevented mass protests.

LESSONS LEARNT

First, the underlying socialist client-patron networks which structured the security apparatus during the PRK and SOC (1978–1992) was not dismantled by UNTAC, which hindered the formation of

a robust and impartial security institution for the post-1993 election government. Partisan use of security forces sowed the seeds of later conflict between the CPP and FUNCINPEC, which won the 1993 elections but failed to build an independent state security apparatus. Revolutionary leaders like Hun Sen rely on highly disciplined and loyal security force commanders to cling on to power and it is more likely to develop a strong, cohesive, and loyal security organization during their sustained struggles against their political enemies. The resultant use of partisan and personalized state security by the Hun Sen faction to maintain political domination significantly spoiled the democratic process after the historic UN-sponsored free and fair elections in 1993.

Second, since the 1993 election, the CPP elites, especially Prime Minister Hun Sen, believed that the West is more interested in removing Hun Sen from power than pursuing a balanced and fair approach to both the CPP and CNRP. When the media in the West keeps demonizing Hun Sen and his generals for human rights abuses, Hun Sen’s security organization became even more cohesive as all of its members depend on the organizational unity for survival. While some of Hun Sen’s top generals are rights abusers, they helped Hun Sen end the civil war with the Khmer Rouge, bring peace, and avert all political dangers for Hun Sen and CPP. It is this strong bond of comradeship forged during war and political crises that makes Hun Sen’s security organization coherent as it is.

Third, without clear mechanisms of succession of power that would allow the losers to enter into office, and genuine reconciliation and mutual trust between political opponents in the post-war transition, incumbent leaders fear political reprisal and rely even more on personal security forces as Hun Sen has done since 1994.

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[REGIME] ARCHIVES

BERND SCHAEFER

THE NATIONAL ARCHIVES OF CAMBODIA

On 20 August 2012, the author spent some time in the National Archives of Cambodia and had an extensive and detailed talk with its Director in the presence of a (silent) representative from the Council of Ministers. Below the author is drawing on his contemporary notes from this meeting, which are still extremely pertinent and current.¹

The National Archives (NA) are best known for their extensive and exclusive collections from the French colonial period.² The periods since 1953 are represented in the NA as follows:

- Sihanouk as King and Prime Minister, 1953–1970: extensive collections of public speeches, state bulletins, newspapers, publications, and more than 10,000 photos of the King's activities and visits in Cambodia and abroad. Material mostly in Khmer and French. However, the NA do not have internal policy documents, not even one single transcript or memorandum of conversation from the Cambodian leader. Those materials are with the Royal Palace, the Norodom family, in Paris (see below) or Sihanouk's personal and official biographer Julio Jeldres (see below).
- Lon Nol Period, 1970–1975: It is basically the same pattern, though much less material is available. Nobody could answer questions about the Cambodian memoranda of conversations of the Lon Nol government's bilateral dealings; neither whether they existed, or whether they were really all “destroyed by the Khmer Rouge” (a familiar refrain; the KR left the National Archives completely unscathed, for instance). The fact is, though, no internal policy documents of the Lon Nol period are in the National Archives.
- DK Period, 1975–1979: This is by far the best documented and researched period of Cambodian post-1953 history. Though the material is not in the National Archives, but in the non-governmental Documentation Center of Cambodia (DC Cam) in Phnom Penh (see below). Also, the prosecution and defense teams with the current Khmer Rouge Tribunal (KRT) have left no stone unturned and uncovered much more material. Most of it is still with the ECCC (the KRT court).
- Vietnamese Tribunal against the “Pol Pot – Ieng Sary Clique” held in 1979 in Phnom Penh: This material is at the National Archives and accessible upon request.
- PRK Period, 1979–1989: According to the NA, this material has not been completely transferred to the NA and is “not yet processed”. Since the current government of Cambodia is on its top mostly identical with PRK protagonists, no substantial research access is to be expected here (definitely not during the KRT trial where defense lawyers try to implicate the current government). The NA are under the supervision of the Council of Ministers of Cambodia. The latter has to permit any post-1978 research.
- The NA does not hold post-1989 materials. Those are with respective ministries and government agency archives as well

as with the CCP archive. Do not expect them to be open for public research.

Other noteworthy things:

- The NA do not have any holdings from the various Cambodian Ministries of Foreign Affairs where the country's international relations unfolded (e.g. embassy reports and correspondence). The Cambodian MFA has its own documentation department that must be addressed for any inquiries.
- The NA has an excellent online database where all holdings are searchable for names, subjects, etc. Respective research will yield detailed results down to each individual records box stored at the NA.

THE DOCUMENTATION CENTER OF CAMBODIA (DC CAM)

DC Cam in Phnom Penh, originally founded in 1995 and supported by Yale University, is the largest repository holding documents and other material on the period of Democratic Kampuchea between 1975 and 1979. Some of its documentation is quite unique. The DK years are the only period of post-1953 Cambodian history that are well documented in archival terms and openly accessible. An overview of DC Cam holdings can be found here: <http://www.dccam.org/Archives/index.htm>. For more details on DC Cam see also the respective paragraphs in Savina Sirik's chapter “Education and Preservation of Sites of Conscience” in this guide.

Its origin lies with Yale's Cambodian Genocide Program based on the access by historian Ben Kiernan to 100,000 pages of files from the DK security police, the Santebal,³ during the 1975–79 period.⁴ After the files stored with DC Cam were microfilmed in 1999,⁵ fully searchable Cambodian Genocide databases were established.⁶

1 The National Archives of Cambodia can be found on Street 61 (Oknha Hing Penn), directly next to the National Library Building, in-between streets 90 and 92 (very close to Wat Phnom). Basically, tell a taxi or tuk-tuk to go to Wat Phnom; every Cambodian knows that Buddhist monastery and temple, nobody knows the National Archives.

2 See also: William B. Noseworthy, “National Archives of Cambodia”, University of Wisconsin-Madison, 13 March 2014, http://dissertationreviews.org/archives/8169?utm_source=rss&utm_medium=rss&utm_campaign=national-archives-cambodia

3 Santebal Microfilms, Yale University Genocide Studies Program, <https://gsp.yale.edu/santebal-microfilms>

4 See “Yale scholar of Cambodia, Ben Kiernan, uncovers rare 19th-century Khmer-language documents”, Department of History at Yale University, 17 May 2018, <https://history.yale.edu/news/yale-scholar-cambodia-ben-kiernan-uncovers-rare-19th-century-khmer-language-documents>. The headline is wrong, those are 20th century Khmer documents of course, not 19th century.

5 Richard Richie, “Preserving Khmer Rouge Archives”, in *Focus on Global Resources*, Fall 2005, Vol. 25, Num.1, <https://www.crl.edu/focus/article/493>

6 Cambodia Genocide Databases (CGDB), Yale University Genocide Studies Program, <https://gsp.yale.edu/cambodian-genocide-databases-cgdb>

PAPERS OF KING/PRINCE/PRIME MINISTER NORODOM SIHANOUK

A/ PAPERS IN PARIS

The late King Norodom Sihanouk did not trust a Cambodian institution with holding his papers from 1970 to 2007, but had them transferred to the French National Archives in Paris in 2009.⁷

B/ JULIO JELDRES

The former Chilean diplomat Julio Jeldres became a confidant and close friend of Norodom Sihanouk who shared some papers with him and expected him to become his official biographer. Being affiliated with Monash University in Canberra, Australia, in 2012, Ambassador Jeldres published a sort of book⁸ after he had translated a memoir volume of King Sihanouk from 2005. In September 2015, and in 2016, Ambassador Jeldres donated copies of material he had researched in from public archives, or received from Norodom Sihanouk himself, to DC Cambodia in Phnom Penh where they are accessible to the public.⁹

FOREIGN ARCHIVES WITH HOLDINGS ON CAMBODIA

A/ FORMER COMMUNIST COUNTRIES OF CENTRAL AND EASTERN EUROPE

The Foreign Ministry and other archives of the former Soviet Union, Poland, the GDR, Czechoslovakia, Hungary, Bulgaria, and Romania, as well as of Yugoslavia, are holding material regarding their country's relations with Cambodia. During the DK period between 1975 and 1979 only Romania and Yugoslavia maintained embassies in Phnom Penh. The densest and revealing material comes from the Phnom Penh embassies of pro-Soviet countries pertaining to the period between 1979 and 1989, due to the very close relationship of those countries with Vietnam, which wielded major influence over domestic and foreign policies of Cambodia in those years.

B/ WESTERN COUNTRIES

The same applies in principle to Foreign Ministry archives of Western countries, only that their embassies had valuable insights only up to 1975. Most of them did not return to Cambodia until after 1990. More recent material in Western archives

is subject to 25-years-or-higher-rules of declassification schedules. U.S. archives and the Freedom of Information Act (FOIA) of the United States provide the best opportunity to gain access to certain material on Cambodian developments since the 1991 Paris Agreement.

C/ OTHER COUNTRIES

Very significant holdings on Cambodia are contained in the archives of the Socialist Republic of Vietnam and the People's Republic of China, but they are generally not accessible to researchers.

LESSONS LEARNT

The period between 1975 and 1979 is the only period in Cambodian post-independence history that is well documented in terms of archival access. This is extraordinary since the DK years represent zealous communist ideology and genocidal history at its most extreme. Access to those files laid the groundwork for the international court prosecuting Khmer Rouge leaders and perpetrators, offered the opportunity to Cambodians to come to terms with crimes and criminals, but also exposed limits of doling out justice in contemporary political environments. The relative inaccessibility of records from other periods of Cambodian history, and the subsequent focus on the DK years, make the latter appear to be more representative of Cambodia and its history than they might deserve. Despite the enormous death toll and regression in the country between 1975 and 1979, other periods like the 1960s, 1980s, and 1990s had more lasting long-term effects on Cambodian politics and society. However, their archival documentation remains inaccessible for the foreseeable future.

7 See 2009 reports on holdings and the transfer here in newspaper articles from "Bangkok Post" and "Phnom Penh Post": "In Sihanouk's words: the Cambodian monarch's private archives", in *Bangkok Post*, 25 February 2009, <https://www.pressreader.com/thailand/bangkok-post/20090301/282720517870470>; Pheaktra, Neth, "Sihanouk donates archives", in *The Phnom Penh Post*, 24 February 2009, <https://www.phnompenhpost.com/national/sihanouk-donates-archives>

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9 "Late King's Biographer Donates Archives to Documentation Center", in *VOA Cambodia*, 25 September 2015, <https://www.voacambodia.com/a/late-king-biographer-donates-archives-to-documentation-center/2977210.html>

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LUSTRATION

KOSAL PATH

INTRODUCTION

Lustration as a mechanism of transitional justice in post-conflict society refers to official state policies enacted to purge individuals from their current positions or ban them from holding specific positions in the future because of their political acts or identity. These policies are often referred to in terms of the banned group: de-Nazification, de-Sovietization, de-Communization, de-Baathification, and so on. Since Cambodia gained independence from France in 1953, the supposedly neutral state security apparatus has often been used, to a varying degree, by the country's political leaders (Sihanouk, Lon Nol, Pol Pot and now Hun Sen) to suppress political dissent and maintain power. During Cambodia's tumultuous democratic transition from 1993 to 2017, no policy close to any of these post-communist lustration policies ever took place. The security forces of the People's Republic of Kampuchea (PRK) from 1979 to 1989, and its successor the State of Cambodia (SOC) from 1989 to 1993 were transferred, together with the FUNCINPEC's security forces, into the new state apparatus of the CPP-FUNCINPEC coalition government after the United Nations-sponsored general election in 1993. Since 1993, the state security apparatus has been dominated by the Cambodian People's Party (CPP) and commanded by Prime Minister Hun Sen's most loyal generals. The results of the July 29, 2018 election with the main opposition the Cambodian National Rescue Party (CNRP) banned a year before, which were widely condemned by the West but strongly recognized by the People's Republic of China, delivered all 125 National Assembly seats to the CPP. This victory gave Prime Minister Hun Sen's absolute control, with his family members and loyalists in the high command of Cambodia's security forces and state security apparatus. Cambodia is on a fast lane to joining the global one-party authoritarian state.

ABSENCE OF LUSTRATION AFTER THE UN-SPONSORED ELECTIONS IN 1993

In the ensuing years, after the Democratic Kampuchea (DK), widely known as the Khmer Rouge regime, came to power in April 1975, members of the defeated US-backed Lon Nol regime were either murdered or later purged by the Khmer Rouge security apparatus when their identity was revealed. After driving the Khmer Rouge forces to seek refuge in the jungle along the Thai-Cambodian border, the PRK, installed by the Socialist Republic of Vietnam, set up a revolutionary tribunal in 1979 to try Pol Pot and Ieng Sary in absentia for the atrocities they committed during the KR regime from 1975 to 1979. Throughout the 1980s, the PRK security forces hunted down the fifth-column elements burrowing within the ranks and files of the new socialist government. In 1983 when the military intelligence unit of Front 479 – a division of the Vietnamese occupying force in charge of combat in the northeastern part of Cambodia – launched a swift campaign to purge the “two-faced enemy” – referring to Cambodian officials and citizens who worked for the PRK government, but

secretly supported the Cambodian resistance forces against the Vietnamese and the PRK. Many PRK officials in Siem Reap were arrested, interrogated, and even tortured in this brief but brutal purging campaign called the “Siem Reap Affairs.” Until the Paris Peace Accords (PPA) in 1991, which offered a political solution to the Cambodian conflict, the PRK and Vietnamese police jailed at least 5,000 political prisoners in the mid 1980s.

After the 1991 PPA, the PRK security apparatus did not go away, but rather morphed into the new state security apparatus of a democratically elected government after 1993. The difference is that the state security forces changed from a communist state security under the control of the politburo of the PRK into “mixed forces” under Prime Minister Hun Sen's control in 1998, after successfully defeating the security forces of his political rival Prince Norodom Ranariddh in the July 1997 coup. The locus of power of the PRK and SOC was the military and police, and thus the Cambodian People's Party (CPP) sought to maintain these security apparatus as important institutions in the new democratic regime – a coalition government – that emerged after the UN-sponsored election in 1993. The CPP continued to dominate the security forces of the new government. According to Article 51 of the constitution of the Kingdom of Cambodia, the government adopts a policy of “liberal democracy and pluralism.” Cambodia, as Article 56 stipulates, also adopts a market economic system. In 1991, the Hun Sen's government officially abandoned its commitment to Marxism-Leninism in favor of a free market economy under authoritarian government. During the transition from SOC to the Royal Government of Cambodia, formed after the 1993 elections, the CPP retained numerous posts at the local level, including those of powerful district chiefs and police. The CPP has secured a majority of ministries in the power-sharing arrangement; it controlled the bureaucracy, most of the military, and the state security apparatus; the CPP also retained entrenched power in the provinces. Law enforcement and punishment remain a state responsibility, i.e. the enforcement authorities of SOC, and other Cambodian factions in their respective territories. UNTAC's responsibility was to “promote or facilitate, but cannot replace” the state's enforcement responsibilities. UNTAC's weak and vague mandate resulted in the CPP-dominated state security forces, with most of their PRK/SOC security officers holding key positions in the new government.

The royalist party FUNCINPEC, which won the first democratic elections in 1993, became fractured from within and weak by 1995, and failed in its attempt to build up its own security forces to counter the CPP domination. Cambodia's first prime minister Prince Norodom Ranariddh was outmaneuvered by second prime minister Hun Sen, who then dismantled security forces under FUNCINPEC after the July 1997 coup. The FUNCINPEC, as biographer of King Sihanouk Julio Jeldres put it, “operated since its inception more as a royal court than a political party [...]. The courtier's style, however, is not likely to be of much help in a power struggle against the hard-bitten cadres of the CPP.” In protest against the results of the 1993 elections, Hun Sen accused the UN and foreign countries of engineering a conspiracy of

massive electoral fraud, which had deprived his party of victory. This was followed by the CPP hard-liners' attempt in July 1994 to stage a secessionist coup, led by Prince Norodom Chakrapong and Sin Song, a former SOC Minister of Interior. This forced Prince Norodom Ranariddh, head of the FUNCINPEC, to make compromises with the CPP in the form of a CPP-FUNCINPEC coalition government, which set the conditions for a power struggle and eventually a violent coup in July 1997 by the Hun Sen faction within the CPP. In retrospect, the failure to dismantle the security forces of former PRK/SOC was partly due to UNTAC's lack of political will and clear and enforceable mandate.

UNTAC's mission was not aimed at lustration of the former PRK/SOC security apparatus, and rather relied on their cooperation to maintain social order. In fact, the UNTAC Civilian Police Component was ineffective, under-staffed, and widely perceived as incapable of disciplining SOC generals for their violation of human rights. Under the 1991 PPA, UNTAC had the responsibility for "the investigation of human rights complaints, and, where appropriate, corrective action." The head of UNTAC Yasushi Akashi interpreted "corrective action" to be largely limited to actions specified in the PPA, such as the dismissal or transfer of government officials. In reality, UNTAC's enforcement of human rights was limited to the use of threats to remove some of the government leaders from their authority. In 1994, senior CPP military intelligence officers were reportedly continuing to conduct a reign of terror in western Cambodia a year after UNTAC's departure. On the military side, the PPA had assumed cooperation on the part of the SOC. However, in 1992, when the Khmer Rouge began violating the PPA, the SOC also became un-cooperative. As a result, the UNTAC was unable to supervise and control the SOC's military and police. The PPA failed to bring peace to Cambodia, and the Royal Government of Cambodia plunged into a civil war with the Khmer Rouge rebels until 1998 when Prime Minister Hun Sen put an end to that civil war with his "Win-Win" policy.

In 1996–98, Hun Sen initiated his own style of conflict resolution and war termination strategies, known as the "Win-Win" Policy, which offered former Khmer Rouge soldiers and their commanders three guarantees, namely personal security from prosecution, positions within the government, and individual ownership (home and farm land). Notably, a number of Hun Sen's most trusted generals today, including General Sao Sokha, who is commander of the national military police, were his ardent supporters in the July 1997 coup against Prince Ranariddh and secret negotiations with Khmer Rouge commanders to end the civil war in 1996–98. Hun Sen's "Win-Win" Policy successfully brought about mass defection and integration of former Khmer Rouge soldiers and commanders into the Cambodian society. His policy terminated the Khmer Rouge political and military organization and put an end to the bloody civil war in Cambodia, which UNTAC failed to deliver.

Hun Sen's "Win-Win" Policy not only put an end to the civil war in 1998, but has also fostered national reconciliation and economic development in the former battleground regions. Former Khmer Rouge officers were given military posts within the RCAF, and administrative positions at the commune, district and provincial levels in regions they previously controlled such as Pailin, Malai, Samlot, and Anlong Veng. Combined with the UN-backed trials of the top surviving Khmer Rouge leaders for the eleven years from 2006 to 2017, Hun Sen's amnesty-for-peace model certainly defines Cambodia's unique transitional justice experience after the 1991 PPA.

THE IMPACT OF NON-LUSTRATION ON STATE AND SOCIETY

The state security apparatus from 1994 to 2013 was dominated by a small, cohesive and privileged organization made up of former PRK/SOC military and police officers loyal to strongman Hun Sen. This elite security organization is nearly defection-proof; the social status within this organization and members' close ties to the leader (Prime Minister Hun Sen) makes it very difficult for any members to defect. Prime Minister Hun Sen has used material rewards or sanctions to get every member to toe the organization's line. Hun Sen ostracized his recalcitrant generals and invited the cooperative ones into the inner circle. Prime Minister Hun Sen is first and foremost a military commander. As sociologist Daniel Bultmann, who specializes in Cambodian military culture, succinctly observes: "The strongman's subordinates were organized in concentric circles according to their degree of loyalty and trustworthiness, with intimates held close and always in sight. A strong man promoted and rewarded only those who were trusted and close, those who proved their loyalty by bravery in many battles for him – be it at combat operations or the 'home front'". For instance, in 2009, Hun Sen removed General Ke Kim Yan, who was long-time loyalist of Cambodian People's Party President Chea Sim and Interior Minister Sar Kheng, from the post of Commander-in-Chief of the RCAF. Hun Sen then promoted his loyalists General Pol Saroeun, General Kun Kim and General Meas Sophea to the posts of Commander-in-Chief and Deputy Commander-in-Chief. Hun Sen had his loyalist General Sao Sokha as the commander of the military police, General Hok Lungdy, and now, General Neth Savoeun as Chiefs of the national police, and Hing Bun Heang as commander of his bodyguard unit. With the widely condemned July 2018 elections in which the only political opposition was banned from participating, Hun Sen installed his two sons and son-in-law in charge of all the top spy agencies within the state security forces.

From 1998 to 2018, the control over the state security apparatus shifted from Prime Minister Hun Sen's trusted generals to his family in his quest of absolute power in Cambodia. Over the past decade, *Oknha*, a business elite class (at least 700 members) with close tie with the Prime Minister's family, has engaged in sponsoring units of security forces, adding another layer of patronage between corporate interests and the state security forces. In February 2010, the government passed a sub-decree enshrining the *Oknha*-RCAF relationship in which wealthy business elites can donate to security force units in what Defense Minister Tea Banh once called "a culture of sharing and distributing" to the nation between private institutions and RCAF. For instance, a number of *Oknha* including Ly Yong Phat and Kith Meng reportedly contributed significant funding to the Prime Minister's Bodyguard Unit.

As he prepared to eliminate the main opposition party, the Cambodian National Rescue Party (CNRP) in the run-up to the July 2018 elections, Hun Sen elevated his sons, son-in-law, and nephew-in-law to top positions in the security forces. The results of the 2013 elections and the 2017 commune elections showed that the CNRP was getting close to defeating the ruling CPP in a free and fair election. By promoting his own family members to the top positions of the state security apparatus and the army before the one-sided elections of July 2018, Hun Sen has established firm control over the state security apparatus. From 2014 to 2018, as Hun Sen's fear of losing the election and contemplated a bold move to dissolve the opposition, he made a final move to ensure

that this important organization is controlled by his family. Before the 2018 elections which the CPP won all national assembly seats, his two sons, Hun Manet and Hun Manith became the heads of counter-terrorism and military intelligence at the Ministry of Defense and son-in-law Dy Vichea serve as director of the central intelligence of the national police at the Ministry of Interior. His third son, Hun Many, is a colonel in the prime minister's bodyguard unit. In 2017–18, Hun Sen's sons and son-in-law are groomed to take over the top positions of the armed forces and the state security apparatus as a number of his top generals stepped down to assume their new roles as National Assembly representatives. The kinship tie becomes of prime importance in Hun Sen's security apparatus he continues to primarily depend on, as he would expect to face a legitimacy crisis and possible sanctions by the Western democracies after the flawed July 2018 elections.

LESSONS LEARNT

One important lesson from Cambodia's democratic transition is that the security apparatus from the communist regime morphed into the newly democratic regime, setting the stage for these spoilers to undermine the democratic process itself.

The absence of lustration policies allowed former security officers from the communist regimes (PRK/SOC), who are familiar with popular repression, to continue to dominate the state security apparatus of the new coalition government after the first free and fair elections in 1993. UNTAC's reluctance to ban former communist security officers from assuming offices in the new democratic government is a missed opportunity, and has stifled Cambodia's democratic process over the next two and a half decades. Some of the PRK/SOC security officers have been promoted to top positions within the state security apparatus after 1993, members of the ruling party CPP's Central Committee, and privileged status within Prime Minister Hun Sen's inner circle. They have helped Hun Sen avert danger and crush his political rivals during the most perilous and chaotic period from 1994 to 1998. In the run-up towards the July 2018 elections, they backed Hun Sen's plot to get rid of the only viable political opposition, the CNRP, in an attempt to put an end to Cambodia's experiment with liberal democracy. In Cambodia today, a non-partisan state security apparatus does not exist, and in its place is a concentric structure of symbiotic relationship between security forces, business and political elites, with Prime Minister Hun Sen as its sole arbitrator. And Prime Minister Hun Sen has China as a reliable great power friend to back his regime.

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INVESTIGATION AND PROSECUTION OF THE CRIMES OF THE REGIME

PECHET MEN

CRIMINAL PROSECUTION OF CRIMES OF THE KHMER ROUGE REGIME

From 1975 to 1979, the Khmer Rouge regime wreaked havoc upon Cambodian society, causing the deaths of around 1.7 million people, nearly 25 % of the country's population of 8 million.¹ Despite the fall of the regime in 1979, the horror of the Khmer Rouge continued. Throughout the 1980s and 1990s, the Khmer Rouge remained active along the Cambodian–Thai border, waging civil war against the successor government. Only in 1999 did the Khmer Rouge's reign of terror finally come to an end, when most of its followers surrendered; their crimes essentially going unpunished. It was only in 1997 that the United Nations (UN) and Royal Government of Cambodia (RGC) began to discuss the establishment of a tribunal to prosecute the crimes of the Khmer Rouge. It took almost six years of negotiation before the two parties came to an agreement in 2003, establishing a tribunal known officially as the Extraordinary Chambers in the Courts of Cambodia (ECCC).

In January 2001, while negotiation was still underway, the Cambodian National Assembly adopted the draft law (hereinafter “ECCC Law”) establishing the ECCC. In October 2004, the UN-RGC Agreement, and Amendments to the 2001 ECCC Law were approved by the National Assembly, making them official legislation. After waiting for so long, the ECCC began its operation in 2006 as a hybrid tribunal in Phnom Penh. Being hybrid, the ECCC is part of Cambodia's domestic court sitting in Cambodia, which applies both to Cambodian law and international law, and is staffed by both local and international staff. A unique and complicated feature of the tribunal is that Cambodian judges make up the majority of the judges at all levels of the Chambers including the pre-trial Chamber, trial Chamber and Supreme Court Chamber. The prosecution office and investigation office are composed of two co-prosecutors and two co-investigating judges respectively – one national and one international. The ECCC offers legal aid to defendants who can select both local and international lawyers to represent them. Another exceptional feature of the ECCC concerns the recognition of victims as a formal party to the case. Victims are also entitled to lawyers to represent their interest before the ECCC.

PEOPLE'S REVOLUTIONARY TRIBUNAL (PRT)

As a matter of fact, the ECCC was not the first tribunal to look into the crimes committed by the Khmer Rouge. Immediately after the fall of the Khmer Rouge regime in January 1979, the new government of the People's Republic of Kampuchea (PRK) attempted to bring about some forms of accountability. The little-known People's Revolutionary Tribunal (PRT) conducted a trial *in absentia* in Phnom Penh of the Khmer Rouge's former Prime Minister Pol Pot and former Minister of Foreign Affairs, Ieng Sary.

The trial that lasted just five days from 15 to 19 August 1979 found the two defendants guilty of genocide and sentenced both of them to death, and ordered the confiscation of all their property. Although it was the world's first tribunal to prosecute individuals for crimes defined under the 1948 Genocide Convention, the tribunal bore no legal significance, and was considered a “sham trial” by the international community.² The trials failed far short of upholding international due process; the two defendants still actively controlled parts of the country and were not in custody.

Clearly, the right of the defendants to be presumed innocent was not respected by the PRT. Just one day before the trials began, the presiding judge Keo Chenda issued a political statement indicating the already decided objective of the tribunal, which was meant to “expose all the criminal acts... and... the true face of the criminals who are posing as representative of the people of Kampuchea[.]”³ The defense lawyers were appointed without the knowledge and consent of the defendants, and had no communication with them relative to the trials. The defense counsels accepted all crimes charged, and did not carry out any cross-examination of witnesses. Regardless of the quality of the lawyers, the ultimate result was already pre-determined, and that was conviction. Regardless of the respect for due process, the politics of the cold war at the time already dictated that the verdict of the revolutionary tribunal was a politicized one, and would have made no impact whatsoever. Both the survivors and the international community rejected the PRT and continued to advocate for a legitimate prosecution.

INVESTIGATION OF CRIMES OF THE KHMER ROUGE

Although Cambodia and the international community had failed to put an end to the impunity of the Khmer Rouge, they were not forgotten. Relentless efforts by survivors and activists led to the adoption of the Cambodian Genocide Justice Act in April 1994 by the US Congress. President Bill Clinton signed the Act in May of that year. The Act mandated the US State Department to support the effort to look into the crimes committed by the Khmer Rouge between April 17, 1975 and January 7, 1979, and to arrange

1 The most cited figure for the death toll of 1.7 million was given by Ben Kiernan in his book “The Pol Pot Regime: Race, Power and Genocide in Cambodia under the Khmer Rouge, 1975–79,” (New Haven: Yale University Press, 1996). The ECCC estimated the death toll to be between 1.8 and 2.2 million and about 800,000 died of violent deaths. The exact figure is not known. The total death figure is controversial, ranging from 740,000 to 3.314 million; please see Tom Fawthrop, Helen Jarvis, *Getting Away With Genocide, Elusive Justice and the Khmer Rouge Tribunal*, University of New South Wales Press, 2005, 3–4.

2 Ibid.

3 Kelly Whitley, History of the Khmer Rouge Tribunal: Origins, Negotiations, and Establishment, in John D. Ciorciari (ed.), *The Khmer Rouge Tribunal*, Phnom Penh: DC-Cam, 2006.

for an investigation into that period.⁴ As part of this investigation, Lawyers Jason Abrams and Stephen Ratner were commissioned in 1994–5 to produce a legal analysis of the criminal responsibility of members of the Khmer Rouge relating to war crimes, crimes against humanity and genocide. The two lawyers concluded in their findings that they found *prima facie* evidence for all identified crimes and suggested a number of options for prosecution.

The Cambodian Genocide Program (CGP) of Yale University was awarded the grant from the US State Department to carry out research, training and documentation, and thereafter established a field office in Phnom Penh known as the Documentation Center of Cambodia (DC-Cam). Immediately, DC-Cam started to collect and document primary materials from the Khmer Rouge regime. In 1995, CGP and DC-Cam hosted an international conference where the two lawyers presented their findings. In 1995 and 1996, DC-Cam held its first legal training program for government officials, legal practitioners and judges on international justice. By early 1997, DC-Cam had gathered and documented a huge amount of primary documents. In January 1997, DC-Cam became an independent non-governmental organization (NGO) in Cambodia and, since then, continued to document crimes of the Khmer Rouge.

The Khmer Rouge ran their regime with extreme secrecy using code names and numbers in their documents. This has presented as a huge challenge to those looking into their conduct. In addition, the Khmer Rouge leaders managed to burn many of their documents before the Vietnamese army and Cambodian resistance force took control of the country in January 1979. Further, in the post-Khmer Rouge era, people did not understand the value of materials from the Khmer Rouge period. There were reports of these primary documents being used to wrap fried banana sold on the streets of Phnom Penh.⁵

According to DC-Cam, there are two major categories of documentary materials collected and documented since its inception.⁶ The first category involves original materials produced during the Khmer Rouge regime, and contains mostly documents produced during the era, and by the Khmer Rouge officials themselves, prisoner confessions, and documents from foreign countries. The second includes materials produced after the fall of the Khmer Rouge in 1979. They consist primarily of survivor petitions, interview transcripts of survivors, and mapping reports of extensive mass grave and memorial studies. DC-Cam has uncovered roughly 20,000 mass graves and about 200 detention centers where those deemed enemy of the state were kept and tortured. These documents have become an important source of evidences in the trials of the surviving Khmer Rouge leaders.

IDENTIFICATION OF LEADERS OF THE KHMER ROUGE

The prosecution of those responsible for the crimes of the Khmer Rouge is a political as much as a legal matter. The negotiations on the establishment of the tribunal involved complex political issues taking place between 1997 and 2003. The Cambodian government and the United Nations had differences on almost every aspect of the tribunal. The differences included the type of tribunal – special or domestic –, who would make up the majority of judges, which legitimate authority would appoint the judges and prosecutors, the number of defendants and, among other things, the issue of amnesty.⁷

PERSONAL JURISDICTION

One of the most heated aspects of the negotiation was, perhaps, who were to be included under the tribunal's personal jurisdiction. The discussion on the personal jurisdiction of the tribunal was a complicated political negotiation.⁸ The UN argued that both “senior leaders” and “those most responsible” for the crimes committed during the Khmer Rouge regime should fall under the jurisdiction of the tribunal. A group of experts – Ninian Stephen, Rajsoomer Lallah, and Steven Ratner – sent by the UN Secretary General to carry out legal assessment of the feasible prosecution in 1999, put forward an estimate of 20–30 individuals.⁹ The Cambodian government strongly rejected the number. Cambodia's Prime Minister Hun Sen announced publicly in late 1999 that only a limited number of individuals would be prosecuted, limiting the number to 4 or 5 individuals.¹⁰ He cited the risk of civil war. Critics argued that this move serve self-interest. The Prime Minister himself, before defecting to Vietnam in 1977, and other high-ranking officials were once serving parts of the Khmer Rouge regime. A large number of defendants may put these officials in the hot seat.¹¹

Prior to discussions on the personal jurisdiction of the tribunal, according to Professor David Scheffer who was one of the UN negotiators, the prosecutorial targets referred to during 1997 and 1998 were surviving senior leaders of the Khmer Rouge leadership. At the time, the negotiators were not even aware that Duch, the chairman of the Khmer Rouge's notorious torture chamber S-21, who was later convicted and sentenced in 2012 to life in prison by the ECCC, was still alive.¹² Scheffer emphasized that the focus, then, was on securing the arrest or surrender of surviving Khmer Rouge leaders, including Pol Pot (who died in 1998), Ta Mok (who died in 2006), Ke Pauk (who died in 2002), Ieng Sary (who died while on trial in 2013), Khieu Samphan and Nuon Chea (who both have been sentenced to life imprisonment in Case 002), Ieng Thirith (the spouse of Ieng Sary, who was found unfit to stand trial by the ECCC in 2011, and later died in 2015) and other senior leaders, as opposed to the actual number of individuals. According

4 Tom Fawthrop, Helen Jarvis, *Getting Away With Genocide, Elusive Justice and the Khmer Rouge Tribunal*, University of New South Wales Press, 2005.

5 Michelle Vachon, “When I Believed in the Khmer Rouge”, in *The Cambodia Daily*, 2006, <https://www.cambodiadaily.com/stories-of-the-month/when-i-believed-in-the-khmer-rouge-438/>

6 John D. Ciorciari, Youk Chhang, Documenting the Crimes of Democratic Kampuchea, in Jaya Ramji, Beth V. Schaack (ed.), *Bringing the Khmer Rouge to Justice, Prosecuting Mass Violence Before the Cambodian Courts*, Edwin Mellen Pr., 2005.

7 Kelly Whitley, History of the Khmer Rouge Tribunal: Origins, Negotiations, and Establishment, in John D. Ciorciari (ed.), *The Khmer Rouge Tribunal*, Phnom Penh: DC-Cam, 2006.

8 Steve Heder, “A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia”, Cambodia Tribunal Monitor, 2011; David Scheffer, “The Negotiating History of the ECCC's Personal Jurisdiction”, Cambodia Tribunal Monitor, 2011.

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11 John D. Ciorciari, History and Politics Behind the Khmer Rouge Trials, in John D. Ciorciari, and Anne Heindel, (ed.), *On Trial: The Khmer Rouge Accountability Process*, Phnom Penh: DC-Cam, 2009.

12 David Scheffer, “The Negotiating History of the ECCC's Personal Jurisdiction”, Cambodia Tribunal Monitor, 2011.

to Scheffer, before the tense discussion on personal jurisdiction, the estimate was about 10 individuals. Despite this initial estimate, the proposal of 20–30 suspects was a firm position by the UN.

The UN's initial draft law in late 1999 establishing the Khmer Rouge tribunal, drafted by Scheffer, described the tribunal's personal jurisdiction as "senior leaders of Democratic Kampuchea and *all persons* responsible for the most serious violation of Cambodian law..." Such a description would have given wide discretion to the prosecution, but was rejected by the Cambodian government.¹³ By January 2000, the Cambodian government returned with the language "senior leaders of Democratic Kampuchea and those who were responsible for serious violation..." In a letter to Prime Minister Hun Sen in March 2000, UN Secretary General Kofi Annan referred to personal jurisdiction as "senior leaders of Democratic Kampuchea and those responsible for crimes and serious violation of Cambodian penal law, international law and custom, and international conventions recognized by Cambodia..."¹⁴

All along, the assumption of the negotiators was that there were two distinct groups that would fall under the jurisdiction of the tribunal – "senior leaders" and "those responsible". The remaining concern was how large the second group would be. In a letter dated March 24, 2000 to his Cambodian counterpart, Hans Corell, the UN Legal Counsel was concerned that the Cambodian government would propose too many potential suspects to be included in the second group, and implicitly reflect a reduction in number from the 20–30 suspects. It was only then that the UN negotiators proposed the second group to be "those who were most responsible" taking into consideration the capacity of the discussed tribunal.¹⁵ The agreed language went into the ECCC draft law.

On January 2, 2001, the Cambodian National Assembly adopted the ECCC draft law even before the agreement with the UN was reached. Article 1 of the law described the ECCC's personal jurisdiction as "... senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws..." Hans Corell raised the problems he saw in the adopted law in a letter to the late Senior Minister Sok An who led the Cambodian Task Force in negotiations with the UN on the establishment of the tribunal; personal jurisdiction was not one of them. From then on, both parties appeared to be silent on the issue of personal jurisdiction, which seemed to suggest that the issue was resolved. On January 19, 2001, Prime Minister Hun Sen visited the Khmer Rouge's last stronghold of Anlong Veng and spoke to over 1000 Khmer Rouge residents of the area. He assured them that "[J]ust top leaders" would be prosecuted and that would include Duch as one of those who were most responsible. He also softened his previous position on a controversial issue related to a royal pardon granted by the King to Ieng Sary, the Khmer Rouge's Minister of Foreign Affairs, by stating that the King had "no right to protect anyone from prosecution".¹⁶ According to the news coverage of his visit to Anlong Veng, the Premier described the number of suspects to be between 4 and 10 individuals only.¹⁷

CASE 001 AND CASE 002

Although negotiations on personal jurisdiction appeared to be agreed upon on the surface, the negotiating teams had reached an impasse on other aspects of the tribunal, leading the UN team to formally withdraw from the negotiations by early 2002. The cessation of the negotiation had drawn condemnation from UN member states. The UN was later pressured to return to the negotiating

table. In a resolution sponsored by France and Japan in late 2002, the UN began its engagement with the Cambodian government. By the end of 2003, the UN agreed that it was assumed that the number indicted would range from 5 to 10, but stressed that this number could change based on the court's investigation.¹⁸ The two parties reached an agreement in 2003 and, in October 2004, the UN-RGC Agreement and Amendments to the 2001 ECCC Law were approved by the National Assembly. The ECCC began its legal operation in 2006 as a hybrid tribunal in Phnom Penh.

Soon after its inception, the ECCC indicted 5 persons, two of whom have since died, in two cases – Case 001 and Case 002.¹⁹ Case 001 concerned Duch and Case 002 Nuon Chea, Ieng Sary (deceased), Khieu Samphan and Ieng Thirith (deceased).

- *Kaing Guek Eav* (known as "Duch") was Chairman of the notorious torture chamber S-21 in Phnom Penh where an estimated 14,000 victims were tortured and killed. His case, Case 001, began its trials in February 2009 and he was convicted and sentenced to life imprisonment by the Supreme Court Chamber in February 2012. In June 2013, Duch was transferred to Kandal Provincial Prison to serve his life sentence.

- Nuon Chea (known as "Brother Number Two") was Deputy Secretary of the Communist Party of Kampuchea (CPK) and a member of the CPK Central and Standing Committee. Case 002 began its trial in 2011 and was severed into two trials: Case 002/01 and Case 002/02. Nuon Chea together with Khieu Samphan were found guilty by the Trial Chamber in August 2014 and confirmed by the Supreme Court Chamber in November 2016 for crimes against humanity in Case 002/01. The Trial Chamber of the ECCC announced on November 16, 2018 that Nuon Chea and Khieu Samphan were sentenced to life imprisonment in Case 002/02 for genocide, crimes against humanity and grave breaches of the Geneva Conventions of 1949. The crimes were committed at various locations throughout Cambodia between 1975 and 1979. While Nuon Chea was convicted for genocide against the Cham and Vietnamese ethnics, Khieu Samphan was convicted for genocide against only the Vietnamese ethnic. Lasting for 283 hearing days, the Chamber heard the testimony of 185 individuals, including 114 witnesses, 63 Civil Parties and 8 experts.²⁰

13 Ibid.

14 Ibid.

15 Steve Heder, "A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia", Cambodia Tribunal Monitor, 2011; David Scheffer, "The Negotiating History of the ECCC's Personal Jurisdiction", Cambodia Tribunal Monitor, 2011.

16 David Scheffer, "The Negotiating History of the ECCC's Personal Jurisdiction", Cambodia Tribunal Monitor, 2011.

17 Steve Heder, "A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia", Cambodia Tribunal Monitor, 2011.

18 Ibid.

19 Anne Heindel, Overview of the Extraordinary Chambers, in John Ciorciari and Anne Heindel (ed.), *On Trial: The Khmer Rouge Accountability Process*, Phnom Penh: DC-Cam, 2009.

20 Public Affairs Section of the Extraordinary Chambers in the Courts of Cambodia (ECCC) (2018), "Nuon Chea and Khieu Samphan Sentenced to Life Imprisonment in Case 002/02", Press Release dated on November 16, https://www.eccc.gov.kh/sites/default/files/media/20181116%20Case%20002.02%20Press%20Release_ENG_Final.pdf. For Trial Chamber's Summary of Judgement Case 002/02, please visit: https://www.eccc.gov.kh/sites/default/files/media/20181116%20Summary%20of%20Judgement%20Case%20002-02_Courtesy%20Copy_Public%20version_Final-ENG.pdf

- Khieu Samphan was head of state and a member of CPK Central Committee.
- Ieng Sary, husband of Ieng Thirith, was Deputy Prime Minister and Minister of Foreign Affairs and a member of the CPK Central and Standing Committees. He died in detention while on trial in March 2013.
- Ieng Thirith, wife of Ieng Sary and sister-in-law of Pol Pot, was Minister of Social Affairs and Action and also a candidate member of the CPK Central Committee. In November 2011, the ECCC found her unfit to stand trial, due to dementia, and was released from the tribunal detention in 2012. She later died in August 2015 in Pailin near the Thai border.

CONTROVERSIAL DISPUTE ON PERSONAL JURISDICTION

A few months before the start of the Duch trial, former international Co-Prosecutor Robert Petit filed on November 18, 2008 a notice of disagreement between him and his Cambodian counterpart with regard to judicial investigation into additional suspects. He filed two new introductory submissions and one supplementary submission, which had since been withdrawn. These new submissions contained charges against six additional suspects, one of whom had since died. The author did confirm at the time that the sixth suspect had died. This new investigation was strongly contested by the national Co-Prosecutor Chea Leang, and later by the national side of this hybrid tribunal and the Cambodian government.

The views on this dispute between the two co-prosecutors were mixed. NGOs, outside observers and a large portion of the Cambodian public, held the view that they support additional prosecution and this additional prosecution would prove the court's independence and legitimacy.²¹ While others argued that it made no difference and the ECCC should focus on the five already accused and charged, and get it done quickly. Based on the ECCC Law, the disagreement had to be resolved before a five-membered Pre-Trial Chamber, whose decision needed an affirmative vote of at least four judges. This complicated feature was a compromise agreed during the complex negotiation. This meant that at least one international judge had to agree with the decision of the three Cambodian judges in order to stop the investigation. In this case, the three Cambodian judges voted against additional investigation and the two international judges voted in favor. Because of the lack of a super majority decision to stop the requested investigations, the new investigations moved forward by default.

The ECCC then began its investigation into an additional 5 suspects and they became known as Case 003 (Meas Muth and Sou Met), Case 004 (Yim Tith), Case 004/01 (Im Chaem) and Case 004/02 (Ao An).²² Sou Met died in 2013. The four surviving suspects have since been charged, but the ECCC found one of them (Im Chaem) to be outside of its jurisdiction.

- Case 003: Meas Muth was alleged to be a member of the CPK Central Committee, General Staff Deputy Secretary, Division 164 (including the navy) Secretary and Kampong Som Autonomous Sector Secretary. He has been charged with genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949 and violations of the 1956 Cambodian Penal Code.
- Case 004: Yim Tith (also known as "Ta Tith") was alleged to be Southwest Zone Sector 13 Secretary, Kirivong District Secretary and Northwest Zone Deputy Secretary and Sector 1, 3

and 4 Secretary. He has been charged with genocide of ethnic Khmer Krom and ethnic Vietnamese, crimes against humanity, grave breaches of the Geneva Conventions of 1949, and violations of the 1956 Cambodian Penal Code.

- Case 004/02: Ao An (also known as "Ta An") was alleged to be Central Zone Deputy Secretary and Sector 41 Secretary. He has been charged with genocide of ethnic Cham, crimes against humanity, and violations of the 1956 Cambodian Penal Code.
- Case 004/01: Im Chaem was alleged to be Preah Net Preah District Secretary and Northwest Zone Sector 5 Deputy Secretary. She was charged with homicide and crimes against humanity. On February 2017, the Co-Investigating Judges dismissed the case against her by deciding that she did fall within the personal jurisdiction of the tribunal. The International Co-Prosecutor, without the support of his National Co-Prosecutor, appealed against the decision. The Pre-Trial Chamber had again had split decision between the national and international judges. Three national judges found that the ECCC lacks personal jurisdiction over Im Chaem, while the two international judges found that Im Chaem was among those most responsible, and thereby under ECCC jurisdiction. However, because the ECCC needed four out of five votes to overturn the decision of the Co-Investigating Judges, the Case against Im Chaem was dismissed in June 2018.

Without the support and cooperation of their national counterparts and of the Cambodian government, the investigation was extremely challenging. The ECCC needs the cooperation of their national counterpart to make arrests and, among others, call witnesses to testify. It was widely believed that the Cambodian government was working to prevent additional cases from moving forward.²³ Prime Minister Hun Sen was reported to have said in his meeting with UN Secretary General Ban Ki-moon that additional cases were not allowed.²⁴ This perception is strongly reflected in the consistent position of Cambodian lawyers, judges and staff at the ECCC by their opposition in moving these two cases forward.²⁵ The controversy in Case 003 and 004 has drawn strong criticism and allegation of political interference and even corruption.²⁶ Three international investigating judges have either resigned or have been blocked from their official function since the start of the controversy. Although the legal process has seemed to move forward more smoothly recently, the rift between the national and international staff at the tribunal appeared to remain as evidenced by the recent split decision to dismiss the Case against Im Chaem.

21 Terith Chy, "Questions on Additional Prosecution Posted by the Co-Prosecutors at the Extraordinary Chambers in the Courts of Cambodia (ECCC)", 2009.

22 "ECCC at a glance", January 2018, https://www.eccc.gov.kh/sites/default/files/publications/ECCC%20at%20a%20glance%20-%20january%202018_5.pdf

23 Randle DeFalco, "Case 003 and 004 at the Khmer Rouge Tribunal: The Definition of 'Most Responsible' Individuals According to International Criminal Law", in *Genocide Studies and Prevention: An International Journal*: Vol. 8: Issue 2: 45-65, 2014.

24 "No third Khmer Rouge trial, says Hun Sen", in *RFI*, 2010, <http://en.rfi.fr/asia-pacific/20101027-no-third-khmer-rouge-trial-says-pm>

25 Open Society Justice Initiative, "Political Interference at the Extraordinary Chambers in the Courts of Cambodia", July 2010, <https://www.opensocietyfoundations.org/sites/default/files/political-interference-courts-cambodia-20100706.pdf>

26 John D. Ciorciari, Anne Heindel, "Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal", 35 *Mich. J. Int'l L.* 369, 2014.

LESSONS LEARNT

For the victims who are still alive today, the ECCC is their last hope of bringing to justice the Khmer Rouge leaders who had inflicted so much pain and devastation. But the journey has not been an easy one. There have been so many challenges along the way. The negotiation on the establishment of the ECCC took 6 years, and the UN had to walk away once before an agreement was reached. While the investigation and trials of Case 001 and Case 002 seemed to be proceeding rather smoothly and two surviving leaders of Khmer Rouge have been sentenced to life imprisonment in Case 002 for genocide and crimes against humanity, a few charged persons and suspects have died along the way. Case 003 and Case 004 have proceeded with so much controversy that the credibility of the tribunal itself has been questioned. A few observers of the tribunal went so far as to

suggest that the UN should pull out of the process completely.²⁷ Personal jurisdiction and, perhaps, balance of influence have been central to this controversy. The ECCC has accomplished 3 convictions and spent over 200 million over ten years, while at the same time the status of Case 003 and Case 004 remain uncertain and the credibility of the tribunal has been seriously affected. Despite some limited success, many observers suggest avoiding the ECCC model for future tribunal, mainly due to its complicated features and being politically vulnerable.²⁸

27 John D. Ciorciari, "Justice and Judicial Corruption", Cambodia Tribunal Monitor, 2007; Open Society Justice Initiative, "Recent Developments at the Extraordinary Chambers in the Courts of Cambodia", 2012.

28 John D. Ciorciari, Anne Heindel, "Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal", 35 Mich. J. Int'l L. 369, 2014.

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REHABILITATION OF VICTIMS

PECHET MEN

SCOPE AND TYPOLOGY OF THE REHABILITATION

In a broader term, rehabilitation refers to services and programs that are designed to assist individuals who have experienced a trauma or illness resulting in impairment, which creates a loss of function (physical, psychological, social, or vocational).¹

However, this paper specifically defines rehabilitation as various measures that Cambodia and the survivors of the Khmer Rouge Regime (1975–1979) have taken to come to terms with their past traumatic experiences, during which time almost two million Cambodian people died from exhaustion, starvation, torture, and mass execution.

LEGAL FRAMEWORK OF THE REHABILITATION

After the Khmer Rouge regime collapsed in 1979, Cambodia and the survivors of the regime have struggled to rebuild their lives, reconstruct their society, restore relationships, and resolve collective psychological trauma. Significant efforts have been observed throughout the time. Below illustrates those efforts made by Cambodia and her people.

THE PEOPLE'S REVOLUTIONARY TRIBUNAL (PRT)

Legally, the first and foremost effort was to hold the senior Khmer Rouge leaders accountable for their crimes. Shortly after the fall of the Khmer Rouge regime, Cambodia made a considerable effort to put two senior Khmer Rouge leaders on trial, namely Ieng Sary and Pol Pot, by establishing the People's Revolutionary Tribunal in 1979.²

While the People's Revolutionary Tribunal was neither internationally recognized nor in compliance with fair trial principles, and was viewed as a show trial that was projected to legitimize the Vietnamese occupation in Cambodia,³ to some certain extent, the tribunal contributed to the lifting of Cambodia's spirit,⁴ and in the meantime, provided the chance for reconciliation and improved socio-political condition in Cambodia.⁵

THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (ECCC)

In 2006, almost 30 years later, a hybrid court, the Extraordinary Chambers in the Courts of Cambodia (ECCC), or the Khmer Rouge Tribunal, was co-established by the government of Cambodia and the United Nations to address grave human right violations and crimes committed under the Khmer Rouge regime (ECCC).

Located in the Capital of Phnom Penh, Cambodia, the ECCC has brought nine senior Khmer Rouge leaders and other responsible persons to justice in four different cases (ECCC), which has helped Cambodians to achieve a measure of justice and reconciliation.⁶

VICTIM PARTICIPATION BEFORE THE ECCC

The ECCC has claimed that, "One of the major innovations of the [court] is the enhanced recognition of victims in its proceedings. Victims of crimes that fall under the jurisdiction of the court are given a fundamental role in the ECCC [...] Victims may also participate as Civil Parties. In this capacity, they are recognized as parties to the proceedings and are allowed to seek collective and moral reparations."⁷

Victim participation before the ECCC provides exceptional prospects for a more victim-oriented justice process in Cambodia. In addition to telling their stories through their legal application, victims could share their stories in the formal courtroom and even ask questions to the accused.⁸

For some people, the sharing of stories and testimonies are rehabilitating in and of themselves. Victims are also entitled to legal representation and can seek reparations. Victims could participate as either a Civil Party or a complainant.⁹

Subsequently, about 5,124 Civil Party application forms have been submitted before the ECCC, among which 90 were in Case 001,¹⁰ 3,866 in Case 002,¹¹ 321 in Case 003,¹² and 847 in Case 004.^{13, 14}

- 1 Robin E. Remsburg, Barbara Carson, Rehabilitation, in Ilene Lubkin, Pamela Larsen (Eds.), *Chronic Illness: Impact and Interventions*, Sudbury, MA: Jones and Bartlett Publishers, 2006, 579-16.
- 2 Ly Sok-Kheang, *Reconciliation Process in Cambodia: 1979–2007 before the Khmer Rouge Tribunal*, Phnom Penh: Documentation Center of Cambodia, 2017.
- 3 John D. Ciociari, Ly Sok-Kheang, The ECCC's Role in Reconciliation, in John D. Ciociari, Anne Hendel (Eds.), *On Trial: The Khmer Rouge Accountability Process*, Phnom Penh: Documentation Center of Cambodia, 2009.
- 4 Savina Sirik, Kunthy Seng, Pechet Men, "Museum of Memory: Promoting Healing in Cambodia through History, Culture and Arts", in Sandra Dudley, Kylie Message (Eds.), "Museum Worlds: Advances in Research", *Berghahn Journals*, Vol. 2, 2014.
- 5 Ly Sok-Kheang, *Reconciliation Process in Cambodia: 1979–2007 before the Khmer Rouge Tribunal*, Phnom Penh: Documentation Center of Cambodia, 2017.
- 6 Savina Sirik, Kunthy Seng, Pechet Men, "Museum of Memory: Promoting Healing in Cambodia through History, Culture and Arts", in Sandra Dudley, Kylie Message (Eds.), "Museum Worlds: Advances in Research", *Berghahn Journals*, Vol. 2, 2014.
- 7 Sarah Thomas, Terith Chy, Including the Survivors in the Tribunal Process, in John D. Ciociari, Anne Hendel (Eds.), *On Trial: The Khmer Rouge Accountability Process*, Phnom Penh: Documentation Center of Cambodia, 2009.
- 8 Ibid.
- 9 Nadine Kirchenbauer et al., "Victims Participation before the Extraordinary Chambers in the Courts of Cambodia: Baseline Study of the Cambodian Human Rights and Development Association's Civil Party Scheme for Case 002", Phnom Penh: ADHOC, 2013.
- 10 In Case 001 against the S-21 prison chief, Kaing Guek Eav (alias Duch), there were 90 civil parties, 22 of whom were able to testify before the court. A total of 36,493 people attended the trial and appeal hearings in Case 001 during 80 days of hearings. Duch began serving his prison term in the ECCC detention center in 2012 and was transferred to Kandal Provincial Prison in June 2013 to serve the remainder of his term.

This is the first endeavor of its kind that allows victims to participate, not only as witness, but also as full participants in the proceedings.¹⁵

THE REPARATIONS BEFORE THE ECCC

As part of the proceedings, Civil Parties are entitled to reparations, should the accused be found guilty. However, pursuant to the Internal Rules of the ECCC, Civil Parties may only be granted collective and moral reparations, but not in monetary form, and Civil Parties cannot receive individual compensation.¹⁶

Besides the judicial reparations, the Victims Support Section (VSS) of the ECCC is tasked to develop Non-Judicial Measures with external partners in order to address broader interests of victims.¹⁷

Between 2013 and 2017, 16 reparations and non-judicial measures have been proposed to the ECCC, among which nine are judicial reparations. Projected to be about USD 7 million, those 16 projects have been divided into four different categories, including documentation, education, rehabilitation, and remembrance that have been, and will be, implemented by the Victims Support Section, non-governmental organizations, and the Cambodian government.¹⁸

In regards to Education, three projects have been identified, namely a Chapter on Victims Participation in a National History Textbook, Community Peace Learning Centers, and the ECCC Virtual Tribunal; Documentation includes four projects, such as the ECCC Documentation Center, the Forced Transfer Exhibition, the Publication of ECCC Verdict, and the Victims Register; Rehabilitation consists of four projects, including the Gender & Transitional Justice Project, a National Reconciliation Event, Self Help Groups for Rehabilitation, and the Testimonial Therapy Initiative; Remembrance includes, the Community Memorials Initiative, a National Remembrance Day, Preservation of Crimes Sites, and the Tuol Sleng Stupa Project; the last one is the Victims Foundation of Cambodia.¹⁹

In conclusion, a number of notably legal efforts have been made by the Cambodian government, in collaboration with non-state actors, in order to address and acknowledge the suffering inflicted by the Khmer Rouge on the Cambodian people between 1975 and 1979. As a result, some of the senior Khmer Rouge leaders, and other responsible persons have been brought to justice, and a number of reparations as well as non-judicial measures have been proposed to restore the dignity, and to remember the victims of the Khmer Rouge.

SOCIAL FRAMEWORK OF THE REHABILITATION

While we have looked at legal aspect of the rehabilitation of the victims in Cambodia of the Khmer Rouge regime, we should not neglect the social framework established by Cambodia and the survivors, on one hand, the 1979 People's Revolutionary Tribunal was not internationally acknowledged, and on the other hand, the ECCC was established almost 30 years later. Therefore, in the absence of these legal mechanisms in addressing past atrocities, substantial struggles have been endured by Cambodia, and the survivors, in order to cope with the past. These achievements should be taken into account and should serve as model for other post conflict societies.

SOCIAL MOVEMENT

In addition to the abovementioned legal mechanisms, Cambodia has made other, formal and informal, efforts to cope with the legacy of the Khmer Rouge regime. Social movements driven by both individuals and the state have contributed to relieving the suffering of the survivors. These include commemorating remembrance days, such as the Day of Victory on January 7 and the Day of Remembrance on May 20.²⁰

Another novel triumph of such an effort is the construction of memorials that are dedicated to those who lost their lives during the Khmer Rouge regime. According to data from the Mapping Project of the Documentation Center of Cambodia (DC-Cam), approximately 81 genocide memorials have been constructed by survivors (Mapping Project).²¹

Even though healing and reconciliation is a personal matter, these continuous social efforts have made an extensive impact on the Cambodian people. For instance, every year on May 20, Cambodians visit various memorial sites throughout the country to celebrate the Day of Remembrance. The process through which they participate in the ceremony, allow for space to remember the victims and find their own reconciliation.²²

The above movement reflects the Cambodian effort to inspire healing and forgiveness through national events that encourage

11 Case 002, which was split into two smaller cases, involves two senior Khmer Rouge leaders, Nuon Chea and Khieu Samphan. The two accused were charged with crimes against humanity, grave breaches of the Geneva Conventions of 1949, and genocide against the Muslim Cham and the Vietnamese. The Trial Chamber held the initial hearing in June 2011. Since then, Case 002 has been severed into at least to separate trials, each addressing a different section of the indictment.

12 Case 003 involves Meas Muth, former Central Committee Member, General Staff Deputy Secretary, Division 164 (including the navy) Secretary and Kampong Som Autonomous Sector Secretary.

13 Case 004 involves Ao An, Im Chaem, and Yim Tith. There are about 847 Civil Party applicants in Case 004. Ao An was former Central Zone Deputy Secretary and Sector 41 Secretary. Im Chaem was former Preah Net Preah District Secretary and Northwest Zone Sector 5 Deputy Secretary. Yim Tith was former Southwest Zone Sector 13 Secretary, Kirovong District Secretary and Northwest Zone Deputy Secretary and Sectors 1, 3 and 4 Secretary.

14 Victims Support Section and Civil Party Lead Co-Lawyers of the ECCC, "ECCC Reparation Program 2013–2017 for the Victims of the Khmer Rouge Regime 1975–1979," 2013, <http://vss.eccc.gov.kh/images/stories/2014/Reparation.pdf>

15 Terith Chy, *When the Criminal Laughs*, Phnom Penh: Documentation Center of Cambodia, 2014.

16 Yim Charline, "Scope of Victim Participation before the ICC and the ECCC", Memorandum, Phnom Penh: Documentation Center of Cambodia, 2011, http://www.dccam.org/Abouts/Intern/ECCC_ICC_Victim_Participation_C_Yim.pdf

17 Victims Support Section and Civil Party Lead Co-Lawyers of the ECCC, "ECCC Reparation Program 2013–2017 for the Victims of the Khmer Rouge Regime 1975–1979," 2013, <http://vss.eccc.gov.kh/images/stories/2014/Reparation.pdf>

18 Ibid.

19 Ibid.

20 Savina Sirik, Kunthy Seng, Pechet Men, "Museum of Memory: Promoting Healing in Cambodia through History, Culture and Arts", in Sandra Dudley, Kylie Message (Eds.), "Museum Worlds: Advances in Research", *Berghahn Journals*, Vol. 2, 2014.

21 In addition to memorials, about 196 Khmer Rouge prisons, 388 killing sites, and 20,000 mass graves have been recorded by the Mapping Project of the Documentation Center of Cambodia.

22 Ly Sok-Kheang, "Remember 17 April", in *Searching for the Truth Magazine*, First Quarter, Phnom Penh: Documentation Center of Cambodia, 2012.

a shared victimhood among the survivors, which in turn helps alleviate society, restore victims' dignity and honor, and allow them to come to terms with the past.²³

RESTORATION OF CULTURE AND ARTS

Culture and the arts play a vital role in building peace and reconciliation in a post conflict society,²⁴ although very few efforts have been made to deal with the past trauma in the form of culture and the arts, since the justice process has been the dominant topic for Cambodian and international communities. The arts can contribute to the healing of past painful memories by bringing people and society together to understand its history and learn from past mistakes, and thus, be able to move forward and reconcile the past. However, very few such efforts have been formalized and acknowledged at the national level.²⁵

Presumably, the song "Oh, Phnom Penh", which was composed and written in 1979 about the sorrow of Cambodian people during the Khmer Rouge regime, and the love for Phnom Penh, the city from where the Khmer Rouge had evacuated its residents to do forced labor in the countryside, has been the only healing song for the Khmer Rouge survivors to commemorate the past.²⁶

Apart from the song "Oh, Phnom Penh", the play *"Breaking the Silence"*, produced by the Amrita Performing Arts, is among the few artistic efforts to promote dialogue as part of the reconciliation process.²⁷

GENOCIDE EDUCATION IN CAMBODIA²⁸

Shortly after the Khmer Rouge regime collapsed, the effort to bring the Khmer Rouge history into formal classroom has been very minimal, given political sensitivity and instability of the country. It took almost 28 years before the Khmer Rouge history textbook "A History of Democratic Kampuchea (1975–1979)" was published in 2007, and a few years later in 2009, the Teacher's Guidebook: The Teaching of "A History of Democratic Kampuchea (1975–1979)" came into existence.²⁹

Since then, there have been more efforts to document and disseminate what happened during the Khmer Rouge to Cambodia's younger generation. One such effort was the development of a smart-device mobile application for learning the Khmer Rouge history.³⁰

PSYCHOLOGICAL SUPPORT

The experiences during the Khmer Rouge regime have depressed Cambodian society and the survivors. A number of studies have estimated that millions of Cambodians have suffered from trauma related illnesses as a result of the Khmer Rouge regime.³¹

In an effort to provide psychological support in regard to mental health, Transcultural Psychosocial Organization (TPO Cambodia), Cambodia's leading NGO in the field of mental health care and psychosocial support, has provided mental health care and support to more than 200,000 Cambodians since 1995, in collaboration with both governmental and non-governmental institutions (TPO Cambodia).

While access to psychological and psycho-social rehabilitation is crucial, mental healthcare in Cambodia is still inadequate to address the needs of the people.³² The number of psychiatrists – 26 of them – cannot fulfill the needs of the Cambodian

population. Thus, the Cambodian government needs to allocate more resources, both finance and human resources, to increase awareness to the issue, and facilitate coordination among various players in the field in order to address the issue, properly and adequately.³³

In conclusion, substantial efforts have been made by both state and non-state actors in order to rehabilitate victims of the Khmer Rouge regime, and socially to restore people's dignity, honor, and to achieve reconciliation; and thus, those efforts should be continued and improved.

ORGANIZATIONS OF FORMER VICTIMS

DOCUMENTATION CENTER OF CAMBODIA (DC-CAM)³⁴

DC-Cam is an autonomous Cambodian research institute that records and preserves the history of the Khmer Rouge regime for future generations. Link: www.dccam.org

ANLONG VENG PEACE CENTER³⁵

The Anlong Veng Peace Center is dedicated to memory, reconciliation, and peace building, and it achieves these objectives through peace studies and genocide education. Link: <http://www.d.dccam.org/Projects/AVPC/avpc.htm>

23 Ly Sok-Kheang, *Reconciliation Process in Cambodia: 1979–2007 before the Khmer Rouge Tribunal*, Phnom Penh: Documentation Center of Cambodia, 2017.

24 Youk Chhang, "Restoring Cambodian Community and Way of Life: Breaking the Silence", in *Searching for the Truth Magazine*, First Quarter, Phnom Penh: Documentation Center of Cambodia, 2010.

25 Savina Sirik, Kunthy Seng, Pechet Men, "Museum of Memory: Promoting Healing in Cambodia through History, Culture and Arts", in Sandra Dudley, Kylie Message (Eds.), "Museum Worlds: Advances in Research", *Berghahn Journals*, Vol. 2, 2014.

26 Ibid.

27 Ibid.

28 Please see the chapter by Savina Sirik entitled "Education and Preservation of Sites of Conscience" for further details on Genocide Education in Cambodia.

29 Kamboly Dy, *Genocide Education in Cambodia: Local Initiatives, Global connections*, Rutgers University, PhD Dissertation, 2015

30 Rayna Stackhouse, "Khmer Rouge History Phone App to Educate Cambodian Youth", in *The Cambodia Daily*, August 29, 2016.

31 Beth Van Schaack, Daryn Reicherter, Youk Chhang, (Eds.), *Cambodia's Hidden Scars: Trauma Psychology and the Extraordinary Chambers in the Courts of Cambodia*, Phnom Penh: Documentation Center of Cambodia, 2nd Edition, 2016.

32 The Human Rights in Trauma Mental Health Laboratory, "The Mental Health Outcomes Resulting From Crimes Committed by the Khmer Rouge Regime", Stanford University Department of Psychiatry and Behavioral Sciences, Stanford University School of Medicine for Draft Submission to the ECCC in Case 002/02, in Beth Van Schaack, Daryn Reicherter, Youk Chhang, (Eds.), *Cambodia's Hidden Scars: Trauma Psychology and the Extraordinary Chambers in the Courts of Cambodia*, Phnom Penh: Documentation Center of Cambodia, 2nd Edition, 2016.

33 Beth Van Schaack, Daryn Reicherter, Youk Chhang, (Eds.), *Cambodia's Hidden Scars: Trauma Psychology and the Extraordinary Chambers in the Courts of Cambodia*, Phnom Penh: Documentation Center of Cambodia, 2nd Edition, 2016.

34 Please see the chapter by Savina Sirik entitled "Education and Preservation of Sites of Conscience" for further details on Documentation Center of Cambodia.

35 Please see the chapter by Savina Sirik entitled "Education and Preservation of Sites of Conscience" for further details on Anlong Veng Peace Center.

VICTIMS SUPPORT SECTION OF THE ECCC

The Victims Support Section (VSS) was established to support the ECCC by assisting Victims who want to participate in the proceedings. The VSS is the central contact point between the ECCC and Victims or their representatives. The VSS aims to facilitate the effective participation of Victims in the proceedings. This consists of processing complaints and applications of Victims who seek to exercise their right to participate. It also oversees that Victims have access to legal representation of a high quality. To that end, the VSS also provides legal and administrative support to the Civil Party lawyers. Finally, the VSS serves as a meeting place where all the actors involved in the proceedings that is the Victims, the Court members, the lawyers and intermediary organizations can gather and thus share their views for the most efficient representation of the Victims' interests. Link: <https://www.eccc.gov.kh/en/victims-support-section>

LEGAL DOCUMENTATION CENTER

Launched in 2017, the Legal Documentation Center houses legal and related documents from the ECCC's trial proceedings and serves as a place for the public, as well as national and international researchers, to explore topics pertaining to the trial of former senior leaders of the Khmer Rouge regime.

KDEI KARUNA

Kdei Karuna is a politically-neutral peacebuilding NGO aiming to contribute to sustainable peace efforts in Cambodia. Through an expertise in dialogue facilitation and sustained engagement with communities, Kdei Karuna encourages locally-driven approaches to address conflict, encourage mutual understanding, and promote healing. Link: <http://kdeikaruna-organization.squarespace.com>

TUOL SLENG GENOCIDE MUSEUM³⁶

The Tuol Sleng Genocide Museum is the memorial site of the S-21 interrogation and detention center of the Khmer Rouge regime. Tuol Sleng Genocide Museum aims to serve as a place of reflection and education by preserving and presenting evidence of the past prison system and keeping alive the memory of the Khmer Rouge Regime. Link: www.tuolsleng.gov.kh

TRANSCULTURAL PSYCHOSOCIAL ORGANIZATION (TPO)

TPO Cambodia is Cambodia's leading NGO in the field of mental health care and psychosocial support. TPO Cambodia was established in February 1995 as a branch of the Netherlands-based NGO 'TPO International' with the aim to alleviate psychological and mental health problems of Cambodians. In 2000, it was registered as an independent local NGO, 'TPO Cambodia,' run and staffed by Cambodians. Since its beginnings in 1995, TPO Cambodia has provided mental health care and support to more than 200,000 Cambodians. Link: www.tpocambodia.org

YOUTH FOR PEACE (YFP)

YFP is a Cambodian NGO that offers education in peace, leadership, conflict resolution, and reconciliation to Cambodian's youth. YFP aims to bring about a society of peace and social justice in Cambodia, through the development of good role models and active citizenship of youth who understand and practice a culture of peace. Through its program, YFP anticipates that youth are equipped with peacebuilding tools and skills and are empowered to be agents of social change, and civil society is challenged and impacted for change through education and awareness of peaceful solutions to problems of social injustice. Link: www.yfpcambodia.org

YOUTH RESOURCE DEVELOPMENT PROGRAM (YRDP)

YRDP envisions a society in which youth are empowered to exercise their civil and political rights as leaders for a peaceful, equitable and sustainable development in Cambodia. YRDP engages youth in the development of their critical thinking skills, empowers them to utilize their civil and political rights, and strengthens their social conscience for positive social action on behalf of their own future, family, community and country. YRDP anticipates that youth become committed and active citizens with a better quality of life through taking concrete initiatives and motivating others for the promotion of sustainable peace, justice, and a democratic society. Link: www.yrdp.org

BOPHANA AUDIOVISUAL RESOURCE CENTER

The Bophana Center acquires film, television, photography and sound archives on Cambodia from all around the world and gives free public access to this precious heritage. From the very beginning, the Bophana Center's main objective was to offer young Cambodians vocational training as well as professional support over the long run. Link: www.bophana.org

LESSONS LEARNT AND RECOMMENDATIONS

From Cambodian experiences, rehabilitation of victims of the past traumatic events, like the Khmer Rouge Genocide, has been accomplished in both a legal and a social framework, and both components should not be left out of the process.

Though a legal framework, for some reasons, did not take place soon enough after the fall of the Khmer Rouge regime, it is still important in the rehabilitation process, for it acknowledges the serious crimes committed in the past, ends impunity, and provides justice for the victims.

Additionally, while the Cambodian government initiated a social framework and her people have played significant roles in restoring Cambodian society, relationships, dignity, culture and arts, education, and reconciliation, it is advised that imitation of any activities might not work in other countries. Local, cultural and religious context should be placed into consideration before designing any activities.

³⁶ Please see the chapter by Savina Sirik entitled "Education and Preservation of Sites of Conscience" for further details on Tuol Sleng Genocide Museum.

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EDUCATION AND PRESERVATION OF SITES OF CONSCIENCE

SAVINA SIRIK

MEMORIALIZATION OF THE DIFFICULT PAST

Memorialization has been a prominent practice in societies emerging from war, genocide and mass atrocities. The use of memorialization as a tool to unite state subjects is especially evident in transitional states. However, memorialization practices can be very politicized. For example, one can regard memorials as sites of power struggle; where power relations interplay and different actors are involved in the process.

Memorials have often been constructed in order to produce a collective memory. Given that memorials are important symbolic sites in the articulation of nation-statehood, the decision to commemorate or dismiss the past is frequently made by individuals or institutions of authority or power. Indeed, many prominent memorials constitute official or state-sanctioned practices designed to promote a particular version of the past in an attempt to provide legitimacy for the present and future rule. This is especially true in the case of Cambodia, where sites of violence, including prisons and mass graves, were immediately converted to official memorials for genocide remembrance. Consequently, the public landscape has been used by the People's Republic of Kampuchea (PRK) government to serve the politics of memory, rightly observed by Dwyer and Alderman, that "historical representation is not only a product of social power but also a tool or resource for achieving it."¹ Therefore, commemoration and education of past atrocities is often linked to the construction of national narratives and memories that serve the state interest in enforcing state legitimacy and political power.

These processes have suppressed personal memories for a long time. However, this has begun to change in the context of Cambodia. Recent initiatives by local civil society organizations have supported and promoted processes through which individual accounts and experiences of survivors have been brought to the fore. Memorials and history education have increasingly included personal accounts into their content and structure, providing individual voices and spaces for survivors to get involved in the process. Thus, the process of remembrance of past atrocities have gradually moved from state-sponsored to local-driven initiatives, with support from civil society organizations, who are important actors in the transitional process.

MEMORY INSTITUTIONS

Immediately after the fall of the Democratic Kampuchea (DK) regime in 1979, a new state, the People's Republic of Kampuchea (PRK) was announced. This new government faced significant challenges in the reconstruction of the country, as there was scarcely an adequate infrastructure remaining. Despite these challenges, the most important task for PRK leaders was to initiate a political agenda to justify its invasion of the DK regime,

and thus legitimize its right to exist. The PRK realized a political opportunity through recognition of the landscapes of violence left behind by the DK regime. This landscape of violence provided evidence of the crimes committed against Cambodians by the Khmer Rouge government. Thus, in the early period of their occupation, the PRK began memorializing past violence through the transformation of sites of violence into memorials of memory.

One of the first major memorial initiatives was the transformation of two significant sites of the violence perpetrated by the DK state: the S-21 Khmer Rouge prison and the killing fields and mass graves at Choeung Ek. The PRK government saw a new opportunity in legitimizing the regime through establishing official narratives. As David Chandler argues, memories of the DK period and what was written about it were channeled by the new regime to suit the 'demonizing' policies favored by the regime.² Among the sites of violence left behind by the Khmer Rouge, the PRK quickly memorialized the two prominent sites mentioned above, and several other local prisons and mass grave sites. The S-21 Prison was transformed into the Tuol Sleng Genocide Museum; the killing fields and mass graves at Choeung Ek became a memorial site. Ultimately, the PRK used these two places as major landmarks, and 80 other local memorials, to convey the national narrative for remembrance and memorialization of "genocide".

TUOL SLENG GENOCIDE MUSEUM

Before the DK regime, Tuol Sleng had been a high school in the inner city of Phnom Penh. The Khmer Rouge converted it into a security center designated as 'S-21' – a facility utilized by Khmer Rouge security forces for imprisonment, torture and interrogation. David Chandler has extensively examined the role and function of S-21 and notes that the facility functioned as a place of incarceration, investigation, punishment and counterespionage.³ During its existence from 1976 to 1979, Chandler estimates that the prison processed approximately 14,000 prisoners.⁴ Approximately 300 people are known to have survived the prison.⁵ Soon after Phnom Penh was captured by Vietnamese forces and

1 Owen J. Dwyer, Derek H. Alderman, "Memorial landscapes: analytic questions and metaphors", in *GeoJournal*, 2008, (73), 3, 171.

2 David Chandler, "Cambodia deals with its past: Collective memory, demonisation and induced amnesia", in *Totalitarian Movements and Political Religions*, 2008, (9), 2–3, 358.

3 David Chandler, *Voices from S-21: Terror and history in Pol Pot's secret prison*, University of California Press, 1999, 15.

4 Ibid., 36. The Extraordinary Chambers in the Courts of Cambodia (ECCC) provides an update list of S-21 prisoners with a total of 12,272 victims based on the documentary evidence available to the court.

5 Dacil Keo, Nean Yin, *Fact Sheet*, Phnom Penh: Documentation Center of Cambodia, 2011.

the National Salvation United Front, S-21 was discovered by two Vietnamese journalists who had been accompanying the troops, and were drawn to the site by the smell of decomposing bodies.⁶ The journalists took photographs of the bodies remaining in all of the interrogation rooms; some of those photos are now exhibited throughout the Tuol Sleng Museum. A few days after the initial discovery of the prison, vast stacks of documents – including thousands of pages of documented confessions, mug-shot photographs, and notebooks of cadres – were found in the S-21 compound.⁷

Realizing the importance and potential propaganda value of these discoveries, the PRK government officials proceeded to have the documents organized and archived, and to convert the site into a museum. Mai Lam, who had extensive experience in legal studies and museology, arrived in Phnom Penh in March 1979 to lead the transformation of the site into an internationally-recognized museum of genocide.⁸ A couple of weeks after the renovation of the site, the museum hosted its first group of foreign visitors. As asserted in PRK documentation, “the site was intended primarily to show... international guests the cruel torture committed by the traitors against the Khmer people.”⁹ By January 25 – a mere two weeks after the “discovery” of Tuol Sleng – a group of journalists from socialist countries was invited; these were the first official visitors to Tuol Sleng.¹⁰ The museum was officially opened to the public in July 1980. Local Cambodians were transported from various places throughout the country to visit the museum and learn about the crimes against humanity, as well as other crimes committed by the Khmer Rouge. Cambodians were indoctrinated by the PRK government with such political messages to justify the government’s legitimacy and to promote a reliance on the PRK, thus preventing the return to power of the Khmer Rouge. Prominently featured throughout the curation of S-21 were clear messages of legitimacy; in addition to this display, exposed display of skulls and bones were featured at the Choeung Ek mass graves site. Displays in the museum feature mug shots of victims and Khmer Rouge cadres, graphic images of torture and the corpses of prisoners, and a map of Cambodia depicted in skulls and bones which was later removed from the exhibition due to controversies around skull display.¹¹ Through these images, the curator intended to establish a connection between the DK regime and the atrocious crimes that took place at S-21 and Choeung Ek.

In March 2015, a Memorial to the Victims of the DK regime was unveiled inside Tuol Sleng, dedicated to the victims of the DK regime, especially to the 14,000 victims who were detained and executed at S-21 prison, and the Choeung Ek killing site. The memorial, designed and erected by Cambodia’s Ministry of Culture and Fine Arts,¹² replaced an old stupa memorial that was built in the 1980s, and destroyed by a storm in 2008. While the memorial was warmly welcomed, the inscription of the names of the victims of S-21 prompted debate over whether the inscribed names represent victims or perpetrators.¹³ Given that the majority of the victims at S-21 had been former Khmer Rouge cadres, survivors and academics were concerned that the name inscriptions would offend other victims and their surviving families.¹⁴ The Extraordinary Chambers in the Courts of Cambodia (ECCC) approved the memorial project as symbolic reparation for the victims and survivors of the Khmer Rouge regime in ECCC’s Case 001 against the S-21 prison chief, Kaing Guek Eav or Duch.

CHOEUNG EK MEMORIAL CENTER

The history of the Tuol Sleng Genocide Museum is directly linked to the killing fields of Choeung Ek, located approximately 15 kilometers southwest of Phnom Penh. The mass graves at Choeung Ek were selected for excavation, also under Mai Lam’s supervision. Over 9,000 bodies were exhumed from the graves and initially placed in a wooden structure, which was later replaced with a monumental memorial stupa made of concrete and glass, built in the style of a Khmer Buddhist stupa. The memorial was inaugurated and opened to visitors in 1988. The excavated pits were left exposed, forming open-air exhibitions with signs attesting to the horrific activities that took place on that landscape. Along with the Tuol Sleng Museum, the Choeung Ek Memorial reinforced the political message of the PRK in condemning the genocidal crimes committed by the Khmer Rouge. Due to the lack of background information on the site, a museum was later built and opened to the public to provide additional information and historical context on the Khmer Rouge regime. Audio tours containing a history of the site as well as personal stories of victims and former Khmer Rouge guards were added to the site. In addition, public ceremonies are held annually at the memorial site to celebrate the May 20 day of remembrance. The site still represents the official narrative of the genocide, which occurred during the DK regime.

LOCAL MEMORIALS

While sites such as Tuol Sleng and Choeung Ek provide visible evidence of memorialization, many other sites of violence have scarcely been memorialized. Only about 81 sites of the innumerable documented sites of mass violence that are widespread throughout the country, including 196 security prison sites, 300 burial sites, and 200,000 mass graves,¹⁵ have been memorialized. Hundreds of other burial sites and labor camps stand as silent testimony to the pervasive violence, which took place in Cambodia. These sites constitute unmarked, violent landscapes, identifiable only by local residents, and remain invisible to visitors who merely pass by the area. This is especially true for members of the younger generation who were born after

6 David Chandler, *Voices from S-21: Terror and history in Pol Pot’s secret prison*, University of California Press, 1999, 2.

7 Ibid., 3.

8 Ibid., 4.

9 Ibid., 8.

10 Ibid., 4.

11 See the discussion in Wynne Cougill, “Buddhist cremation traditions for the dead and the need to preserve forensic evidence in Cambodia”, Documentation Center of Cambodia, http://www.dccam.org/Projects/Maps/Buddhist_Cremation_Traditions.htm

12 “Inauguration of the Memorial to Victims of the Democratic Kampuchea Regime at Tuol Sleng Genocide Museum”, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, 26 March 2015, <http://giz-cambodia.com/inauguration-of-the-memorial-to-victims-of-the-democratic-kampuchea-regime-at-tuol-sleng-genocide-museum/>

13 Poppy McPherson, “Memorial plan prompts debate about victims and perpetrators of genocide”, in *The Phnom Penh Post*, 9 May 2014, <https://www.phnompenhpost.com/7days/memorial-plan-prompts-debate-about-victims-and-perpetrators-genocide>

14 Ibid.

15 Documentation Center of Cambodia (DC-Cam), *Mapping Report*, unpublished report, 1998.

the atrocities. The potential for these sites to become memorialized or representative of past violence have largely been associated with the politics of memory, which have been employed as a tool to justify the political regime. Most local memorial sites have decayed over time since they have not been properly taken care of. A few of them are maintained and developed into community learning centers.

WAT SAMROUNG KNONG, BATTAMBANG

Following the consultation process on memory initiatives in 2009, Youth for Peace (YFP)¹⁶ – a local organization, based in Phnom Penh, working to promote peace and social justice through youth development – started a memory project at Samroung Knong commune, Battambang province. A community memorial committee was established and a vocational training program was developed. Funded by a Swiss Agency for Development and Cooperation through the Victims Support Section of the ECCC, the Samroung Knong Community Peace Learning Center was built, with the purpose of preserving the mass grave site in Wat (Buddhist Temple) Samroung Knong, for its rich history and transforming it into a place where intergenerational dialogue and peace education can take place.¹⁷ Wat Samroung Knong was turned into a prison by the Khmer Rouge. The majority of prisoners were former soldiers, government officials of the Lon Nol regime and their families and relatives. In 1980, approximately a hundred mass graves were excavated to recover victims' remains.¹⁸

In 2015, the Community Peace Learning Centre was in the process of developing an information center, so that the community could access information and participate in the key activities of the Center. Some of these activities include public forums, vocational training programs for youth (such as computer training courses), film screening, radio programs, religious festivals, fundraising and documenting historic cities.¹⁹ The Peace Learning Center has been approved by the ECCC as symbolic reparation for victims and survivors of the Khmer Rouge regime in the Case 002/01 against Khieu Samphan and Nuon Chea.

GENOCIDE EDUCATION AFTER THE KHMER ROUGE REGIME

The education system and infrastructure were revived and rehabilitated after the fall of the Khmer Rouge regime. Under the PRK government, the Khmer Rouge history education was integrated into political education, which emphasized the importance of socialism and civic revolution. Khmer Rouge history was subsequently developed and taught to promote a political agenda and ideology to which the PRK subscribed.²⁰ The school curricula outlined political contents that condemned the Khmer Rouge's brutal violence, while praising the revolutionary figures, who liberated the country from the Khmer Rouge's occupation. The textbook content, at the time, included language that provoked anger and vengeance toward the Khmer Rouge leaders including phrases such as "Pol Pot-Ieng Sary-Khieu Samphan genocidal cliques" or "KR genocidal massacres of innocent people."²¹ Consequently, such political propaganda was emphasized and utilized as a tool to maintain the political survival and legitimacy of the state.²²

From 1993 to the early 2000s, the contents of Khmer Rouge history became marginalized and at times disappeared from

the textbook. During this period, Cambodia faced continued challenges in resolving its internal political conflict and building peace and reconciliation. Even so, politics continued to dictate Cambodian history content to the extent that the Khmer Rouge history was kept silent or marginalized. When the curriculum and teaching materials were being revised, the content on Khmer Rouge atrocities were not prioritized. During the academic year of 2000 and 2001, social studies textbook for grade 9 and 12, for example, was revised to include a modern history of Cambodia from 1953 to 1998 with a brief narration of the Khmer Rouge regime, which did not provide a clear account of what had happened or allow for a critical or in-depth understanding of the historical events at that time.²³ Also, in the middle of academic year of 2002, the government withdrew the social studies textbook from the curriculum. The textbook did not return until 2011.²⁴ Thus, the national interests in teaching Khmer Rouge history during that time slowly decreased and the Khmer Rouge history content became marginalized due to internal political conflicts and efforts to integrate different political fractions into society.

Nonetheless, increased international interests and influences in the concepts of human rights and genocide in Cambodia during the transitional period contributed to the reconstruction Khmer Rouge history education, and development of a local genocide education initiative.²⁵ The works of NGOs, the flow of human rights concepts, and the global influence of Holocaust education became one of the driving forces for the emergence of a local genocide education. Local NGOs that devote their work to promoting democracy and human rights in the country stepped up and worked in collaboration with the government to develop genocide education. Among local civil society organizations, the Documentation Center of Cambodia (DC-Cam) took the initiative in establishing Cambodian genocide education, particularly developing the Khmer Rouge history content for the secondary high school level. DC-Cam has worked in collaboration with the Ministry of Education to provide formal education on the Khmer Rouge history for young people. This effort represents one among many local initiatives to formalize Khmer Rouge history education through the formal education system.

DOCUMENTATION CENTER OF CAMBODIA (DC-CAM)²⁶

Established in 1995 as a field office of Yale University's Cambodian Genocide Program to facilitate field research on the Khmer Rouge's crimes in Cambodia, DC-Cam became an independent research institute in 1997. DC-Cam has collected, catalogued, and disseminated information on the DK regime to survivors, researchers, students, and the general public. Its archive stores a million pages of Khmer Rouge documents, photographs, interviews, and physical evidence of the genocide. The documentary

16 See Youth for Peace, <http://www.yfpcambodia.org/>

17 Ibid.

18 Documentation Center of Cambodia (DC-Cam), *Mapping Report*, unpublished report, 1998.

19 Youth for Peace, <http://www.yfpcambodia.org/>

20 Khamboly Dy, *Genocide Education in Cambodia: Local Initiatives, Global connections*, Rutgers University, PhD Dissertation, 2015, 143.

21 Ibid., 97.

22 Ibid., 144.

23 Ibid., 163.

24 Ibid., 166.

25 Ibid.

26 See Documentation Center of Cambodia, <http://d.dccam.org/>

collections held by the Center have informed much of the preparation for the prosecution cases against the former Khmer Rouge leaders in trials underway at the Extraordinary Chambers in the Courts of Cambodia.

DC-Cam has played an important role in the dissemination of Khmer Rouge history education to the public. It has made a significant effort to educate the public about the Khmer Rouge regime through outreach, public education forums, exhibitions, and genocide education programs. As part of the genocide education program, DC-Cam published a textbook, in 2007, entitled *A History of Democratic Kampuchea 1975–1979*, and distributed hundreds of thousand copies to all secondary high schools throughout the country. In addition, the Center has integrated the textbook and the lessons of the Khmer Rouge regime into the formal curriculum at the secondary high school level and provided training to all history and social science high school teachers.²⁷ The integration of Khmer Rouge history in the formal curriculum has become a major initiative in institutionalizing genocide education in Cambodia's education system. In addition to these efforts, DC-Cam has also initiated other memory and education efforts through establishing of two institutions: Sleuk Rith Institute and Anlong Veng Peace Center.

SLEUK RITH INSTITUTE²⁸

The Sleuk Rith Institute is intended to be a permanent site for DC-Cam. SRI aims to preserve the memory of the Khmer Rouge genocide, provide a sense of justice, and contribute to the healing of Cambodian society. SRI plans to expand its archival core by incorporating a genocide museum, a research center, and a school of genocide, conflict, and human rights into an integrated research institute focused on the studies of human rights and sustainable development. The project is supported by an architectural partner of the renowned London bureau, the Iraqi-born architect Zaha Hadid. She calls her design a structure of hell, earth, and heaven, tracing the hoped-for progression from the silence of the present generation of Cambodians about their unthinkable past, to a future of openness and vitality. The new SRI building, to be established alongside a respected and still functioning high school in central Phnom Penh, is intended to support deeper research into the past atrocity and to disseminate information through the country's educational system.

The Sleuk Rith Institute also plans activities and events at the heart of the capital, which will promote healing through cultural revival and celebration. The SRI plans to incorporate into its programs the issues of culture, history, gender, and environment. In addition, SRI plans to present to the future generations of Cambodians and global tourists the ways in which Cambodian survivors and their children may strive to deal with the horrendous tragedy through acts of commemoration and genocide education.

ANLONG VENG PEACE CENTER ²⁹

Situated in Anlong Veng district, the last stronghold of the Khmer Rouge regime, the Anlong Veng Peace Center is a new initiative of the Documentation Center of Cambodia. Created in 2014, the Peace Center aims to achieve memory, reconciliation, and peacebuilding through peace studies, genocide education, and sustainable tourism. Peace studies and genocide education represent the Center's efforts in promoting a critical understanding

of different forms of violence, conflict resolutions, and root causes of what happened under the Khmer Rouge regime. Guided tours to historical sites and meetings with local community members provide space for interactive discussions and shared understanding of individual stories. These concerted efforts are critical to peacebuilding, education, and rule of law in the country.

Using the Center's core approach of historical empathy, key activities that have been conducted at the Peace Center include a variety of educational and tourism related programs that help preserve the oral and physical history of the region, as well as building peace and reconciliation between generations and across society.³⁰ In order to achieve the stated objectives, the Center works in close collaboration with the local community, schools, and tourism officials in order to implement these activities. In addition to providing an understanding of the past, its main activities also involve providing guided tours of historical sites, conversations between local community members and students, as well as developing a curriculum that utilizes individual stories to promote an understanding of different human experiences.

LESSONS LEARNT AND RECOMMENDATIONS

In addition to memorialization at the state level, such as the construction of the major memorial sites of Tuol Sleng Genocide Museum and Choeung Ek Memorial Center, memorialization has emerged from the concerted effort of local civil society organization and local communities, which is essential in the larger process of memory construction, peacebuilding and reconciliation in Cambodia. As discussed above, the preservation and development of historical sites such as Wat Samroung Knong and Anlong Veng, initiated by YFP and DC-Cam, in collaboration with local communities and other stakeholders, can contribute to promoting local ownership of the process of establishing historical truth, reconciliation, and bridging the generational divide. On the one hand, memorial sites serve as significant means through which to commemorate victims of atrocities and preserving memories of the past; on the other hand, providing history education of past atrocities to the younger generation and engaging them in the processes of memory preservation are critical to processes of building peace and democracy in post-conflict societies.

Furthermore, creating fair history content on a difficult past requires political commitment and support from a variety of actors, including domestic and international actors. Historical content can only provide an accurate historical account to young people, if it is created and developed based on scientific research. Such a difficult history should be delivered to the younger generation in such a way that helps promote harmony, empathy, reconciliation, and critical thinking, rather than serving as a propaganda tool to achieve a certain political aim. Cambodian genocide education must go through many years of turbulence and political

27 For further details see "Genocide education 2004–present", http://d.dccam.org/Projects/Genocide/Genocide_Education.htm

28 See The Sleuk Rith Institute, <http://www.cambodiasri.org/>

29 See Anlong Veng Peace Center, <http://d.dccam.org/Projects/AVPC/avpc.htm>

30 Ibid.

controversy, before it can begin to establish historical content that is more objective and scientific. This is just the beginning of a long journey toward peace and reconciliation that Cambodia has to make.

What we can learn from the Cambodian experiences is that local actors who initiate and develop local genocide education program, formally or informally, could benefit from working with various actors at multiple levels to provide legitimacy and effectiveness to the processes. These actors may be formal or non-formal, global or regional, state or local. More importantly, working with a variety of actors will help improve the capability

of local implementers and to balance the dominant power of the authorities or political elites. Furthermore, the institutionalization of genocide education will be complemented by other transitional mechanisms, whether they are formal or informal efforts (such as criminal prosecution and memorialization), to educate younger generations about the past. Developing public education to teach children about the Khmer Rouge regime is well resonated among survivors of the atrocities, many of whom are mainly concerned that their children will not receive a proper education about their horrendous past, and thus fail to acknowledge their sufferings.

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- Youth for Peace: <http://www.yfpcambodia.org/>

TIMELINE OF THE MAJOR EVENTS

BERND SCHAEFER

1950	Cambodian communists join forces with Vietnamese against French colonialism
November 9, 1953	Cambodia declares its independence from France
1954	Geneva Conference: France withdraws from all of Indochina
1954–70	Kingdom of Cambodia under Prince, from 1955 Prime Minister Norodom Sihanouk
March 18, 1970	Coup against Prime Minister Norodom Sihanouk
1970–75	The Khmer Republic, General Lon Nol as President; Sihanouk, in exile in China, forms exile government with Cambodian communists ('Khmer Rouge'/KR).
April 17, 1975	KR forces led by Pol Pot defeat Lon Nol army and take the capital Phnom Penh
1975–79	Democratic Kampuchea (DK)
October 1975	Sihanouk returns to Cambodia, nominal Head of State, disappears in house arrest soon after
1976	DK Government is announced with Khieu Samphan as Head of State and Pol Pot as Prime Minister and Secretary-General of the Communist Party of Kampuchea (CPK)
1977	Cambodia launches military attacks across all three of its borders in Thailand, Vietnam, and Laos
1978	Vietnam fights back, occupies Cambodian territory, fully withdraws by March, but returns with full force in December 1978 and defeats Pol Pot forces by January 1979
1979–1989	People's Republic of Kampuchea (PRK) Heng Samrin President; Prime Ministers Pen Sovan (until 1981), Chan Sy (until 1984), Hun Sen (since 1985)
1989–1993	State of Cambodia (SOC), Hun Sen Prime Minister
1989	First Paris Conference with Cambodian government and opposition factions fails. Vietnamese troops withdraw from Cambodia by December
1990	Formation of the Supreme National Council (SNC), composed of six SOC members and two from each of the three opposition factions, including former DK President Khieu Samphan
October 23, 1991	Paris Agreement on Cambodia signed by all four Cambodian factions and eighteen Foreign Ministers of interested countries
May 23 and 28, 1993	General elections with 90 % turnout, boycotted by KR. Coalition government formed with a First and Second Prime Minister: Prince Norodom Ranariddh (FUNCINPEC Party) with 45.5 % and 58 seats and Hun Sen (Cambodian People's Party/CPP) with 38.2 % and 51 seats
1993 to the Present	Kingdom of Cambodia
June 1993	Norodom Sihanouk becomes Head of State, on 23 September King of Cambodia
1994	KR movement outlawed by Cambodia's National Assembly.
1997/98	Turmoil within KR, defections and struggles, Pol Pot dies in 1998. KR dissolve
July 1997	Power struggle within government, Hun Sen and CPP oust Prince Ranariddh and his allies in a coup, Hun Sen the only Prime Minister, Ranariddh in exile
July 26, 1998	National Assembly Election, CCP gets 41.4 % of vote and 64 seats, FUNCINPEC 31.7 % and 43 seats, the Sam Rainsy Party (SRP) 14.3 % and 15 seats, Hun Sen Prime Minister
July 27, 2003	National Assembly Election, CCP gets 47.3 % of vote and 73 seats, FUNCINPEC 20.7 % and 26 seats, the SRP 21.9 % and 24 seats, Hun Sen Prime Minister
July 27, 2008	National Assembly Election, CCP gets 58.1 % of vote and 90 seats, SRP 21.9 % and 26 seats, Hun Sen Prime Minister
July 28, 2013	National Assembly Election, CCP gets 48.8 % of vote and 68 seats, opposition Cambodian National Rescue Party (CNRP) 44.6 % and 55 seats, disputed election until compromise in July 2014, Hun Sen Prime Minister

June 4, 2017	CNRP wins 43.8 % in Cambodian communal elections with a 90 % turnout, a significant swing away from CPP and towards CNRP
November 16, 2017	Cambodian Constitutional Court bans and dissolves CNRP, its National Assembly seats are distributed to other parties, opposition leaders in exile or under arrest
July 27, 2018	CCP runs basically unopposed and wins 76.9 % of the vote and all 125 National Assembly seats, Hun Sen Prime Minister
November 16, 2018	The Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) sentences surviving KR leaders Nuon Chea and Khieu Samphan to life imprisonment in Case 002/02 for genocide, crimes against humanity and grave breaches of the Geneva Conventions of 1949

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MEMORY OF NATIONS

Democratic Transition Guide

[The Chilean Experience]



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AUTHORS

CATH COLLINS

Professor of Transitional Justice at Ulster University's Transitional Justice Institute since March 2013. Previously, Associate Professor of Politics at the Universidad Diego Portales, Chile, where she founded and still directs the Transitional Justice Observatory. Currently, she is involved in research and exchange between Northern Ireland and Latin America about the search for victims of disappearance. She teaches and supervises in Northern Ireland and Chile on Latin American politics, international criminal justice, human rights, and transitional justice.

MIREYA DÁVILA

Professor of History at the University of Chile.

CLAUDIO FUENTES S.

Professor at the School of Political Science at the Universidad Diego Portales, in Santiago, Chile. He is an Associated Researcher at the Centre for Intercultural and Indigenous Rights, and coordinates the Constitutional Laboratory at the Universidad Diego Portales. Among other books, he is the author of *La Erosión de la Democracia* (Catalonia, 2019), *Cuándo se Jodió Chile* (Catalonia 2016), and *El Pacto* (Universidad Diego Portales, 2013). As well as being a Luksic Fellow at Harvard University (2011).

BORIS HAU

Chilean lawyer and Senior Research Associate at the Transitional Justice Observatory of the Universidad Diego Portales,

Chile, specialising in issues of memory and public policy on human rights. Previously, he served as a researcher and testimony-taker for both iterations of Chile's second Truth Commission, the "Valech Commission", which documented cases of dictatorship-era political imprisonment and torture. Currently he teaches on a range of human rights related courses at Chile's Alberto Hurtado University

MARÍA LUISA ORTIZ

Head of the Collections and Research Department of the Museum of Memory and Human Rights of Chile (MMDH), since January 2010. From 1985 to 2001 she worked at the Corporation for the Promotion and Defence of the People's Rights (CODE-PU) in its Mental Health and Research and Documentation Programs. From 2002 to 2006, she worked as a documentarist in the Human Rights Program of the Ministry of the Interior. From 2006 to 2009 she was Advisor in Human Rights, Archives and Information in the Presidential Commission for Human Rights Policies, of Michelle Bachelet's government, joining in 2008, the Museum of Memory project team and responsible for the formation of its Collections.

DANIELA FUENTEALBA

Sociologist from the University of Arts and Social Sciences in Chile (ARCIS). She has been working on memory and human rights from 2004 to present. She is part of the organization Ciudad Elefante and has been working professionally for more than 10 years as an Archivist Researcher in the Collections and Research Department of the Museum of Memory and Human Rights. Her current projects include the direction of the research program Archivos de la Memoria, dedicated to rescuing the history of the defence of human rights during the dictatorship throughout the different regions of Chile, whose results are published every year and available in the Museum's web page.

OMAR SAGREDO MAZUELA

Professor at the School of Political Science at the University Academia de Humanismo Cristiano. Previously, he was Professor of Human Rights, Humanitarian Law and Transitions to Democracy at the University Academia de Humanismo Cristiano, University of Santiago, and the University Alberto Hurtado. Currently, he works at the site of memory Parque por la Paz Villa Grimaldi.

RODOLFO IBARRA

Social Worker and Researcher. Between 2010 and 2011 he worked in the "Presidential Advisory Commission for the Qualification of Disappeared Detainees, Political Executed and Victims of Political Prisoners and Torture". Since 2011 he joined the Collections and Research Department of the Museum of Memory and Human Rights. During the years 2015 and 2016, as part of the organization Colectivo Piso Piloto, he is a researcher for the Project Memorial of the Cuartel Lautaro, one of the dictatorship's extermination centre located in the commune of La Reina, Santiago.

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TRANSFORMATION OF THE POLITICAL SYSTEM

MIREYA DÁVILA

INTRODUCTION

This chapter deals with the main transformations of the Chilean political system during the transition from dictatorship to democracy at the beginning of the 1990s. The military dictatorship that ruled Chile for 17 years (1973–1990) introduced deep transformations in Chilean society that impacted on the transition process itself, as well as on the political system inaugurated in March 1990. The main changes introduced by the dictatorship included a new political Constitution and the introduction of pro-market reforms in the economic sphere, a change in the territorial organization of the country (with the creation of new administrative), a new binominal electoral system, reduced powers for Congress and therefore, a hyper-presidential system. These changes constituted the framework within which the political system has had to process subsequent political dynamics and conflicts over social, economic, and political change.

INITIAL CONDITIONS

The initial conditions of the transition process in Chile were influenced by the particular characteristics of the Chilean military dictatorship, including the nature of military rule, its long duration, and the transformations it introduced.

The Chilean military dictatorship began on September 11, 1973 with a coup. All three branches of the Armed Forces, plus the Carabineros (uniformed police) participated in the coup. The ensuing dictatorship, led by the Army, and its Commander-in-Chief, General Augusto Pinochet, was characterized by massive political and social repression. This included violation of the human rights of the population in general, and members of left-wing political parties in particular.¹ A new political order was centered on Pinochet, and founded on deep neo-liberal economic reforms.² Although the first military *junta* had four members (the heads of each of the three Armed Forces, plus the uniformed police) *de facto* powers of government soon came to be concentrated in the hands of Pinochet and the Army High Command. Economic management was meanwhile delegated to neo-liberal civilians (Varas, 2017). Pinochet simultaneously served as President of the Republic, President of the Government Junta (until 1980) and Commander-in-Chief of the Army. The Military Junta became the legislative branch of government.

The coup of September 1973 also meant the end of the institutions and organizations typical of a democracy. Congress was closed; the political parties that had made up the overthrown previous governments were banned,³ and other parties were obliged to go into recess; the electoral rolls were burned; press freedom was restricted and censorship was established; and public universities were intervened and radically modified. The trade union movement was persecuted.

During the 1970s, the dictatorship developed a strategy for political legitimization that sought to embed the authoritarian regime on a basis other than the previous one of fear. This strategy

embraced attempts to create historical legitimacy by deploying anti-Marxist and anti-Communist discourse to condemn the deposed socialist government of Salvador Allende (1970–73).⁴ It also sought legal and constitutional legitimization by imposing a vision of an authoritarian and protected democracy, and pursued economic legitimization based on the success of a new, neo-liberal, economic model.⁵

New rules of the political game were a fundamental part of the changes introduced during the dictatorship. The new institutional design was enshrined in the new, 1980, Constitution, which began to be implemented in 1981.⁶

A set of institutions established in this 1980 Constitution gave the Armed Forces an important role in the political order, and placed them in a privileged situation relative to other state organizations. Dispositions included dissolving civilian authorities' power to remove commanders-in-chief of the Armed Forces or internal security agencies; plus the creation of a National Security Council, an advisory body of the President of the Republic on national security matters, in whose decisionmaking the Armed Forces were to play an important role. In addition, the Constitution established a set of rules that favored a concept of so-called "protected democracy". This involved the creation of non-elected (designated) Senators, whose number was to include former commanders-in-chief of the armed forces and security services.⁷ Other aspects included the introduction of high quorums, designed to make any future reform of this Constitution and associated constitutional organic laws more difficult. A new, binominal, electoral system was also introduced. This tended, at least in the early years of its operation, to favor the political Right, who were political allies of the military and the dictatorship.

1 The Dictatorship had two agencies responsible for repression: the National Intelligence Directorate (Dirección Nacional de Inteligencia, DINA), created *de facto* in 1973 but formalized in 1974, and the National Information Center (Centro Nacional de Información, CNI), created in 1977 to replace the DINA.

2 Carlos Huneeus, Carlos Huneeus, *The Pinochet Regime*. Boulder: Lynne Rienner, 2007.

3 Outgoing parties that had formed part of the deposed Popular Unity government (Unidad Popular) were banned: Decree Law 77 of the Military Junta banned the Communist and Socialist parties, the Popular Socialist Union (*Unión Socialista Popular*), the Unitary Popular Action Movement (*Movimiento de Acción Popular Unitario*, MAPU), the Radical and Christian Left parties, Independent Popular Action, and "all organizations that promoted Marxism".

4 For more details see: Carlos Huneeus, *The Pinochet Regime*. Boulder: Lynne Rienner, 2007; Ricardo Ffrench-Davis, *Chile entre el Neoliberalismo y el Crecimiento con Equidad. Reformas y Políticas Económicas desde 1973*, Santiago: J-C.Sáez Editor, 2008.

5 The exception was the national copper company, CODELCO, which continued in the hands of the State.

6 It was ratified in a plebiscite in September 1980.

7 The Constitution of 1980 established the figure of designated senators, appointed by the President of the Republic. The categories of person eligible for these senatorships were: former presidents of the Republic; two former Supreme Court judges; a former comptroller-general of the Republic; former commanders-in-chief of the Armed Forces; a former rector of a state university; and a former Minister of State.

The design of the new political system also included new laws governing political parties and the electoral roll.

One of the singular features of the Chilean Dictatorship is undoubtedly the fact that it came to an end as a result of following its own institutional standards, as established in the Constitution of 1980. This set down regulations for a long transition period, with Article 25, for example, stipulating that, as of March 11, 1981, General Pinochet was to continue in office as President for at least eight more years, i.e. until March 1990. The transitory provisions established that the commanders-in-chief of the Armed Forces, plus the General Director of the Carabineros (i.e. the members of the military Junta) would then propose a new candidate, to be ratified or otherwise via a citizen plebiscite. This candidate, if ratified by the plebiscite, would occupy the position of President of the Republic in the subsequent presidential period, which was to run between March 1990 and March 1997. On August 30, 1988, the Governing Junta nominated Augusto Pinochet as their candidate for the plebiscite.

The plebiscite was duly held on October 5, 1988, after campaigns involving the regime and a now-tolerated political opposition. Against all odds, the “NO” vote won,⁸ with 55.99 % of the votes, to the 44.01 % obtained by the “YES” vote that would have confirmed Pinochet in the presidency for seven more years.⁹ Accordingly, Pinochet would continue only for another year, at which point – in 1989 – open presidential and parliamentary elections would be called.¹⁰

The plebiscite and subsequent electoral process were notable for the large size of voter turnout, are despite the years of dictatorship, fear and repression. For example, 7,435,913 citizens registered to vote in the plebiscite, a figure that represented 97.5 % of all citizens theoretically eligible to vote that year. This represented a first in the country’s history: never before had such a large percentage of eligible citizen actively registered to vote.¹¹

THE TRANSITION PROCESS

The Chilean Transition was an orderly process that occurred according to a timetable laid down by the dictatorship. The Army, and especially General Pinochet, retained control of the process due to the institutional power that was vested in them by the Constitution, combined with Pinochet’s by then unquestioned authority over the other branches of the Armed Forces and security services.

Despite the abundance of scholarship on the process of transitions from authoritarian to democratic regimes, there is no single agreed definition of “transition.”¹² In the case of Chile, the concept of transition (defined as the change from one political regime to another) is often applied to the period between October 5, 1988 and March 11, 1990, with the latter constituting the date on which the first democratically-elected government took power after 17 years of dictatorship. Following a similar logic, one might instead argue that Chilean electoral democracy fully restarted in March 1994, the date on which the second President elected in this new democratic cycle took power. Others feel, however, that the democratization process cannot yet be considered fully complete, as there has not yet – as of 2019 – been a process of creation of a new constitution, one that fully meets democratic standards and has been debated and approved by the country’s citizens.

However, we could date Chile’s transition as a process that was at least begun with the October 1988 plebiscite, and whose first stage lasted until March 1990, when Patricio Aylwin, leader of

the opposition, took office at the head of this first democratically-elected government since 1970.

The creation of a political opposition to the Chilean dictatorship had in itself been a lengthy and contested process. As far back as the early 1980s, a range of political groups attempted to constitute a cohesive opposition, capable of confronting Pinochet and recovering democratic rule. The opposition tendency that finally gained the ascendant was one that proposed accepting the rules of Pinochet’s game, i.e. the Constitution of 1980, and the schedule set down in it for a return to electoral democracy schedule. Other alternatives, including outright rejection of the 1980 Constitution and a strategy of taking up arms against the regime, did not in the end attract majority support. The political coalition that became the main official opposition to the dictatorship, demanding free elections, was mainly formed along an axis taking in Christian Democrats and a renewed group of Socialists. Broad international political support was decisive for strengthening this opposition movement. The role played towards the end of the regime by the US¹³ also helped in allowing the emergence of an effective political opposition, avoiding the danger of counter-reaction by regime forces seeking an excuse to cancel the plebiscite.

Once it became clear that the opposition had triumphed in the 1988 plebiscite, opposition parties began preparing to compete in the presidential and parliamentary elections of December 1989. A broad coalition was formed, the *Concertación de Partidos por la Democracia*, known as the *Concertación*. This coalition brought together Christian Democrats and Socialists,¹⁴ plus other groupings including the Radical Party (*Partido Radical*, PR), the newly-formed Party for Democracy (*Partido por la Democracia*, PPD) and 13 other parties.

The political right-wing, which had supported and defended the dictatorship, organized itself into two political parties for the 1989 presidential and parliamentary electoral campaign: the Independent Democratic Union (*Unión Demócrata Independiente*, UDI) and National Renewal (*Renovación Nacional*, RN).

Meanwhile, the military government devoted the time between October 1988 and March 1990 to creating a set of legal

8 “Estudio Nacional de Opinión Pública, Septiembre 1988”, Documento de Trabajo 1, Santiago: Centro de Estudios Públicos, 1988; Felipe González, Mounu Prem, “¿Por qué ganó el NO? La historia detrás de la historia”, Santiago: CIPER Chile, 2019, www.ciper.cl

9 In 1985, the Electoral Registration Tribunal (*Tribunal Calificador de Elecciones*, TRICEL) had been put into operation, and in 1986 the electoral register had been reopened.

10 Had the Yes (*Sí*) option triumphed in the plebiscite, the existing President of the Republic, i.e., Pinochet, would have taken office once more, with an additional eight year mandate.

11 “Plebiscito de 1988 marca el fin del régimen military”, www.bcn.cl At the time, Chile’s electoral system was based on voluntary registration.

12 Juan J. Linz, Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America and Post-communist Europe*, Baltimore: The Johns Hopkins University Press, 1996.

13 See: Report of the US Senate Investigation Commission on undercover actions in Chile, 1963–1973; Peter Kornbluh, “Desclasifican nuevas conversaciones entre Nixon y Kissinger para derrocar a Allende”, CIPER-Chile, 2008, <https://ciperchile.cl/2008/09/10/desclasifican-nuevas-conversaciones-entre-nixon-y-kissinger-para-derrocar-a-allende/>

14 During the dictatorship, Chilean socialism experienced a difficult process of division focused, among other things, on disputes about strategies to deal with the dictatorship. One important current underwent a process of ideological renewal that involved reconciling socialism with a commitment to liberal democracy. This was the tendency around which the Concertación was founded.

provisions that granted privileged positions to those who had been in power for seventeen years. Examples include the binominal electoral system, and a decree preventing 35,000 civil servants from subsequent dismissal. In addition, constitutional reforms carried out in 1989 boosted the autonomy of the Armed Forces by investing laws and regulations on issues such as military career structure, and the military budget, with constitutional rank. This protected existing favourable arrangements, by increasing the legislative quorum necessary for any subsequent reform.¹⁵ In the December 1989 elections, the opposition candidate, Patricio Aylwin, won with 55.7 % of the vote (against 29.4 % for the pro-military government candidate, Hernán Büchi). A second right-wing candidate, Francisco Javier Errázuriz, obtained 15.4 % of the vote).

The Congress that came into session in 1990 did so according to the new regulations established by the 1980 Constitution. Under these provisions, 120 lower house deputies and 38 senators were elected. The former would all serve for four years. Senatorial terms meanwhile differed according to the district that was represented: half would serve an eight year term, half, only four years. Nine designated (non-elected) Senators made up the full strength of the upper house. Ninety-five per cent of the country's 7,557,537 eligible citizens emitted a valid vote in the 1989 elections: a total of 7,158,422 votes. Overall, the Concertación obtained 51.49 % of the votes in the legislature, compared to 34.18 % of the right-wing. Considering the non-elected senators, the right nonetheless controlled 50 % of the upper house. The Christian Democratic Party was the major political force, with the Concertación overall obtaining 69 (of 120) elected deputies and 22 (of 38) elected Senate seats.¹⁶

The first administration of this first transition period lasted for four years (1990–1994), and was a transitional government in many senses of the term, including the need for careful handling of countervailing political tendencies in Chilean society if economic, political and social stability were to be achieved. The government promoted a set of socioeconomic policies aimed at increasing public resources for social policy targeting education, health, and the reduction of poverty.

In the sphere of human rights, Patricio Aylwin's government introduced a set of State policies in truth, memory, reparations, and justice. During his first term, President Aylwin created a truth commission, despite resistance not only from the right-wing and the Armed Forces, but also from some within his own coalition. The National Commission on Truth and Reconciliation – known as the Rettig Commission after its chairman, lawyer Raúl Rettig, was charged with establishing the historical truth about human rights violations, including the number of victims killed and forcibly disappeared during the Dictatorship. In 1991, President Aylwin informed the country of the Commission's results, apologizing to the country on behalf of the Chilean State and setting in motion the drawing up of reparations policies. Right-wing sectors and the Armed Forces sectors nonetheless rejected the report's conclusions. General Pinochet, who was to continue in his post as Commander-in-Chief of the Chilean Army between 1990 and March 1998, stated that: "The Chilean Army certainly sees no reason to apologize for having participated in this patriotic work." [i.e. the military regime] ... "[The Army solemnly declares that it will not accept being placed in the dock for having saved the freedom and sovereignty of the country, in compliance with the repeated requests of citizens."¹⁷

Military civil relations during these first years of transitional government could be described as a "tense calm". There were, however, two episodes that increased tension, making headlines and grabbing public attention. In the first episode, which became known as the "Pinocheques" case, Pinochet had the Army called to battle stations, in December 1990. The move was intended to send a signal to the government that a corruption case, in which one of Pinochet's sons was involved,¹⁸ should not be reopened before the courts. The second case, which occurred in 1993, came to be called "*el Boinazo*" (named for the black berets, or *boinas*, worn by troops). In May 1993, the newspaper *La Nación* reported that the case related to Pinochet's son, involving fraudulent checks, would be reopened. In response, Pinochet again pressured the government to ensure his son was not investigated. This time, Pinochet called other military officials to the Armed Forces headquarters – symbolically located directly in front of the Presidential palace – escorted by armed soldiers in combat dress.

The democratic electoral process was deepened, under the first transitional government, by the holding of mayoral elections (during the dictatorship, mayors had been directly appointed by Pinochet). The elections returned 334 municipal mayors and their respective town councils, made up of 6, 8 or 10 councillors, depending on the number of voters in each district. In these elections the Concertación again obtained a majority of votes cast, with the highest vote for a single party going to the Christian Democrats, who obtained almost 29 % of the votes.

March 1994, saw the accession of the second democratic administration elected since the Dictatorship, after scheduled elections in December 1993 saw Christian Democrat candidate Eduardo Frei Ruiz Tagle elected with 57.98 % of the votes, defeating both the the right-wing, and alternative, more left-wing, candidates fielded by other parties of the Concertación.

This first democratic election since transition marked the process of democratic consolidation in Chile. Although important areas of Chile's institutional and *de facto* power structure still remained unchanged since the dictatorship, democratic elections finally became the only possible way to formally gain power.

THE PRESENT-DAY POLITICAL SYSTEM

From the point of view of stability, the Chilean political system is secure. One requirement of democracy is successful alternation in power. The Concertación ruled for 20 years, between 1990 and 2010. In 2010, right-wing candidate Sebastián Piñera, was elected president. In 2014, a new version of the Concertación coalition took back government, this time with the inclusion of the Communist Party in the ruling coalition. In 2018, Sebastián Piñera was elected once again.

Although democracy is consolidated, some democratization processes remain pending. These include a new Constitution, and mechanisms allowing greater citizen participation in public

15 Claudio Fuentes, "Mirando el pasado, definiendo el futuro: Diseño Constitucional en Chile 1980 – 2005", Paper presented at the 28th Congress of the Latin American Studies Association, LASA, Rio de Janeiro, June 11–14, 2009.

16 www.bcn.cl

17 Minutes of a session of the National Security Council, held on March 21, 1991, www.latercera.com

18 Augusto Pinochet Hiriart

policy formation.¹⁹ As elsewhere, Chilean democracy has also had to contend with dwindling political participation, and a crisis of legitimacy of essential institutions of the democratic system, such as political parties and the legislature.

Between 1994 – the year in which the second democratically-elected government took office – and the present (2019), a range of important changes have affected issues that remained pending at and after transition. As has already been stated, Pinochet remained as Army Commander-in-Chief until March 1998. Upon retiring from that post he became a designated Senator, as laid down in the 1980 Constitution. However, his arrest in the UK in 1998 became a turning point for the balance of power, in terms of the transition and the sway that the Armed Forces and Pinochet continued to hold in Chilean society. The arrest, over allegations of human rights violations being investigated by a Spanish judge, led to extradition wrangling that was to last for a year and a half. While the incident at first generated an intense and polarized reaction in Chilean society, it ended up removing Pinochet from the political scene, and amplifying legal proceedings already open against him in domestic courts. Finally, the 2004 discovery that the General had a large personal fortune hidden in the US Riggs Bank weakened Pinochet's domestic image.

In addition, in 2005, an important set of reforms to the Constitution put an end to the designated senator system, restored the power of the president to remove Commanders-in-Chief of the Armed Forces, and modified the composition of the National Security Council.

Chile's political party system is consolidated. New parties have emerged alongside the two, center-left and center-right, coalitions that emerged during the dictatorship. The new movements and parties include, on the right-wing, a movement known as Political Evolution (Evópoli). On the left-wing, a group of parties created a grouping called Frente Amplio, ("Broad Front"). This coalition, similar to others in the region, such as Uruguay's Frente Amplio, brings together left-wing parties and movements that propose deeper reforms to the neo-liberal development model. On Chile's extreme right-wing, meanwhile, José Antonio Kast was (in 2019) in the process of creating the Republican Party.

In electoral terms there have been two major changes. The first was the replacement of the previous system of voluntary registration and mandatory voting. The new system features automatic registration, combined with voluntary voting. The change has however led to a large decrease in electoral participation. The second change is a new, proportional, electoral system. In the most recent round of parliamentary elections, this system allowed for a greater representation of citizen diversity in Congress. Since the system also incorporates gender quotas, the number of female legislators also increased.

One problem facing the Chilean political system – one which it shares with many other countries – is a decrease in citizens' electoral participation. For example, 51.02 % of those authorized to vote in the second round of the 2017 presidential elections did not do so. The percentage of abstentionism is even higher among the younger population. In fact, more than 62 % of people between 20 and 29 years of age who were eligible to vote, did not do so.²⁰ This tendency toward decreasing political participation has been a steady trend since the return to democracy.²¹

Other political system issues that have been on the agenda in recent years include scandals linked to illegal financing of political parties. In response, there have been important changes to campaign financing, and moves to improve transparency in

the use of public resources for political representation. Corruption scandals linked to political financing also led to the creation of a special commission: in 2015, the second presidential administration of Michelle Bachelet (2006–10; 2014–18) established the Presidential Advisory Council against Conflicts of Interest. This Commission, colloquially called the Engel Commission after its chairman, economist Eduardo Engel, was to propose regulation of the relationship between money and politics.

Despite this decrease in electoral participation, Chilean society is however still active in mobilization around particular demands or issues that attract public attention. Concerns around education, and over the environment, for instance, have created sustained periods of citizen mobilization over the past decade (since 2010). There is also a noticeable organized civil society around issues such as sexual and gender diversity.

LESSONS LEARNT

Like any complex political and social process, the Chilean transition and its impact on the political system contains areas of light and shade. We might highlight, for instance:

- The democratic political system was installed and consolidated in Chile against a backdrop of economic, political and social stability, and with very little violence. On the other hand, the political costs of this stability included reduced levels of participation on the part of the civil society groupings that fought for the return of democracy, with a concomitant growth in the domination of politics by an elite political class.
- The prioritization of stability, and the particular public policies implemented in economic matters, allowed for a reduction in poverty and the generation of greater well-being for Chilean society. However, objectives and principles such as stability were prioritised while others, such as reforms to the economic model, the deepening of political participation, or greater justice regarding human rights, were left aside.
- The balance of power in the dictatorship and during transition was clearly tipped in favor of the military and its political allies, who did not want human rights violations to be addressed. Nonetheless, the first transitional administration chose to move forward with the National Commission on Truth and Reconciliation, which at least established a first step for human rights policies.
- One warning note, or negative learning point, should be struck as regards the institutional and *de facto* power preserved by Chile's Armed Forces – especially by the Army, and General Pinochet. While this was perhaps unavoidable during the first transition government, subsequent administrations failed to generate greater civilian control of the Armed Forces. This failure

19 To this day there is a discussion in Chile about whether the reforms of 2005 were sufficient for the post-2005 Constitution to be considered qualitatively distinct from the one imposed in 1980. Then-President Ricardo Lagos chose to replace the existing signature in the preface of the text – that of General Pinochet – with his own, a symbolic attempt to mark a distinction. Nonetheless, the post-2005 text still contains dispositions that are at odds with a fully democratic Constitution, for example in relation to the Armed Forces and the concept of National Security.

20 www.serve.cl

21 "Diagnóstico sobre la participación electoral en Chile", Project Promoting Electoral Participation in Chile, Santiago: United Nations Development Program (UNDP), October 2017.

encompassed not only human rights, but also defense-related matters including the military budget, education, and weaponry.

- The incoming authorities faced a tension between political and economic stability, versus pressure for transformation of the economic model, since the latter had been an initial component of social and political opposition to Pinochet. In the end, a subsidiary State model was imposed. Neo-liberal reforms introduced in the dictatorship, such as the privatization of basic services including water and electricity, were maintained. Tax changes that might have increased the tax base, or tax revenues, were not implemented.

RECOMMENDATIONS

Based on the experience of the Chilean case, the following recommendations can be made:

- Transitional coalitions that achieve a social majority are needed. It is important to build spaces of cooperation between the groups that demand democratization. This implies

generating strategies for cooperation strategies, and compliance mechanisms for any agreements that are reached.

- Representative democracy needs to be valued, as a fundamental tool for resolving conflicts.
- Human rights should be addressed and defended. Transitional justice policies should be designed in a way that takes political and social viability into account, without compromising on essentials. Policy design requires information-gathering and analysis, which will require state capacity and financing.
- It should be understood that transition processes are multi-dimensional, involving political and socioeconomic aspects. This should be taken into account when governance strategies and public policy are drawn up.
- There is a need for those who take charge of government in transition contexts to have technical and political knowhow.
- For effective administration, priorities need to be established within the government agenda. Governing is always difficult: it is doubly so, in transitional contexts.
- The participation of civil society and citizen movements in policy design should be encouraged and institutionalized.

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DISMANTLING THE STATE SECURITY APPARATUS

CLAUDIO FUENTES S.

INTRODUCTION

This paper examines the process of adaptation and reform of the armed forces and public order following the political transition in Chile in 1990. The case is particularly noteworthy because the Chilean political transition is usually considered to be “successful” in terms of the peaceful process by which the transfer of power from military to civilian authorities occurred, in addition to the way in which the armed forces were accommodated into the democratic process. In the case of Chile, it was an agreed transition, in which the military regime imposed the rules of the constitutional game and established a series of privileges for the armed forces, and where minimum conditions were negotiated by the opponents of the regime.¹

This chapter analyzes the political and institutional conditions that favoured such an outcome. It will be argued that the transition process involved the acceptance by the civilian political elite of a number of conditions for military autonomy. In addition, a gradual process of institutional-legal reform was initiated, which gradually reduced the room for military autonomy. Usually these changes occurred due to corruption scandals that weakened the negotiating capacity of the military and police with respect to civilian authority.

POLITICAL-INSTITUTIONAL CONTEXT OF THE MILITARY REGIME

The military dictatorship in Chile (1973–1990) was established by a coup d'état against the constitutionally elected regime of Salvador Allende (1970–1973). The three branches of the armed forces and the uniformed police, the Carabineros,² assumed total control of the country by establishing a military government junta. Early on, Army General Augusto Pinochet took over the leadership of this military junta, establishing a mechanism to concentrate the executive actions of the regime in Pinochet and the function of issuing regulations and decrees in the military junta composed of the military heads of the three armed branches and the director of the Carabineros. The regime established a commission that proposed a new constitution, which was promulgated in 1980. The Constitution itself established an itinerary that considered a plebiscite to ratify the permanence of the regime, which took place in October 1988.

Unlike other countries in Latin America, the Chilean military regime was characterized by: (a) single-member power concentrated in the figure of General Pinochet with respect to the regime; (b) the institutionalization of the regime on the basis of a series of constitutional norms and other bodies of law and order that would endure over time after the political transition; and (c) the establishment of alliances with civilian political and economic groups—mainly right-wing political parties and businessmen—who supported the regime from the beginning until the handover of power in March 1990.³ In addition, (d), from the point of view of public opinion, from March 1990 onwards, there was increasing

support for the professional role of the armed forces in addition to an increasing rejection of the figure of General Pinochet and the violation of human rights.

The military regime maintained its political itinerary for the holding of a plebiscite in 1988, where civil society would be consulted on whether or not to accept the continuity of the regime for another eight years. The opposition agreed to participate in this plebiscite but requested some conditions, such as the existence of electoral rolls, the possibility for the opposition to use the media and allowing the presence of international observers.⁴

Pinochet's narrow defeat at the polls in 1988 opened up the possibility of negotiating some constitutional reforms. Although the opposition rejected the 1980 Constitution, it agreed to abide by it and called for a series of reforms to the regime. Some of these proposals were submitted to a new plebiscite in July 1989. The reforms affected some minimal, though relevant, aspects of the Constitution. For example, the original version of the 1980 Constitution established a National Security Council that had broad powers and was composed of four uniformed members and only three civilian members. The proposal approved in the 1989 plebiscite incorporated another civilian, leaving a composition of 4 to 4. In addition, an article was removed from the Constitution that excluded the Communist Party from participating in the political system.

Subsequently, in December 1989, presidential and congressional elections were held, and Patricio Aylwin (55.2 %) was elected, representing a coalition of moderate centre-left parties. Consequently, before the transfer of power, the military regime approved, within the military junta, a series of laws of a constitutionally organic nature (with a qualified quorum of ¾ for their approval), with the aim of protecting some of the legal prerogatives, and room for military autonomy, including military justice and what it says about military careers.

The military regime designed a new framework for the insertion of the armed forces into the state apparatus, combining high political-institutional interference with a high level of autonomy in their own management. These regulations were not affected by the process of the transition to democracy or by the reforms of 1989. Therefore, the Chilean transition had this particular condition for the transfer of power from the military regime to the civilian authority, while they remained relevant actors from

1 Cristóbal Rovira, “Chile: transición pactada y débil autodeterminación colectiva de la sociedad”, in *Revista Mexicana de Sociología*, 2007, Vol. 69, No. 2, 243–372.

2 In the case of Chile, the armed forces are considered to be the Army, Navy and Air Force. The forces of law and order are considered to be the uniformed police, which has the structure of a military nature (Carabineros), and the investigative or civilian police (Investigaciones). We usually talk about the armed forces and security.

3 Carlos Huneeus, *The Pinochet Regime*, Santiago: Editorial Sudamericana, 2001.

4 The plebiscite was held on October 5, 1988 and the option “Yes” for Pinochet lost against the “No” vote (44 % vs. 56 % respectively). The foregoing compromised the holding of free elections the following year, which were held in December 1989.

the institutional and, as we will see later, the political point of view. The legal framework at the beginning of the transition established the following conditions:⁵

a/ High political-institutional interference. The armed and security forces participated through the National Security Council in the designation of authorities; they could bring to the attention of the civil authority their concerns on any subject that in their opinion affected or constituted a risk to the institutions, since they were, according to the Constitution, “guarantors of the institutions”. This council was composed of 4 uniformed and 4 civilian members and participated in the appointment of some members of the Constitutional Court and the members of the Senate. There were 9 senators in total, representing 19 % of the upper house, of which 4 were to be former members of the armed forces and law enforcement agencies, and the rest were appointed by the regime.

In addition, a provision was established in the Constitution that former presidents could serve as senators for life, thus allowing General Pinochet to serve for eight years as Commander in Chief of the Army (until 1998) and later as a senator for life.

b/ Civilian control of appointments and removals. The civilian authorities would have limited control over the appointment and recommendation of uniformed personnel, since the Constitution established that the Commander-in-Chief of the Armed Forces and the General Director of the Carabineros were irremovable. In addition, promotions and retirements of officers were to be proposed by the military authority to the civilian authority, with no possibility for civilians to remove them.

c/ Civilian control over institutional management. The armed and police institutions were linked through the Ministry of Defence to the presidential authority. The Ministry of Defence did not have the capacity to control the institutional management of arms, since it only exercised administrative control.

d/ Control over the intelligence apparatus. Autonomy also extended to the intelligence services that depended directly on the military chiefs and there was no capacity for civilian legal control by either the executive or the legislative branch. Nor was there a civilian intelligence agency to coordinate intelligence efforts.

e/ Control over the military budget. In the case of the military budget, a minimum floor was established for the regular expenditure of the armed forces and of internal security agencies, which was set at the equivalent of the year 1989, with a mechanism for updating it according to inflation; the same equivalent was established for a minimum floor for reserved resources that were transferred to the commanders in chief of the armed forces and to the heads of the police for expenses that did not require accountability; and it was established that 10 % of the foreign sales of the state-owned copper company CODELCO would be allocated annually to the armed forces for the acquisition of armaments. This fund also had a minimum floor equivalent to US\$ 180 million per year. Legal and operational capacities for civilian control over military spending were non-existent at the beginning of the transition.

f/ Control over education systems. Legally, the armed forces and the Carabineros had full autonomy to define their educational plans and programs. It was also established by law that armed institutions could issue professional titles within their armed institutes.

g/ Control over social protection systems. The armed and security forces have their own social security system, which includes a social welfare system for their members, where the State is responsible for the pension costs of its members, and a health system is also defined for the armed institutions themselves.

h/ Control over military justice. Finally, the armed institutions have a military justice system that allows for any violation of the law committed by a member of the military to be tried by military courts, regardless of whether the violation occurs during the exercise of military duties or whether the incident is of a civilian nature.

ACCOMMODATION AND INTERACTION AT THE BEGINNING OF THE TRANSITION

From a political point of view, the first and second governments of the transition (Aylwin 1990–1994 and Frei 1994–2000) did not advance any institutional reforms in relation to the armed forces. These governments decided not to open up an area of conflict with the armed forces or security agencies since they favoured other reforms associated with the economy, social policies and the re-establishment of cooperative relations at an international level.

The main tensions in the relationship to the armed forces and internal security agencies occurred in relation to General Augusto Pinochet, who was in charge of the Army. The Chamber of Deputies in the first year of government began a parliamentary investigation into possible irregularities in the sale of weapons by the Army. In December 1990, General Pinochet pressured the government into hastily closing this investigation by calling for a quartering to barracks of the armed forces. There was an agreement between the government and the Army that ended up closing the case in the Chamber of Deputies without clarifying responsibilities. A new quartering to barracks took place in 1993 when the same case started to be investigated by an independent state body (the Comptroller General’s Office), which began the study of the irregular sale of arms in which General Pinochet’s son was involved.⁶

Subsequently, in 1995, a new incident occurred when the Justice Department decided to prosecute the retired Army General Manuel Contreras, who was in charge of the National Intelligence Directorate of the military regime (DINA). On this occasion, the Army negotiated with the government the establishment of a special prison for those military personnel who were eventually prosecuted and sentenced for human rights violations.

The centre-left governments did not have a legislative majority in the Senate. The military regime appointed senators for 8 years (1990–1998) which meant there was a right-wing majority. In addition, in the future, at least 3 appointments had to be former military personnel. Added to which, General Pinochet could be appointed for life as a senator and the National Security Council, where the armed forces represented 50 % of the council, could appoint 3 other senators. Therefore, the governments of the ruling coalition (Concertación) opted for the pragmatic policy of using the few mechanisms it had to reduce the influence of the military and contain conflicts with the military.

5 Claudio Fuentes, *El Pacto*, Santiago: Universidad Diego Portales, 2012

6 Claudio Fuentes, *La Transición de los Militares*, Santiago: LOM ediciones, 2006

Another issue that caused great tension was the new government's approach to human rights. The first government's political decision to establish a Truth and Reconciliation Commission that would compile a report (1991) on human rights violations that had occurred in Chile between 1973 and 1990 provoked strong tensions with the military, who publicly questioned the results and submitted an alternative report. The government also had a relatively limited policy in this area (see Cath Collins' chapter on human rights).

INITIAL REFORMS (1990–2000)

The main changes in the first decade after the transition were linked to increased staffing and resources for the police, reform of the intelligence structure and some changes associated with the operational dimensions of the armed forces.

The democratic government progressively increased the number of Carabineros and Investigative Police. During the military regime, priority was given to increasing the size of the armed forces, while from 1990 onwards the resources and facilities of the police were increased. In addition, citizen security plans were established that sought to rationalize resources, establish institutional objectives, and link the Carabineros to the communities in which the police stations operated.⁷ It should be mentioned that the police institution in Chile is centralized and depends directly on the central government. There are no police forces dependent on regional authority, so all public security activities are organized centrally.

As for the intelligence system, as a result of the assassination of the right-wing Senator Jaime Guzmán⁸ by extreme left-wing groups at the beginning of the political transition, the government established (1991) a Public Security Coordination Council. It was an entity dependent on the Ministry of the Interior whose objective was to propose policies associated with public security. Criticism of this body by human rights organizations for its infiltration of left-wing groups led to its replacement by a Public Security and Information Directorate (1993). This new body sought to coordinate intelligence measures and propose plans and programs for the government in matters of internal public security. An Advisory Committee on Intelligence was also set up with representatives from the Ministry of the Interior, the Ministry of Defence, the Ministry of Foreign Affairs and the armed forces and the Carabineros. This body only fulfilled the function of seeking to coordinate efforts, but not of establishing a national intelligence system.

In relation to defence policies, the most relevant policies referred to promoting measures for the strengthening of mutual trust with Argentina, encouraging the participation of the armed forces in United Nations peace operations, and promoting policies of transparency of defence definitions through defence white papers. The first of these was published in 1997 and since then, this tradition has been maintained by publishing them relatively regularly.⁹

SECOND CYCLE OF REFORMS (2000–2018).

In 1999, the third presidential election since the return of democracy took place, and again the centre-left coalition, this time led by Ricardo Lagos (2000–2006) of the Socialist Party (PS), won.

A very significant fact affected the political scene and said relationship with the armed forces. In October 1998, the then Senator for life Augusto Pinochet, who had recently left the army's command, was arrested in London during a private visit he was making. Pinochet was arrested on a warrant issued by a judge in Spain to Interpol. The Spanish justice system argued that the conditions were not in place in Chile to prosecute General Pinochet for the execution of Spanish citizens killed by the dictatorship in Chile. Pinochet would be returned to Chile in March 2000, after being held under house arrest in London for 18 months. As a result, between August 1999 and June 2000, the civil authorities convened a dialogue table for dialogue between the police and the military in order to find out the whereabouts of the bodies of those who had been detained and consequently disappeared.

The case had three direct effects on civil-military relations in Chile: 1) General Pinochet would lose popular and right-wing political party support, particularly after allegations of corruption became known, 2) there was an increase in the number of complaints filed against him for human rights violations that kept him under house arrest until the day of his death in December 2006, and 3) the Lagos government would initiate a political dialogue with the opposition to carry out reforms to the Constitution to eliminate various clauses granting autonomy to the armed forces.

Three relevant institutional reforms were introduced during the government of Ricardo Lagos. In 2004, a new regulation was approved (Law 19.987), relating to the Investigative Police, which established, among other things, the obligation for the director of this police force to be an officer of that institution and not designated from outside it, as used to be the case. In addition, internal regulations were approved that established development goals and an institutional development plan. A few years earlier, the government had approved a reform to Chile's justice system, which established a public prosecutor's office, which would take over the investigative function in judicial proceedings. In the previous model, the judge had investigative and punitive functions. This reform involved modernizing the functioning of the Investigative Police to adapt it to a more demanding and professional system of judicial investigation. As a result, the training plan for this police force was modernized and institutional facilities and resources were increased.

That same year, 2004, a law was passed establishing the National Intelligence Agency (ANI), which attempts to coordinate the action of military and police intelligence within a democratic framework. This institution was created to process information and produce intelligence, generate reports, propose standards and procedures for the country's information systems, and request information from the country's police and military agencies regarding the actions of possible terrorist and/or transnational criminal groups. It is a relatively small institution with less than

7 Lucía Dammert, De la seguridad nacional a la seguridad ciudadana. Chile 1973–2003, in Lucía Dammert, John Bailey, *Seguridad y reforma policial en las Américas*, Santiago: FLACSO Chile y Siglo Veintiuno editores, 2005. In 1998, the number of Carabineros reached 34,000, and by 2018 it had reached 52,000, which represents a rate of one police officer per 339 inhabitants, ranking 37th from 148 countries. See: <https://www.pauta.cl/cronica/la-duda-resuelta-cuantos-carabineros-hay-en-chile>.

8 Jaime Guzmán was a lawyer who participated in the creation of the 1980 Constitution and is considered one of the political ideologues of the regime. He was killed in broad daylight after leaving classes at a university campus.

9 Claudio Fuentes, *Militares en Chile: ni completa autonomía ni total subordinación*, in *Chile 96. Análisis y Opiniones*, Santiago: Nueva Serie FLACSO, 1997.

150 staff members who perform analytical but not operational duties (Law 19.974)

The most relevant change at this stage occurred in 2005 when a political agreement was reached between the government and the opposition to reform the Constitution. Among other things, the functions of the National Security Council were reduced, leaving it as an advisory body to the President. Its functions associated with appointing members of the Senate and the Constitutional Court were eliminated, and another civilian authority was added to give it civilian supremacy over the military, and it was established that it could be convened only by the President of the Republic and not at the request of the military, as had previously been the case. In addition, it was established that the President could remove the commanders-in-chief of the armed forces from their duties by informing Congress of the decision. In addition, appointed senators and senators for life were eliminated, allowing all representatives in Congress to be democratically elected by the citizens.

From the point of view of the institutional structure, the two most relevant reforms carried out to date have been the reform of the Ministry of Defence (2010) and the reform of the Ministry of the Interior (2011). In the first case, it was a relevant reform because since its consolidation in 1932, the Ministry of Defence had not undergone very significant changes. Before the reform, it was organized around five under-secretaries (Army, Navy, Aviation, Carabineros, Investigations), who played an essentially bureaucratic-administrative role in the link between the armed institutions and the State. The defence and public security forces depended administratively on the same Minister of Defence. There was no planning or policy making capacity.¹⁰

In 2010, a new organizational chart was established for the Ministry of Defence (Law 20.424). It was structured around a minister who had two undersecretaries (of Defence and of the Armed Forces), a joint general staff, and a board of commanders in chief who assumed an advisory role to the minister. The Undersecretary of Defence is in charge of preparing defence policy, military policy, international defence relations, proposals on acquisitions of the armed forces, and participating in the preparation of the annual budget of the ministry and its evaluation. The divisions of plans and policies, pre-project evaluation, international relations and technological development and industry were structured in this sub-secretariat. For its part, the Undersecretariat for the Armed Forces is the body that manages the administrative affairs of the armed institutions, in addition to its functions of coordinating sectoral policies, proposing recruitment policies, and participating in the financial and budgetary programming of the sector. This undersecretariat has the divisions of institutional affairs, administrative, legal, budget and finance, and audit. Finally, the Joint Chiefs of Staff is the advisory body to the minister in charge of issues associated with the preparation and joint employment of the armed forces.

A few months later, the Ministry of the Interior was reformed (Law 20.502), defining that the forces of public order (Carabineros and the Investigative Police) will depend on this ministry and not on the Ministry of Defence, as used to be the case. In addition, the Undersecretariat for Crime Prevention was established to develop and coordinate public policies aimed at preventing crime and rehabilitating offenders. Finally, the obligation to define a National Public Safety Policy was established at the regional, provincial and municipal levels, which is executed in coordination with each city council.

TOPICS UNDER DISCUSSION

A number of issues are part of the current political discussion in Chile and are related to the security sector. The main issues under discussion are as follows:

- **The role of the armed forces: professional vs. multipurpose.** The large amount of resources invested in national defence, the fact of having a relatively stable neighbourhood, and with the resolution of border conflicts through diplomatic channels, has raised a debate on the use of the armed forces. The current right-wing government authorities (Piñera, 2018–2022), have maintained that the armed institutions should contribute to solving emergencies or natural disasters, and help in times of peace in terms of social policies and control of drug trafficking. A particularly sensitive issue for the public and politicians is the participation of the armed forces in public security operations (anti-drug policies, social protest control) which has been raised by some political actors.
- **Professional career of the armed forces and the Carabineros.** Another issue concerns the modernization of careers in the military and Carabineros. As careers in the military and Carabineros last approximately 25 years, retirement of personnel occurs when they are just over 50 years of age. To this, we must add the high cost to the State of the pension system since uniformed personnel receive a pension, which is similar to their last salary, something that does not happen in the civil sector. Thus, the political system has become concerned. A bill is currently being discussed to extend the length of a military career, and to seek more flexible mechanisms to allow for the hiring of professionals for more limited time spans. The debate on promotion on merit (by virtue of their achievements within their career) vs. on seniority (by virtue of their time in the institution) has also arisen.
- **Women's involvement in military careers and the prevention of abuse.** The inclusion of women in armed institutions has also been considered. Although the armed forces and public security forces have progressively incorporated women into their institutions over the last few decades. Pending issues in this area relate to their incorporation into functions beyond administrative matters, their greater incorporation into the line of command and the development of policies associated with the prevention of abuse and gender violence.
- **Abuses in the recruitment system.** Another relevant issue relates to the reporting of abuse by officers and non-commissioned officers with respect to conscripts, which has led to some allegations being made public.
- **Corruption control mechanisms in the armed forces and public security.** In recent years, judicial investigations have been initiated in relation to the misuse of public resources. Corruption scandals have mainly affected the Army and Carabineros. The *modus operandi* is of a pyramidal structure of operation involving generals, colonels and lower-ranking personnel. This has encouraged the revision of rules associated with the control of fiscal resources, the establishment of external and internal audits and the reformulation of some divisions within the armed and law enforcement institutions.
- **Reform of the financing of the armed forces.** The most significant change being discussed by the National Congress is

10 Report on the Security Sector in Latin America and the Caribbean, Santiago: FLACSO-Chile, 2007

the revision of the armed forces financing system. The institutional conditions for financing the armed forces were defined on the basis of the following conditions, which have not changed to date:¹¹

i/ General activities budget floor. It was established that for the expenditure of the armed forces, which would be considered in the budget law to be approved annually, “a contribution in national and foreign currency not less than that assigned in the budget law approved and executed for the year 1989, corrected by the factor resulting from dividing the value of the average consumer price index for the year in which the budget law applies and the average for the year 1989” (art. 96, Law 18.948). This floor is only granted to the armed forces, making the budget of the entire public apparatus in Chile exceptional.

ii/ Reserved copper grade for military procurement. It was established that 10 % of the income in foreign currency from the sale of copper production abroad, including the by-products of the state-owned company CODELCO, should be transferred to an account to be used for the purchase of weapons, which will be supervised by the Superior Council of National Defence.¹² This contribution also has a minimum contribution floor of US\$ 180 million per year.¹³

Since the return to democracy, cases of economic corruption have been revealed. The cases with the greatest impact were those discovered in 2015 where a media outlet revealed the existence of a network of members of the Army who used funds derived from the reserved Copper Law for the purchase of weapons for their own benefit, amounting to millions. The purchase of war materials was falsified, and the money was used for personal purposes in an ongoing investigation, although it is estimated that the amount defrauded exceeded US\$ 8 million.

Since 2009, several governments have presented proposals to reform the financing of the armed forces. The National Congress is currently discussing a project that aims to: (a) eliminate the reserved copper law, (b) establish a multi-year fund for military procurement, (c) establish a multi-annual fund for military acquisitions, (d) improve the control systems of the Ministry of Defence, the National Congress and the Comptroller General's Office to authorize and control military purchases, and (e) establish another contingency fund for possible damage resulting from natural disasters.

OUTSTANDING ISSUES IN THE FIELD OF DEFENCE AND PUBLIC SECURITY.

A number of issues have not been addressed or are pending on the institutional reform agenda in relation to the security sector (see Varas, Fuentes and Agüero 2017). These include:

- **Civilian professionalization of the Ministry of Defence and Public Security.** Neither in the defence sector nor in the public security sector has a professional capacity been generated to establish civilian human resources capable of designing, evaluating and leading these sectors. In general, civilian training programs have been sporadic, based on short courses, and existing programs have been associated with the military institutions themselves, which propose excessively conventional programs with a traditional security perspective.
- **Institutional capacities of the Ministry of Defence.** One problem with the institutionalization of the Ministry of Defence is that divisions are understaffed, and military or ex-military

personnel are usually called upon to perform these functions. No technical civilian staff has been created to lead the defence sector by the management of the Ministry of Defence, nor is there any capacity to generate information to contribute to decision making.

- **Institutional capacities of the Ministry of the Interior.** No institutional capacity has been developed to address the issue of public security in the Ministry of the Interior, either in terms of human resources or with respect to the gathering of information for decision-making. These two aspects are fundamental for providing guidance and generating sectoral policies. The weakness at the central level generates a dependence on public security institutions in terms of the incidence and trend of crime in policy definitions.
- **Joint Staff of the armed forces.** Although in the reform of the Ministry of Defence, a strengthening of the Joint Staff was considered, in practice today a relatively independent scheme of institutional development of the three branches is maintained.
- **Purchasing and accountability system.** Although the Ministry of Defence has made progress in controlling what should be authorized for purchase, the procedure for managing purchases continues to be the responsibility of the armed institutions and the Carabineros, which implies a serious vulnerability to possible cases of corruption due to illegal commissions that could become evident in the process of linking up with suppliers and developing tenders and contracts.
- **Coordination of defence and foreign policy.** Another area requiring attention concerns the need to establish more effective coordination between defence policy and foreign policy. Institutional definitions have tended to evolve in isolation, without much effective coordination. To solve this problem, some governments established the practice of appointing an official from the Foreign Ministry on a permanent basis in the Ministry of Defence. However, this is clearly not enough.
- **Education and training programs.** At present, the design and implementation of training and education programs are, by law, exclusively the responsibility of the armed institutions and the police. The programs developed in the democratic period have had a limited scope. This means that the State, through the Ministry of Education, cannot influence the curriculum taught in the training schools of these institutions. This is a pending issue since it is essential to develop a new curriculum that responds to the needs of the 21st century and that also meets the requirements of a democratic state.
- **Social security system.** As we indicated above, the social security system of the armed forces and the Carabineros (pensions and health system) burdens the State with a high expenditure because the early retirement conditions of the members of the armed institutions increase these costs, but also because the resources received once retired are favourable for them, in relation to what the rest of the society, who enroll in a different social security system, receives.
- **Militarization of social conflicts.** The strong militarization of social conflicts has been criticized, particularly in

11 Claudio Fuentes, Un enclave duro de eliminar: reforma al financiamiento de las fuerzas armadas, in *Piñera II. ¿Una segunda transición? Barómetro de política y Equidad*, Santiago: Ediciones Sur, 2018, 47-64.

12 In February 2010, the institution was eliminated and replaced by the Ministry of National Defence

13 Mauricio Weibel, *Traición a la Patria*, Santiago: Aguilar, 2006

the Araucanía region where indigenous Mapuche community members have held protests seeking to recover their territory. The response of the political authorities has been to increase the police presence, which has used military tactics to deal with these protests, exacerbating the confrontation with the indigenous groups.

LESSONS LEARNED AND RECOMMENDATIONS

A/ CORPORATE RESISTANCE TO CHANGING THE *STATUS QUO*

One of the characteristics of the Chilean case has been the corporate resistance of the armed forces and public order forces to changes that would involve reducing their powers and authority. At the beginning of the transition, such resistance was openly expressed through public demonstrations of force and insubordination to political authority. However, as they lost political support as a result of Pinochet's arrest and also as a result of more recent corruption scandals, expressions of resistance to change have been less forthcoming.

In this regard, the armed forces in particular have used more informal channels of advocacy in the political process to make their views known. Usually, expressions of institutional discontent have been targeted at the issue of human rights and through, for example, the association of former generals of the armed forces. Recently an informal space was established for former commanders in chief of the armed forces who have made their apprehensions known on some issues-particularly those related to human rights.

In the case of the uniformed police of the Carabineros, no explicit expressions of insubordination have been generated. Usually the demands of the Carabineros have been targeted directly through the higher command. As the Carabineros exercise a crucial crime control function, civil authorities have tended to act very cautiously in their dealings with this police institution, anticipating that a conflict with the Carabineros could have very serious consequences for crime control.¹⁴ Hence, institutional changes in civil control have not been as significant.

Thus, the generation of a broad political consensus on the direction of a reform reduces the ability of the armed institutions to oppose changes that reduce their power.

B/ INSTITUTIONAL CONSTRAINTS LIMIT BUT DO NOT INHIBIT ACTION BY DEMOCRATIC GOVERNMENTS

The case of Chile is peculiar in Latin America because the rules of the game established under the dictatorship tended to endure for many years after the reestablishment of democracy. These institutional restrictions or limitations did not inhibit the action of the democratic governments. The first two post-transition governments opted to establish policies and programs aimed at setting career development goals for the forces. While legally the armed institutions and the police continued to enjoy high levels of autonomy, operationally the civilian authorities sought to encourage schemes that would help foster a greater control over them. The political authorities also encouraged symbolic manifestations of civilian control to reinforce their power in the face of possible military manifestations (subjective subordination).

C/ MAKE REFORMS WITH ARMED INSTITUTIONS, NOT AGAINST THEM

The level of legal autonomy of the armed forces and the Carabineros in Chile is extremely high compared to other Latin American countries.¹⁵ For the same reason, any initiative for change could hardly be imposed by the civil authority. The materialization of reforms such as the new Ministry of Defence, the new intelligence system or the new Undersecretary of Public Security and Crime could not have been done through imposition. In all these projects, the opinion of the armed branches themselves was included so that they felt that their requirements were heard and addressed. The option of seeking allies in the armed forces and Carabineros themselves to design and generate relevant transformations is vital.

D/ GRADUALISM. IDENTIFY PRIORITY AREAS

In the case of Chile, power balance conditions made it difficult to establish significant structural reform at the beginning of the transition. Therefore, when such a limitation became evident, a gradual strategy of reforms was chosen that took advantage of any windows of opportunity that presented themselves. Even, with a favourable balance to the *pro-status quo* political forces, the change of context helped to install important reforms regarding civilian supremacy over the military. This implied having a clear objective and the availability of policy proposals or alternatives.

E/ WHAT TO REFORM? LEVELS OF REFORM

There are three levels of reform in both the armed forces and the police:

- Those reforms that are related to **civilian supremacy** over the armed forces and police and that include regulations on the subordination of the armed forces and the Carabineros at the constitutional level, the appointment and removal of military and police chiefs, and regulations on Security Advisory Councils, among others.
- Those reforms that are related to **institutional management and planning** and that consider the structure of the Ministry of Defence and Ministries of the Interior or Public Security, definitions of strategic objectives in white papers, definitions that clearly distinguish and separate military functions from public security functions, among others.
- Those referring to **process controls** that consider definitions of process control mechanisms, internal and external control and accountability, among others.

Although it will be very complex and unlikely to establish simultaneous changes in all these areas, the important thing is to draw up a vision that one wants to have of the armed forces and the forces of law and order in terms of adequate civilian supremacy, the institutional design that stems from this principle, and the process control mechanisms that will guarantee that such supremacy materializes.

14 Claudio Fuentes, *Contesting the Iron Fist. Advocacy Networks and Police violence in Argentina and Chile*, New York & London: Routledge, 2004

15 *Report on the Security Sector in Latin America and the Caribbean*, Santiago: FLACSO-Chile, 2007

F/ PRIORITY AREAS FOR REFORM

Although in each case an agenda of priorities must be structured that is contingent on the specific needs of each country, there are certain central critical nodes that are obvious in the case of Chile. We will mention those that are vital in our opinion (not in order of preference):

- Civilian supremacy over the armed institutions and the police. This is a key area. In the case of Chile, the legal-institutional starting point allowed for very high levels of autonomy of the armed institutions and the police with respect to civil authority. Restoring levels of effective supremacy (in legal and practical terms) has been a central issue and one that even, almost 30 years after the return of democracy, has not been fully achieved.
- The reform of the intelligence apparatus is a critical element that needs to be addressed by civil authorities. A second central area or critical element concerns the regulation, reform or structuring under civilian authority of a democratic intelligence system. In the case of Chile, it has been a very gradual reform that still lacks strong control and operational management. However, this area seems crucial because of the role that the armed forces themselves had during the previous regime, but also because the generation of intelligence is a relevant source of power that must be supervised democratically.
- Strengthening accountability systems. Another relevant dimension relates to accountability systems. The high corporatization of military and police institutions historically made it difficult to generate control mechanisms. In addition, the nature of the institutions means that special emphasis is placed on the secrecy and confidentiality of the decision-making process. This opacity generated important gaps that were not addressed early on in Chile. If there is one lesson learned from this case, it is the need to implement control systems over the management of the resources of the armed forces and the police. This implies creating internal control and audit systems, establishing external control mechanisms, and promoting the strengthening of the control capacities of Congress over the institutions of Defence and Public Security.
- A fourth area relates to the way in which defence and public security resources are managed, which are often characterized by their opacity. Encouraging transparency and control procedures is fundamental for the adaptation of the armed institutions to the democratic framework. But also, the discussion on *how much to spend* forces decision makers to define *what to spend on*, which implies targeting resources to strategic objectives.
- A fifth area relates to human rights abuses committed by military institutions and the security services in the past and extending to the present. Chile's experience is that it is not possible to restore trust between society and the armed forces and public order, nor is it possible to generate conditions of political stability, if the issue of truth, justice, reparation and the reconstruction of historical memory is not addressed.

G/ DIVISION OF DEFENCE AND PUBLIC SECURITY TASKS

A fundamental question is to distinguish clearly between the functions of defence, as an institutions in charge of border protection and international projection, in matters of defence, and what concerns the internal security of the police. In Latin America, there has been a tendency to involve the armed forces

in tasks that are not related to defence and that directly relate to issues of internal security, which includes disaster assistance roles, social programs, and control of drug trafficking, among others. While the involvement of the armed forces in disaster situations is relevant, it should be considered the exception rather than the rule.

H/ INSTITUTIONALIZATION REQUIRES HUMAN CAPITAL FORMATION.

Security sector reforms require institutional capacities, which implies the formation of a civilian contingent capable of generating knowledge, systematizing information and producing relevant knowledge for the implementation of policies in this sector. One of the problems that the case of Chile has faced is the lack of concern of the political elites for generating this human capital that is vital to give continuity to the policies that are implemented. At the beginning of the transition in Chile there was interest, accumulated knowledge and a certain amount of human capital that was motivated to generate ideas and contribute to the generation of policies. Over time and as other issues became more relevant, there was a clear reduction in interest in these topics. There are few institutions that deal with issues associated with defence and public security. In the university system there is even less interest in developing these topics.

I/ THE INTERNATIONAL CONTEXT AS AN OPTION FOR REFORM

Another issue is related to the relevance that the international context acquires in generating standards to which the country aspires; the agreements signed with neighbouring countries that make reform options viable in the defence sector in particular; and the international trends that favour “importing” good practices to local contexts. In the case of Chile, for example, the cooperation agreements established with Argentina in the 1990s were very relevant, which included a series of measures of mutual trust between the armed forces that stimulated organizational and logistical changes in the forces themselves. In the 2000s, Chile became a member of the OECD, which stimulated the generation of international standards on transparency, which helped to generate state awareness of transparency. Finally, certain ideas such as the “white books” were replicated in Chile in the Ministries of Defence and Foreign Affairs, which also stimulated discussions and the need to specify the objectives of the defence policy that were reflected in such official documents.

J/ CIVIL SOCIETY AND MANAGEMENT CONTROL IN THE SECURITY SECTOR

Another of the lessons from the Chilean case refers to the relevance of civil society proposing options and controlling the action of armed and public security institutions. This has been particularly relevant in the case of the defence of human rights; and perhaps something more significant in terms of generating systems of transparency and control. The case of Chile shows a greater weakness of this civil society in more technical but also relevant issues associated with the control of military spending, peace initiatives and international cooperation, and policy recommendations in matters associated with the “institutionality” of the sector.

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ARCHIVES OF THE REGIME

MARÍA LUISA ORTIZ, RODOLFO IBARRA, DANIELA FUENTEALBA

INTRODUCTION

The image of La Moneda Palace in flames as a result of the bombing ordered by the military junta on September 11, 1973, to remove the constitutional president Salvador Allende, is probably the first document linked to human rights. It is the symbol of the breakdown of democracy and of a deep fracture in Chilean society. The beginning of a dictatorship that systematically violated human rights for 17 years.

The experience of those years has been recorded in various documents by those who were affected by dictatorial power, at different levels, such as those who protected the people, denounced the events, showed solidarity and mobilized within Chile and around the world, to demand the end of the dictatorship and a return to democracy. Those records constitute what we call the human rights archives.

When the transition process began, these archives were cited as fundamental pieces for the processes of truth, justice, reparation and memory. They allow the possibility to prove facts and victims, to contribute to the reconstruction of what happened, and to remember and learn from it. However, they face multiple difficulties, debates and dilemmas. In addition to the lack of collaboration of those responsible for human rights violations, to make available their archives, and the legal and institutional weaknesses that have hindered their protection and have prevented public access.

All these aspects are addressed in this chapter.

CONTENTS OF THE SECRET SERVICE ARCHIVES

In Chile, the archives of the intelligence services have been systematically denied access to. The most frequent response to queries made by the truth commissions, other instances of judicial or extrajudicial investigations or from civil society, is that these archives do not exist, having been incinerated or destroyed after the legal period that allowed them to do so has elapsed. Regarding the participation of members of the armed forces (FFAA) in intelligence activities, the response has been that they are legally prevented from providing this information.¹

Despite systematic denial, in the post-dictatorship years, some documentary pieces or fragmented files have been found that account for the actions of the intelligence services. These are findings within the framework of a judicial investigation, or in an unexpected and casual way. That is how, during a judicial case, the lawyer of an agent prosecuted for crimes against opponents, delivered to the court documentation and files related to interrogations of political prisoners, among them several disappeared detainees, seeking to obtain some benefit for his defendant and making this delivery look like collaboration.² This documentation, related to disappeared political prisoners, has been incorporated in diverse judicial investigations, however it is not known where their originals are, or the totality of the documentation delivered at that time.

The finding of documentation in other countries of the Southern Cone, have revealed the action of national intelligence agencies beyond the Chilean borders, in the persecution, surveillance, kidnapping, torture and extermination of Chileans and, especially, the coordination of intelligence between countries, known as Operation Condor. These archives have become evidence for investigations in Chilean courts and have played a relevant role in advancing the truth about these crimes.³

At the end of September 2005, carrying out architectural recovery work in a building where the Salvador Allende Foundation currently operates, at 475 República Street, a set of documents were discovered that formed part of the archives of the National Information Centre (NIC):⁴ reports, a register of agents, telephone numbers, accounting with payments to CNI officials; charts (organization charts), trades and more than 400 telexes, among others. The Investigative Police (PDI) seized the documentation and handed it over to the courts of justice. After a few years the telexes were recovered by the Salvador Allende Foundation, and they are now publicly accessible in digital

1 In its report, the National Truth and Reconciliation Commission gives an account of certain nuances among the different armed forces: the Carabineros and the Army are the most vociferous in denying the existence of documentation and to a lesser extent the Air Force, the Navy and the Investigative Police (Report of the National Truth and Reconciliation Commission, CNVR, Reissue December 1996, Volume 1, Chapter 1, pages 6 to 9). The National Commission on Political Imprisonment and Torture Report also states that the responses given to that commission when consulting them by background, records and information were similar. (The National Commission on Political Imprisonment and Torture Report, CNPPT, 2005, pages 53–67, 111 and following).

2 In the mid-1990s, lawyer Fidel Reyes, defence lawyer of the retired colonel of the Carabineros, Guillermo González Betancourt, prosecuted for the murder of three professionals, handed Judge Dobra Lusic a bag with documentation and follow-up files from the repressive body known as the Joint Command, which the defendant would have given him.

3 This has happened, for example, with the archives seized in Buenos Aires from the agent of the National Intelligence Directorate, DINA, Enrique Arancibia Clavel, and found by Chilean journalist Mónica González in the Buenos Aires Judicial Archive in 1986 (several years after her seizure by the Buenos Aires police), which were an important contribution to his book *"Bomba en una calle de Palermo"* (Bomb on a street in Palermo) about the assassination of General Carlos Prats and his wife Sofia Cuthbert in Buenos Aires in 1974 and later also to the investigations of journalist John Dinges for his book *"Los años del Cóndor"* (The Condor Years) about intelligence cooperation in the Southern Cone. They have also contributed to judicial investigations in Chile. Another important finding was that of the so-called "Archives of Terror" in Paraguay, discovered in 1992 at the Lambaré police station in that country. They found evidence of the coordination of intelligence services, from the call in Chile to the formal constitution of this coordination, convened by the head of DINA, Manuel Contreras, as well as a series of documentation of criminal actions and transfer of prisoners between countries. Within which the militant of the Revolutionary Left Movement (MIR) Jorge Isaac Fuentes Alarcón is counted, who was detained in Paraguay, transferred to Chile to the secret torture compound Villa Grimaldi, without his detention ever having been recognized until today, remaining to date as a victim of enforced disappearance.

4 The National Information Centre succeeded the DINA, which was dissolved in 1977, and lasted until 1990.

format, as well as the judicial report on the finding and characteristics of the documentation found.⁵

In 2014, Minister Jorge Zepeda, in charge of the judicial investigation into the events that took place at Colonia Dignidad (“Dignity Colony”)⁶ announced the existence of more than 45,000 files and documentation found there in 2005 in underground graves.⁷ Several human rights organizations criticized the fact that it had been kept secret for almost 10 years, as it could have been useful for the judicial processes on disappeared detainees and political prisoners, and their passage through Colonia Dignidad. The judge handed a copy of part of the documentation and files to the National Human Rights Institution (NHRI), to the Human Rights Program of the Ministry of the Interior and to some sites of memory. A television channel made an extensive report on the find and delivered digital copies of the files to human rights organizations, archives and the Museum of Memory and Human Rights (MMDH). Subsequently, the report issued by the Police Intelligence Leadership (JIPOL) of the Investigations Police of Chile (PDI) was made public, in which all the documentation has been analyzed, and the London 38, Memory Space⁸ has made available to the public in the framework of a campaign for the end of the secret archives.⁹ It remained in the hands of the JIPOL until December 2017, after which it was transferred to the National Archive of Chile.

Other documents related to victims of human rights violations were included as “evidence” in the memoirs¹⁰ of Manuel Contreras Sepúlveda, who was Director of the National Intelligence Directorate (DINA). Although the fate of the documentation of the most important intelligence service of the dictatorship, which had the broadest powers and direct and daily contact with the dictator Augusto Pinochet, is unknown, the inclusion of a few documents to support his version regarding the detainees, is a demonstration that the head of intelligence did keep files in his possession which, however, have not yet been found.

All these findings show that the repressive measures, the persecution, control and registration of detainees, interrogations, itineraries or destinations, in short, the innumerable actions linked to the security services and the maintenance of a dictatorial state, were recorded, generating innumerable and diverse institutional archives, of which their existence has later been denied, or it has been affirmed that they were destroyed. Procedures, appeals, personnel were registered and controlled, and in the generation, the participation of diverse institutions and persons, who were more or less conscience of the relevance of their actions, were configuring the act of archiving, ordering, safeguarding, gathering, conserving and generating criteria for the access of all the information produced.

ATTEMPTS TO DESTROY THE DOCUMENTATION OF THE POLITICAL POLICE OPERATION

In the judicial investigation into the death of former President of the Republic Eduardo Frei Montalva, important testimonies were obtained regarding the fact that the documentation found in the CNI offices was transferred to the Army Intelligence Directorate (DINE), remaining in its custody until several years after the end of the dictatorship. A police report contains statements that claim to have seen these archives on microfilm in a cellar in the underground vaults of the DINE, in the heart of Santiago. Adding that it should have been incinerated from 1999 to after

2000. However, there is no incineration certificate to verify this, as would have been the case.

Due to this discrepancy, the Ministry of Defence ordered an investigation, after which the Commander in Chief of the Army stated that there was no proof of the existence of such documentation, and that it was not possible, given the time that had elapsed, to bring criminal proceedings against those responsible.¹¹ The matter is currently awaiting the resolution of the justice system to criminally prosecute those responsible for the destruction of the archives of the CNI, as well as the concealment of the action of destruction, corresponding to the measures carried out between 1980 and 1982.

USE OF ARCHIVES DURING THE TRANSITION

For the truth commissions,¹² the archives played a vital role. They constituted evidence to document the cases and qualify the victims (forced disappearance; executions outside the law, political imprisonment and torture). These archives were essentially formed by the backgrounds, documents and testimonies provided by the victims themselves, their families and human rights organizations. Throughout the dictatorship, Chile documented human rights violations, whether through national or international denunciations or through appeals brought before the courts of justice. Most of the complaints were brought before the courts and, as a result, their history was preserved both in the courts and in the human rights bodies that brought them.¹³ Complaints to United Nations bodies or to the inter-American human rights system, as well as to international human rights protection organizations, were also highly relevant sources of documentation. It was not the archives from intelligence agencies

5 Judicial and police report on the discovery of documents from the National Information Centre (CNI), Recovered secret archives, London 38, Memory Space, <http://www.londres38.cl/1934/w3-article-97121.html>

6 German enclave in southern Chile related to abuses and slavery of its inhabitants, also with an active link to the dictatorship and its intelligence services. Colonia Dignidad was a place of detention, torture and extermination of political prisoners.

7 Carlos Basso Prieto, “Los secretos de las fichas de Colonia Dignidad”, in *El Mostrador*, 12. 12. 2014, <https://www.elmostrador.cl/noticias/pais/2014/12/12/los-secretos-de-las-fichas-de-colonia-dignidad/>

8 DINA torture centre from which most of the political prisoners who passed through disappeared and which was recovered by civil society as a memorial site.

9 Intelligence Report on Dignity Colony Archives, Recovered Secret Archives, London 38, Memory Space, <http://www.londres38.cl/1934/w3-article-97390.html>

10 Manuel Contreras Sepúlveda, *La verdad histórica: el ejército guerrillero*, Santiago: Ediciones Encina, 2000

11 “New Commander-in Chief of the Army signed report accrediting burning of CNI files”, in *Radio ADN* 91,7, 15. 11. 2017 <http://www.adnradio.cl/noticias/nacional/nuevo-comandante-en-jefe-del-ejercito-firmo-informe-que-acredita-quema-de-archivos-de-la-cni/20171115/nota/3638487.aspx>

12 National Truth and Reconciliation Commission; National Corporation for Reparation and Reconciliation; National Commission on Political Imprisonment and Torture; Presidential Advisory Commission for the Qualification of Disappeared Detainees, Political Executed and Victims of Political Imprisonment and Torture.

13 Committee for Peace in Chile; Vicariate of Solidarity; Christian Churches’ Social Assistance Foundation (FASIC); Corporation for the Promotion and Defence of Human Rights (CODEPU); Foundation for the Protection of Children Damaged by the State of Emergency (PIDEE); Chile’s Human Rights Commission. These were the main human rights bodies that collected and preserved this documentation.

or the armed forces that provided information for the investigation of these commissions.

For the National Commission on Political Imprisonment and Torture (CNPPT), the testimonies of the victims themselves and the documentation they presented were relevant for recognizing their detentions. It included detention centres, movement restrictions, visiting permits, correspondence with the family and humanitarian agencies such as the International Red Cross (IRC), among others.

The commissions made special mention of the archives, both in relation to their use and accessibility. The provisions and their scope have been different in each case.

In its recommendations, the National Truth and Reconciliation Commission (CNVR) expressed the need for an entity to centralize the accumulated information in a specialized library, given the future interest in knowing about human rights violations of investigators and the general public, which can be accessed under conditions regulated by law.¹⁴

The law that created the National Corporation for Reparation and Reconciliation (CNRR)¹⁵ determined that it was appropriate to keep in deposit the information gathered by both instances, ensuring their confidentiality, but allowing access to the courts of justice.

At present, the archives on non-survivor victims under judicial investigation are in the Human Rights Program belonging to the Undersecretary for Human Rights of the Justice and Human Rights Ministry, which is responsible for monitoring judicial proceedings. The courts are the only user of this information; neither researchers, nor lawyers not belonging to this program, nor relatives of the victims have access to it.

The CNPPT initially noted in its recommendations¹⁶ that the information collected was part of the nation's cultural heritage and should be subject to safeguarding measures. It recommended that, at the end of its activity, the collected documentary heritage be handed over to the NHRI or, failing that, to the body entrusted by law with the conservation of the documentary heritage of the Chilean nation, in order to protect it against all theft and destruction. It pointed out that the archive consisted of all documents in physical and digital form: personal files containing the background of the victims and the documents generated by the commission in the framework of its activity. It recommended, in relation to personal files, applying a special time limit for communication to the public of 30 years, in order to protect the privacy and honour of individuals.¹⁷ But later, the law which approved the granting of reparation benefits¹⁸ determined the confidentiality of all the documents, testimonies and background provided by the victims should have a time limit of 50 years, specifying that no person, group of persons, authority or magistrate will have access to these archives. Although, it recognizes the personal right of the owners to make them known.¹⁹ Article 15 of this law provides that the documents, testimonies and background provided by the victims before the commission shall be secret. It adds that the members of the commission, as well as all the persons who participated in it, are obliged to maintain confidentiality with respect to the background and data that are of a secret nature.

The Advisory Commission on the Classification of Disappeared Detainees, Victims of Political Executions and Victims of Political Imprisonment and Torture (2010)²⁰ was authorized by the enactment of a law,²¹ unanimously approved by Parliament, to review the documents, testimonies and background of the CNPPT. Only two commissioners and two professionals were authorized, with an obligation to respect the confidentiality, for the sole purpose of

qualifying the cases that arose, and only during the commission's period of operation. All the archives, as well as the officials of this commission, were finally subject to the obligations of confidentiality and sanctions established by Law 19.992.

Consequently, recognizing that the truth commissions, both in their reports and in their recommendations, gave explicit value to the collected archives, the need for their preservation was raised and reference was made to the issue of access. Noting in this an unprecedented process of assessing their impact on society and the country. The laws subsequently passed arrived at different results, especially on the issue of public access. The CNPPT exceeded almost twice the time limit for public access, as recommended in the report.

Human rights archives are also a source of ongoing consultation in judicial investigations. These archives, generated as a denunciation of violent measures, had a practical and urgent purpose in times when people's rights were violated in a systemic and massive way. Human rights bodies received a complaint either from a victim and/or his/her family, and tried to obtain as much background information, witness accounts, and fingerprints of all kinds, as much as possible. All this information was recorded in forms and files, following a protocol built from the need to cross-check information, data obtained from other sources, official responses, new antecedents, witnesses, etc. The sheer size, systematicity and frequency of the repressive acts made the agencies build protocols and rigorous records immediately after the events. Today they constitute proof and a unique record of the official version of the time.

They have also been relevant for the identification of victims, in the case of the findings of human remains illegally buried by the dictatorship in order to hide all traces of their crimes. As a result of errors in the identification of victims of enforced disappearance in 2007, there was a very strong need to gather the documentation dispersed in various public and private bodies; documentation contained information on the pre-mortem antecedents of the victims, circumstances of their detention and final destination, judicial investigations, examinations, expertise and identifying measures carried out on recovered remains. With the advice of experts, the forensic medical service began to work systematically to organize and systematize all documentary sources related to the victims of enforced disappearance and the possibility of finding and identifying their remains.

The post-dictatorship validation of these archives, both in extrajudicial mechanisms of investigation and in judicial action, as

14 Chapter III: Other Recommendations, under the subheading Centralization of Information Accumulated by the Commission (CNVR Report).

15 Law 19.123. February 8, 1992. At www.leychile.cl

16 Chapter IX, Proposals for reparation, basis for defining proposals for reparation, recommended measures, the safeguarding and confidentiality of the information received is included as one of the institutional reparation measures (CNPPT report).

17 Assuming the time frame that has followed the world archival practice in this type of matters. The European Commission recommends a maximum period of 30 years for the maintenance of the confidentiality of records. This recommendation, however, is not applicable in all countries as the transition processes require quick access to documentation for the investigation and documentation of any type of human rights violation.

18 Law 19.992. December 24, 2004. At www.leychile.cl

19 Law 19.992. Title IV, Article 15. At www.leychile.cl

20 Contemplated in Law No. 20.405, Article 3 transitory and established by President Michelle Bachelet, by Decree No. 43 of February 3, 2010. At www.leychile.cl

21 Law 20.496. February 5, 2011. At www.leychile.cl

well as the growing recognition that they constitute an essential source for the reconstruction of the recent past and the preservation of memory, have been supported by the special mention of their role in transitional justice processes, with respect to the right to truth, the right to memory and the duty to remember in the instruments of the international human rights system.²²

In 2003, the State of Chile declared that eight historical human rights archives²³ be declared heritage of humanity in UNESCO's Memory.²⁴ This was an important recognition and an impulse for the generation of initiatives and special declarations by the State.

The creation of the NHRI through Law 20.405 in 2009, stipulated that it should guard the background gathered by the truth commissions.²⁵

The creation of the Museum of Memory and Human Rights in 2010²⁶ is undoubtedly the most important public policy in relation to memory and archives, taking charge of society's right to know what happened. This museum actively assumes the protection, preservation and dissemination of its archives. Its conceptual framework is based on the truth commission reports and from this perspective it fulfills the task of collecting, preserving and making accessible this invaluable cultural heritage for which, until then, there was no system to guarantee its physical and intellectual survival in the long term.

As the main depository of the collection, generated by different sectors of civil society that undertook actions of solidarity and defence of the victims of the dictatorship, the museum is unique in its class. Both in terms of its collections policy and through the means it explores ways to expand its services and users. It also collects documentation and archives generated by public entities that complement the stories for the reconstruction of the memory of the recent past. Recovering these primary sources, preserving them and making them accessible, is a valuable contribution to the country's historical memory, as well as a contribution to the knowledge, reflection and research on human rights violations in Chile between 1973 and 1990, and their effects and consequences.

Human rights archives have documented and supported the declaration of historic monuments in detention facilities or places where people's rights were protected and defended during the dictatorship. In the process of validating this nomination, the archives have played an essential role as proof of what happened in those places and the need for their protection as sites of memory. From 1996 to December 2018, nearly 40 places with these characteristics have been declared historical monuments.²⁷ Among them 4 human rights archives have been protected with this nomination between the years 2016 and 2018. These are the archives of Colonia Dignidad in 2016; in 2017 the archives of the Vicariate of Solidarity, which includes the documentary collections of the Committee of Cooperation for Peace in Chile and in the same year the archives of the Christian Churches' Social Assistance Foundation (FASIC). In 2018, the archives of the National Headquarters of Crimes against Human Rights and People of the Investigative Police was added to this list. It contains a collection of documents related to clandestine detention centres, structures of the intelligence services, statements and testimonies of victims, witnesses and victimizers, photographs of former agents, among others, and that which was generated from the work supporting investigations in human rights court cases.

The first National Human Rights Plan (2018-2021)²⁸ of the Undersecretary of Human Rights,²⁹ recognized the need to preserve the historical memory in the matter of massive and systematic

violations of human rights. Within this framework, the need to implement a public archives policy and coordinate the creation of a national memory archive was raised. To date, there has been no progress in this area.³⁰

The uses of these archives have expanded over time. As they are promoted, public debates are set up throughout the country by citizens, victims and their families, movements which seek to recover sites of memory as well as to install memorials which remember the victims, carrying out social action work through cultural and educational measures, in which the archives are a source which is sought, claimed and appropriated from different spheres. They become means to work with the new generations, who look for sources and evidence to approach our recent past.

22 "Updated set of principles for the protection and promotion of human rights through action to combat impunity," Commission on Human Rights of the Economic and Social Council of the United Nations, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>

23 Association of Families of the Detained-Disappeared (AFDD); Corporation for the Promotion and Defence of Human Rights of the People (CODEPU); Christian Churches' Social Assistance Foundation (FASIC); Foundation for the Protection of Children Damaged by the State of Emergency (PIDEE); Audiovisual Archives of Teleanalisis; Documentation and Archive Foundation of the Vicariate of Solidarity; Chile's Human Rights Commission; Corporación Justicia y Democracia (from this institution, 35 optical discs with information regarding the cases of victims presented to the National Truth and Reconciliation Commission).

24 Created in 1992, the Memory of the World Program (MoW) is a UNESCO initiative aimed at preserving the documentary heritage of the world, housed in libraries, archives and museums, as a symbol of the collective memory of humanity. This heritage reflects the diversity of the people, cultures and languages; it belongs to everyone and must be fully preserved, protected permanently and be easily accessible. At <http://www.unesco.org/new/es/santiago/communication-information/memory-of-the-world-programme-preservation-of-documentary-heritage/>

25 Article Three No. 6 expressly states that its functions shall include "Custody and storage of the records gathered by the National Truth and Reconciliation Commission, by the National Corporation for Reparation and Reconciliation, the Human Rights Program, created by Supreme Decree No. 1005 of April 25, 1997, of the Ministry of the Interior, once their functions have been completed; by the Commission on Political Imprisonment and Torture set up by Supreme Decree No. 1.040, 2003 of the Ministry of the Interior; and by the commission referred to in article 3 of the transitional regulations of this law, once its functions have been completed. It may also request information on the functioning of reparation mechanisms and promote, coordinate and disseminate cultural and symbolic measures designed to complement respect for human rights and to vindicate victims and preserve their historical memory. Likewise, to request, gather and process all existing information in the possession of public or private entities that relates to human rights violations or political violence referred to in the Report of the National Truth and Reconciliation Commission, without prejudice to the provisions of the first paragraph" Law 20.405, at www.leychile.cl.

26 Inaugurated on January 11, 2010 its mission is "To make known the systematic human rights violations by the Chilean State between 1973 and 1990, so that ethical reflection on memory, solidarity and the importance of human rights nationally will be strengthened so that never again will these events that attack human dignity be repeated".

27 Working Paper on Human Rights Heritage: Sites of Memory, Memorials, Archives and Objects of Memory, National Monuments Council, December 2018, 53-58.

28 Presented in December 2017, during the government of President Michelle Bachelet.

29 Law 20.885, article 8. At www.leychile.cl

30 See *Reporte de seguimiento del Plan Nacional de Derechos Humanos (Follow-up report on the National Human Rights Plan)*, March 2018, Undersecretariat for Human Rights, Government of Chile, <http://ddhh.minjusticia.gob.cl/primer-report-de-seguimiento-del-plan-nacional-de-derechos-humanos/>

From the field of art and its different forms, these archives nourish creativity within the theatre, cinema, literature and visual arts, with greater frequency. In 2011, the television series “The Archives of the Cardinal”, inspired by the work of the Vicariate of Solidarity, had a great impact and a massive audience, bringing knowledge of the experience of the dictatorship and the work of human rights organizations to those who did not live in that era, and to those who did not want to know, or did not see what was happening in the country. To commemorate four decades of the coup d’état, the series “Chile: Forbidden images, 40 years later”, collected stories silenced in the media, rescuing images and photographs banned by censorship, especially records of social mobilizations in the 1980s. Recently the documentary “Las Cruces” supports its audiovisual story in the judicial file on missing detainees, forest workers of the commune of Laja. Visual artists have also worked with archives on their works. “*La geometría de la conciencia*”, by Alfredo Jaar at the Museum of Memory and Human Rights works from photographs, the silhouettes of victims.³¹ Voluspa Jarpa has made use of the declassified archives of the CIA for the realization of several exhibitions, among those “*La biblioteca de la no-historia de Chile*” (2011) and “*En nuestra pequeña región de acá*” (2017). In the theatre, the play “No tenemos que sacrificarnos por los que vendrán” (We don’t have to sacrifice ourselves for those who will come) structures its script based on the minutes of the military junta’s sessions, to approve the labour plan proposed by its labour minister, to the detriment of workers’ union rights. The phrase which alludes to the title of the play is a textual phrase of A. Pinochet in those sessions.

These are just a few examples of the numerous cultural productions that, especially after the year 2000, have used archives linked to human rights violations under the dictatorship, in their broadest sense, as a source and inspiration.

PUBLIC CONTROL OVER ARCHIVES

A growing awareness of the value of archives in transitional justice processes has allowed human rights organizations that existed during the dictatorship to seek safeguards to protect their archives. However, this has not been a quick or easy process, especially when it comes to organizations that existed outside the capital, or in small and geographically remote towns. However, the compilation and rescue work carried out by the Museum of Memory and Human Rights has been an important contribution.

With respect to the State archives, there has been no government policy to identify and safeguard these archives, despite the persistent demand of civil society and the recommendations of institutions such as the NHRI. In its Annual Report 2014, NHRI recommended to the executive branch an advancement in the elaboration and execution of a public archives policy that guarantees integrity and public access to the documentary heritage associated with massive and systematic violations of human rights.³²

In spite of this, from the research work developed by the Museum of Memory and Human Rights in the process of its installation, it was possible to locate and rescue archives in different parts of the State, in order to preserve them and make them accessible to the public. At the same time, the very act of making its existence known has allowed its protection, or at least prevented its destruction. This was the case, for example, in the Library of Congress, where the minutes of the sessions of the military junta

were located. Subsequently, the Library of Congress itself digitized all the minutes and made them available online.³³

Thus, the interest of institutions such as the MMDH, proactive public officials or researchers³⁴ has made it possible to identify and safeguard archives in other public departments³⁵ safeguarding them from severe risk of loss. There is no doubt that the dissemination of its existence reduces the risk of its elimination, since in Chile there is no specific rule, either for its protection or to ensure its public access.

RIGHT OF ACCESS TO ARCHIVES

The enactment of Law No. 20.285³⁶ on Access to Information in 2008, during the government of President Michelle Bachelet, has at least established mechanisms for requesting documentation from public bodies that previously had no willingness to give this information, let alone respond to this type of request. This law contains the regulation related to the state administration, the Law on the Transparency of Public Functions and Access to Information, and establishes that information prepared with a public budget, and is in the possession of administrative bodies in any format and support, is public. This has resulted in citizens having real access to a large amount of information, that prior to the enactment of the law, was very difficult to obtain. The transparency law creates an autonomous public-law corporation called the Transparency Council³⁷ to promote transparency in the public service, monitor compliance with regulations and guarantee the right of access to information. However, when it comes to requesting archives and information on human rights crimes, the refusal of parties of the requested institutions always persists.

In 2015, the Chilean Air Force (FACH) refused to provide information on the pilots of the Hawker Hunter planes that bombed the Palacio de la Moneda on September 11, 1973. The Transparency Council ordered the FACH to hand over the background information, which this institution repeatedly refused to do.³⁸

31 The Geometry of Conscience, Museum of Memory and Human Rights, <https://ww3.museodelamemoria.cl/exposiciones/la-geometria-de-la-conciencia/>

32 Annual Report 2014: Situation of Human Rights in Chile, National Institute of Human Rights (NHRI), <http://bibliotecadigital.indh.cl/handle/123456789/740>

33 Diaries of Parliamentary Sessions and Interventions, Legislative Corporations and Diaries of Sessions: 1973–1990, Library of the National Congress of Chile, https://www.bcn.cl/historiapolitica/corporaciones/periodos_legislativos?periodo=1973-1990

34 Carlos Dorat Guerra, Mauricio Weibel Barahona, *Asociación Ilícita. Los archivos secretos de la dictadura*, Santiago de Chile: Ceibo Ediciones, 2012.

35 Ministry of Foreign Affairs, in whose Historical Archive there is a variety of documentation that accounts for the repressive action and control of the dictatorship; Ministry of Public Works, where a file was found on the construction of the Dawson Island Prisoners Camp, the southernmost in Chile, to which the top leaders of the Popular Unity party, ministers and collaborators of President Salvador Allende were taken; this camp was the first public work of the dictatorship in 1973; Ministry of Justice, in 2017 files of war councils against political prisoners at the beginning of the dictatorship were located, of which until that date their existence was unknown, are some examples of these rescues.

36 See <https://www.leychile.cl/Navegar?idNorma=276363>

37 Transparency Council, <https://www.consejotransparencia.cl/>

38 Transparency Council basis for requesting preliminary hearing from the FACH Commander-in-Chief, Transparency Council, 8. 7. 2016, <https://www.consejotransparencia.cl/fundamentos-del-cpltpara-solicitar-instruccion-de-sumario-al-comandante-en-jefe-de-la-fach/>

Faced with this situation, the Office of the Comptroller General of the Republic opened an administrative summary against the Commander in Chief of the Air Force, applying the provision to the effect established in article 49 of the same law.

DECLASSIFICATION AND OPENING

In 2015, a bill was presented to Parliament to repeal Law 18.771, enacted by the dictatorship in 1989, which exempted the armed forces from the obligation that all public agencies have to deposit copies of their documentation in the National Archives of Chile, and authorizes them to destroy their documentation without consulting other bodies. The norm has served to prevent the delivery of information on the human and material resources that the armed forces assigned to repression, through their own intelligence agencies and others specially created, such as DINA and NIC. This project, which had the support of the National Archive and various civil society organizations, was approved in the Chamber of Deputies in November 2015, but to date has not continued in the Senate. In other words, it has stalled.

In relation to the law that established secrecy for 50 years for the archives of the CNPPT, there was extensive debate regarding the right to privacy of torture victims and their stories, and the collective right to truth and justice. Arguments were made in both directions. On the one hand, it was stated that those who had attended the commission were not asked whether they agreed to have their testimonies made public; on the other hand, it was argued that many people, who for the first time, many years after the events, related what they had experienced and the suffering to which they had been subjected, had expressed the wish that their testimonies should remain confidential.

In the context of this public discussion in 2014, a parliamentary motion was presented,³⁹ which ended up not being approved, to establish the public character of these documents. Subsequently, in 2016, emphasis was placed on the presentation of a bill to amend Law 19.992, and give access to the courts of justice. This bill is still in the legislative process.⁴⁰

In 2015, groups of former political prisoners, together with a political artistic collective, began a campaign to access their testimonies presented to the commission, with the slogan “memory is ours”. An artistically disseminated media campaign, increased the demand for access to these files. Appeals were also filed to the courts to obtain the right to this information, which were granted, and the plaintiffs were able to access their testimonies.⁴¹

The NHRI, the custodian of these archives by law, requested the Comptroller General of the Republic to make a pronouncement to determine whether the agency could deliver the information it held to the judges who requested it. The Comptroller's Office determined that this documentation could reach the judges investigating human rights cases.

At the end of 2015, the NHRI began to deliver only the documents contributed by each victim to the commission, to the holders that requested them, but the following year, it decided to deliver all the documentation contained in the personal files “taking care not to violate the rights of third party victims and of the declarants.”⁴² The procedure used to protect the privacy of third parties has consisted of crossing out all personal data in order to anonymize them.

Currently the request of the organizations of former political prisoners, lawyers and other civil society organizations is to

obtain access to the digital databases of the CNPPT, so that it contributes to the processes of justice.⁴³ This request was rejected by the NHRI and the Transparency Council.⁴⁴ The requirement still continues, depending on the exercise of the right to justice that this information would provide.

In another field, the impact of the declassification in the United States of the CIA and U.S. State Department archives between 1970 and 1990 should be highlighted. Shortly after the arrest of A. Pinochet in London, researcher Peter Kornbluh⁴⁵ promoted, together with the National Security Archive,⁴⁶ a campaign for the declassification of more than 24,000 documents before the Clinton administration. Shortly afterwards, part of the documentation was handed over to the government of Chile and deposited in the National Library of Chile. Almost all these archives were crossed out, and in some cases almost all the documents were covered. Despite this, they revealed the role that the United States had played in the coup d'état, financing, responsibility, and complicity with sectors in Chile, such as the business sector, the press and the armed forces. Subsequently, new groups of documents were declassified and were valuable in clarifying, for example, the link between A. Pinochet and the crime of former embassy official Orlando Letelier in Washington, in September 1976, among others.

The request for the opening of the archives is permanent. In 2013, London 38, Memory Space, called for a public campaign “No more secret archives”, affirming that secrecy is anti-democratic, hinders the truth and justice processes, and perpetuates impunity for the guilty. It claimed that “the State has the obligation to provide all available information, and cannot rely solely on the assertion of the non-existence of the documents requested, or on restrictions to access, such as the privacy of individuals or national security” which are common grounds for denying access.

CURRENT STATUS

The current levels of recognition and need for the protection of archives are closely related to the increased awareness of their value for truth, justice and reparation in transitional justice processes; as well as in the approach to the reconstruction of the historical memory of the recent past and its pedagogical value.

Communities are increasingly interested in gathering and compiling their archives, reconstructing the history of their struggles in different periods, especially those who focused on social

39 Newsletter No. 9598-17

40 Newsletter No. 10883-17

41 Desclasificación Popular has a website on which those who voluntarily so determined may publish their complete files or part of them. See <https://desclasificacionpopular.cl/>

42 Information Valech Commission, National Institute of Human Rights, <https://www.indh.cl/destacados-2/comision-valech/>

43 Rodrigo Fuentes, “Organizaciones de DDHH intentan desbloquear datos de Comisión Valech”, in *Diario Uchile*, 4. 5. 2017, <https://radio.uchile.cl/2017/05/04/organizaciones-de-ddhh-intentan-desbloquear-datos-de-comision-valech/>

44 Decisión Amparo Rol C3065-16, Transparency Council, https://extranet.consejotransparencia.cl/Web_SCW/Archivos/C3065-16/DecisionWeb_C3065-16.pdf

45 Kornbluh has published several books on these documents, among them: Peter Kornbluh, *Pinochet: Los Archivos Secretos*, Barcelona: Editorial Crítica, 2004.

46 About Chile Documentation Project, National Security Archive, <https://nsarchive.gwu.edu/about-chile-documentation-project>

and political transformations in the country, and then the struggle for freedom and democracy under the dictatorship. There is a significant development of lines of historical research through oral proceedings, and a growing awareness of the urgency of rescuing and recording sources. Thus, strong archival work has been developed in student federations, contextualizing the social and political process of which they were a part: in the rescue of union histories, agrarian reform and in diverse communities of memory in different parts of the country, the formation of local archives, neighbourhoods, and social organizations. There is an increasing movement that not only places great value in it as an irreplaceable heritage for the reconstruction of historical memory, but also in its value for the strengthening of democracy.

Collaborative work gave birth, in 2011, to the Memory and Human Rights Archives Network RAMDH.⁴⁷ Initially made up of 11 institutions or organizations,⁴⁸ it develops various activities to make visible and promote the use of its archives.

Regarding the State, at the end of 2017, the Ministry of Foreign Affairs made available to the public, through its website, with the purpose of contributing to the knowledge of the historical truth, a sample of documents guarded by its General Historical Archive (ARCHIGRAL). The account is on exchanges between the Ministry of Foreign Affairs and the Ministry of Defence, the armed forces, police, and intelligence services between 1973 and 1990.⁴⁹ After this first publication, the documentary exhibition has not been enlarged.

The National Archive of Chile, in charge of the custody of the Colonia Dignidad Archive, provided for public access, according to its consultation protocols, after having carried out a work of conservation and description.⁵⁰ It also began work aimed at identifying and proposing ways of dealing with documentation related to human rights placed in this institution.

For some years now, the judiciary has been developing a digital platform called Historical Memory, which includes the executory sentences of judicial cases of human rights violations that occurred during the dictatorship.⁵¹ The development of this resource undoubtedly marks some progress in the right to truth and information for all citizens.

However, it should be noted, that while there has been interest in preserving and making publicly accessible these archives in some state administration bodies, the reality is that these isolated and fragmented efforts are not enough. It takes political will and determination, and the investment of resources to catch up on this issue. There is still a great debt to the state archives linked to human rights violations, as well as in laws that protect them and ensure their public access.

LESSONS LEARNED AND RECOMMENDATIONS

The documentation of events, by human rights institutions and victims' groups at the times when they occur, and the awareness of safeguarding these archives, protecting them from the risks of destruction during the dictatorship, have proved essential as evidence in transitional justice processes. However, it was not as clear in the final days of the dictatorship, to demand the protection of the archives of the intelligence services, in order to prevent their possible destruction or concealment. This request was not among the urgent matters at the end of the dictatorship, as it was in other parts of the world, in which citizens took action to request that they not be destroyed.⁵²

As a result of the Chilean experience and the debates regarding the truth commissions archives, it is necessary that these commissions establish from the beginning, and in an informed manner, everything related to the documentation that they collect, compile and produce, both in relation to its subsequent destination, and the access that it will have, having as a support, the right to truth, justice and reparation.

Undoubtedly, the existence of the Museum of Memory and Human Rights, the sites of memory and civil society archives⁵³ are very relevant. There is a need for strong archival institutions, which can promptly take charge of locating, identifying, protecting and making publicly accessible, the documentation existing at the different levels of the state administration, which account for the repressive system and its actions. Having this institutionalization, resources and trained professionals will help prevent the risk of the disappearance of this documentation. Identifying, safeguarding and preserving it are permanent challenges.

There is an urgent need for specific laws on human rights archives that, on the one hand, protect them from possible destruction and, on the other, allow their access for the purposes of justice, research, historical memory, pedagogy or general interest. Safeguarding the dignity of persons and observing the protection of personal data, establishing terms and conditions for the responsible use of them, is critical. Chilean law has not established considerations regarding the right to historical truth, the right of access to public information, or the preservation of archives. This shortcoming should be remedied.

Finally, the appreciation of these archives as a source of knowledge, reflection, research and pedagogical value on the serious violations of human rights that occurred during the dictatorship, as well as their need for preservation and public access, should be understood as an element of the consolidation of democracy.

47 See <https://ramdh.cl>

48 University of Chile Students Federation Archive (AFECH); Archive of Graphic and Audiovisual Documentation of the University of Santiago de Chile (ArchivoDGA); Chilean Human Rights Commission (CCHDH); Parque por la Paz Villa Grimaldi Corporation; Christian Churches' Social Assistance Foundation (FASIC); Foundation for the Protection of Children Damaged by the State of Emergency (PIDEE); Salvador Allende Foundation (FSA); Documentation and Archival Foundation of the Vicariate of Solidarity (FUNVISOL); London 38 Memory Space; Museum of Memory and Human Rights (MMDH); Víctor Jara Foundation. In 2019, a representative of the National Archive of the Administration, dependent on the National Archive of Chile, was added.

49 Documentary of human rights. (1973-1990), Historical Archive of the Chancellery, Ministry of Foreign Affairs., <https://minrel.gob.cl/muestra-documental/minrel/2018-09-10/185924.html>

50 Colonia Dignidad collection: The value of documentary testimony, National Archive of Chile, <https://www.archivonacional.gob.cl/sitio/Contenido/Noticias/89605:Fondo-Colonia-Dignidad-el-valor-del-testimonio-documental>

51 Human rights sentencing system, Digital Historical Memory, <http://mhd.pjud.cl/ddhh/index.php>

52 As happened, for example, in 1989 in the former GDR, with the Stasi.

53 They retain their historical archives and continue to operate autonomously: Chilean Commission on Human Rights (CCHDH); Christian Churches' Social Assistance Foundation (FASIC) and Documentation and Archival Foundation of the Vicariate of Solidarity (FUNVISOL); groups of relatives of disappeared detainees and groups of relatives of political prisoners. Other institutions transferred their historical archives to the MMDH and assume current human rights issues in development in their archives; other institutions, their civil society organizations begin to develop and collect archives recently.

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LUSTRATION

CATH COLLINS

INTRODUCTION

Neither lustration – understood as “cleaning up” the civil service and other public institutions – nor vetting – understood as performing background checks to prevent “unsuitable” people being hired, promoted or elected – were carried out in Chile after the 1973–1990 Pinochet dictatorship. On the contrary, one remarkable feature of the transition from 1990 was precisely how little change there was to constitutional, administrative, economic, security, or judicial arrangements. There are two main, connected, explanations for this absence of real change. First, even though the military regime exited, it did not fall. This was a pacted transition, which happened according to the rules that the outgoing dictatorship had set down in its own, authoritarian Constitution, imposed in 1980. Newly democratic Chile did not replace that Constitution, unlike most Latin American states emerging from military rule at that time. Secondly, the authoritarian regime and its representatives remained popular and politically strong, buoyed up by a persistent though not entirely deserved reputation for economic success.¹ Even in the 1988 plebiscite that led eventually to the end of the regime, there had been a strong minority vote (44 %) in favour of keeping Pinochet in power. The two right wing political parties, made up of ardent supporters of the regime and backed by the business interests who had benefited from it, had enough representation in the new democratic legislature to block real change. They were certainly able to avoid any strong measures being taken to prosecute or investigate past regime crimes (see Collins, chapter on Investigation and Prosecution of the Crimes of the Regime). Many discussions of lustration take it for granted that transitional settings have new constitutional arrangements and strong social repudiation of the past order. Chile had neither.

CHANGING TO STAY THE SAME

Far from being banned from public life, senior figures who had been civil servants, judges, army officers, police chiefs, diplomats etc. under the old regime almost all kept their jobs, their influence, and even their prestige after 1990. Very little stigma or shame attached to having been part of the dictatorship, which moreover was never described by this term (“military regime” or “military government” were usually preferred). Indeed, changes that Pinochet had put in place in his last year as de facto ruler kept many of his loyal followers in their posts. These changes were contained in so-called “mooring” laws (*leyes de amarre*). The objective, as Pinochet himself said, was to “leave the country tied up, and well tied up.”² The laws prevented the incoming government from removing Supreme Court justices, and other senior officials. Because the regime had been so long (17 years), these officials, like almost anyone in a senior public position, had been appointed by the regime, or had proved themselves loyal to it.

The terms of the Constitution meanwhile contained deliberately antidemocratic provisions, cemented in by making major changes subject to a large, almost unattainable, supermajority

in the legislature. These provisions included the concession of operational and financial autonomy and discretion to the armed forces and security services (see chapter by Claudio Fuentes, *Dismantling the State Security Apparatus*); plus, the establishment of nonelected lifetime seats in the Senate for some former commanders in chief and, eventually, for Pinochet himself. The Constitution had also explicitly consolidated a highly neoliberal economic model: health, education and pensions were deregulated and privatized.³

The model enshrined in that Constitution proved remarkably resilient throughout four consecutive periods of centre-left government after 1990, even though each was led by figures associated with opposition to the dictatorship, or even directly victimized by it.⁴ As Claudio Fuentes describes in the chapter on security sector reform, authoritarian enclaves, common throughout the apparatus of state, were particularly pronounced and visible in the armed forces, police, and intelligence services. A law brought in just before transition, and still in force, exempted these services from sending records to the National Archive.⁵ They were allowed instead to destroy old documents, giving them *carte blanche* to remove records that could be considered incriminating. Some of those who were closely involved in often tense negotiations between the incoming elected administration and the outgoing regime described outgoing officials as clearly concerned to prevent any kind of future investigation or scrutiny of Pinochet, his family or his inner circle.⁶ Any sign of such intention was met with sabre-rattling and open threats of authoritarian regression. Pinochet used shows of strength to intimidate the new administration – on two occasions in its first years, troops were called to battle stations or sent out onto the streets in uniform.

Intelligence work was not significantly re-structured or brought under civilian control after transition. One figurehead from the notorious DINA secret police that had overseen the most brutal early repression was eventually tried and jailed. However, the CNI (Centro Nacional de Inteligencia), a less lethal but nonetheless feared replacement for the DINA that had operated through the 1980s, underwent only cosmetic changes. A substantial proportion of its agents were simply transferred into the official military after 1990. Prosecutions for dictatorship-era human rights violations that gathered pace after 1998 eventually

1 Alan Angell, *Democracy After Pinochet: Politics, Parties, and Elections*, London: Institute for the Study of the Americas, 2007.

2 Pinochet was echoing a phrase used by his hero, General Franco, about Spain.

3 The country's entire water resources had already been virtually privatised by the Water Code, introduced by the dictatorship in 1981. The Code defines water as a commodity, allowing the state to sell off water rights, many of which are today concentrated in the hands of a few extremely rich businesses or individuals. This state of affairs, almost unique in the world, was one factor in the social and economic discontent that spilled over into widespread unrest in late 2019.

4 Including subsequent presidents Ricardo Lagos (2000–2006) and Michelle Bachelet (2006–2010 and 2014–2018).

5 Law 18.771, of 1988.

6 Rafael Otano, *Nueva crónica de la transición*. Santiago, LOM: 2006.

declared both the DINA and the CNI to have been “criminal associations”. Nonetheless, as late as 2018, the Army successfully defended itself against an Access to Information request that would have forced it to reveal the names of all former DINA or CNI agents who had been allowed to continue in service, and eventually promoted to the rank of General or above. In a similar case in the same year, the National Security Council was also allowed to keep secret minutes of its meetings in the early transition period. These included its highly critical and insubordinate responses to the Chile’s first Truth Commission, the Rettig Commission (carried out in 1990–91).⁷

In the year 2000, a decade after transition, a Roundtable Dialogue was set up between the government and the Armed Forces, under the chairmanship of the Catholic Church. The stated purpose was to discover the whereabouts of over 1,000 regime victims still missing (the “detained-disappeared”, *desaparecidos*). The fact that the initiative happened at all was due to the weakened position of the Armed Forces after former dictator General Pinochet was arrested in the UK in 1998 on an international arrest warrant issued in Spain.⁸ The Armed Forces were persuaded that a gesture of good faith was necessary, given uncomfortable international publicity focused on Chile’s human rights legacy. Even so, the dynamics of the Roundtable were very conciliatory towards the Armed Forces. They were allowed to persist in their widely disbelieved position that they held no institutional records about repression, because they were not institutionally responsible for it.⁹ Relatives of the disappeared did not accept the Roundtable or its meagre results, and still campaign against what they call a “pact of silence” that still prevails among former military, ex conscripts, and other regime agents.

In 2004 the Army released a much-publicised open letter supposedly acknowledging (for the first time) their involvement in past violations, and promising a definitive change of culture and outlook.¹⁰ The letter – which echoed the popular sentiment “Nunca Más”, Never Again, used as a slogan by many Latin American truth commissions and human rights groups – nonetheless was not borne out by later actions. From 2010 onwards, former and serving commanders in chief made it their business to directly and indirectly criticize trials that sent former agents to prison for human rights crimes. Although a practice was introduced whereby officials charged with such crimes were sent into retirement – which could be seen as a weak form of vetting – it was soon revealed that various officials had been immediately re-hired as civilian consultants. Even former secret police agents now serving dozens of accumulated sentences for torture and crimes against humanity, still retain full military rank and generous pensions. A group of retired senior military officers formed an association for legal and public defence of their former comrades, describing them as “political prisoners”. Each year, on the coup anniversary, the association takes out a full-page advert in Chile’s main conservative newspaper. The ad defends the coup as a patriotic act that saved the country from Marxism, and denies or downplays killings, torture and disappearances by the regime.

The judiciary, a largely conservative body that was also never purged or significantly reformed in the immediate transition period, did finally undergo a gradual process of generational replacement, modernization, and code and system change.¹¹ A limited increased openness to international law, the demonstration effect of the “Pinochet case” in Spain, and the gradual rise to seniority of those few honourable judges who had in the past tried to rein in the dictatorship’s crimes, began to produce new openings

for relatives, survivors and human rights lawyers who continued to insist that past atrocities could not be amnestied and should be investigated. Although this opening up of the judiciary was cautious, slow and never fully consensual, by the mid-2000s it began to gather momentum. By 2019 over 1,000 criminal cases were open, with around 500 more concluded. Over 1,000 regime agents of all levels had been investigated and/or sentenced, with over 150 sent to prison.¹²

In recent years, prosecutions have begun to reach people who were close to the dictatorship, yet continued to be powerful and respected, at least on the political right. In December 2018, Juan Emilio Cheyre, the Army Commander in Chief responsible for the 2004 open letter that supposedly marked a definitive break with the Pinochet legacy, was found guilty of having covered up crimes of torture as a junior officer in 1973. Cristian Labbé, a former bodyguard of Pinochet’s who continued to vocally support Pinochet and his legacy, was four times elected mayor of a major district of the country’s capital after transition. In October 2019, he was sentenced to three years in prison for having tortured a political prisoner in the 1970s. Both Labbé and Cheyre had been given academic posts by universities well aware of their past histories. Cheyre was even the president of the country’s electoral service, Servel, when the first criminal allegations against him surfaced in 2013. He initially defended himself by stating that, since he had been questioned but not (at that time) charged, he should be treated as fully innocent of all blame or responsibility. His attitude basically dismissed questions of political or moral responsibility, insinuating that only those with a proven court case against them could be considered worthy of blame.¹³ This legalistic attitude is still prevalent in Chile. Together with the continued electoral and social popularity of right wing and authoritarian views, it helps explain why there was never a stronger drive for any kind of lustration or vetting process.

The worst excesses of the dictatorship were briefly given renewed attention in the mid-2000s, when a second Truth Commission, focused on torture and political imprisonment, reminded Chilean society of the most depraved practices of the regime, such as the training of dogs to sexually assault defenceless

7 Observatorio de Justicia Transicional, “Negacionismo en la Era de la Post-Verdad: Verdad, Justicia y Memoria en Chile, a dos décadas del ‘Caso Pinochet’”, in *Informe Anual DDHH en Chile 2018*, Santiago: Universidad Diego Portales, 2018, 17–106. <http://www.derechoshumanos.udp.cl/derechoshumanos/images/InformeAnual/2018/Collins-Negacionismo.pdf>

8 Sebastian Brett, “The Pinochet Effect Ten Years On from London 1998”, Santiago, Universidad Diego Portales https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2628432

9 Cath Collins, “Human Rights Policy under the Concertación”, in Siavelis and Sehnbruch (eds) *Democratic Chile: The Politics and Policies of a Historic Coalition, 1990–2010* Boulder, Co.: Lynne Rienner, 143–172.

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11 Paul Drake and Iván Jaksic, *El modelo chileno: Democracia y desarrollo en los noventa*. Santiago: LOM 1999; or Lisa Hilbink, *Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile*, Cambridge: Cambridge University Press, 2007.

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13 Collins, Cath “Truth Justice and Memory, 40 years after the Chilean Coup”, Transitional Justice Institute Research Paper No. 14-05, Transitional Justice Institute, Ulster University. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2628430

prisoners.¹⁴ Around this time, the political Right again began to distance themselves from the regime. It began to be seen as a liability, rather than a badge of honour, to have served under Pinochet. Allegations of economic corruption were however more effective than human rights violations in creating repudiation: the personal reputation and popularity of Pinochet suffered most when, in the year 2004, it was revealed that he had millions of dollars in secret bank accounts in the US Riggs Bank. Pinochet died in December 2006. Although the Army gave him a funeral with full military honours, he was not given a state funeral. Serving President Michelle Bachelet did not attend, nor declare national mourning.¹⁵

Four years later, in 2010, Chile elected its first civilian right-wing administration for fifty years, when Sebastian Piñera won the presidential election. At first, Piñera tried to occupy the centre ground, declaring that he had voted against Pinochet in the 1988 plebiscite. In 2013, on the 40th anniversary of the coup, he gave a public speech strongly denouncing the regime's human rights crimes and its "civilian accomplices". These included many of the country's still-powerful economic elites, including Piñera's own business associates. The moderate tone of Piñera's first government however changed from 2018, when he was re-elected to a (non-consecutive) second term. A harder line was apparent from the very beginning, and he made various controversial ministerial choices, selecting people who had been very close to the dictatorship. As politics in South America in general swung toward the right, the Piñera government began to shed its earlier embarrassment about ties to the dictatorial past. Although rhetoric about democracy and the rule of law was still used, hardline law and order and anti-immigration policies were adopted. A far-right presidential candidate emerged, with a vocal and visible national following.

Throughout the whole post-transitional period Chile continued to be largely prosperous on a macroeconomic level, joining the OECD in 2010 and moving into the World Bank's classification of an upper-middle-income country. However, inequality, lack of cultural diversity, and the preservation of dictatorship-era neoliberalism, authoritarian police culture, and constitutional arrangements finally came to the surface in late 2019. A series of scandals also exposed widespread corruption in political campaign finance, big business, and the higher ranks of the armed forces and police. Many of these practices featured individuals from all sides of the political spectrum and in the case of the army and police, it became clear that a dictatorship-era culture of illicit enrichment had never been rooted out. Years of simmering discontent among secondary school pupils, students, Mapuche indigenous activists and others left behind by the country's

extractive economy and extremely regressive private pension, health and education system, exploded onto the streets in mid-October. The reaction of a visibly rattled president was to declare a state of exception and send tanks onto the streets, producing scenes reminiscent of the 1970s. The military and police brutality which followed left a significant number of people blinded, with police misusing supposedly dissuasive "plastic" bullets as attack weapons. Footage of apparently indiscriminate and senseless police violence, including credible allegations of torture and sexual assault against young women, exploded the carefully cultivated myth of Chile as the "perfect transition" that had evolved into a successful democracy. Protests were amorphous, acephalous and enduring. Efforts by the political opposition to broker an end to them by – finally – acknowledging that constitutional change was needed were met, at least initially, with skepticism and rejection. Disillusion with the entire "political class" finally seemed to expose a failed social contract behind the self-proclaimed Chilean success story.

CONCLUSIONS AND RECOMMENDATIONS

It is impossible to say for certain that a lack of lustration or vetting contributed to Chile's late 2019 social and political upheaval. Nonetheless it is evident that incoming democratic forces in 1990 failed to install a clear and lasting break with dictatorship-era legacies and culture, particularly in policing, but also in public administration, educational practices, and economic and social policy. Compromises that may have seemed prudent in 1990, given real transition constraints, fast became a self-limiting and eventually self-defeating preference for maintaining the status quo. Chile became a byword for neo-liberal experimentation under Pinochet, and continued to be so, less explicably, after he was long gone. At time of writing it is impossible to know what the outcome of the late 2019 protests will be, although a new Constitution has – finally – been promised. However, the episode certainly suggests that excessive post-transitional caution, consensus and elite bargaining can create anti-systemic forces.

14 Informe de la Comisión Nacional sobre Prisión Política y Tortura ("Informe Valech"), Santiago: Gobierno de Chile, 2004, and see Pérotin-Dumon, Anne, "El pasado vivo de Chile en el año del Informe sobre la Tortura", in *Nuevo Mundo*, Débats, 2005 <https://journals.openedition.org/nuevomundo/954>

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INVESTIGATION AND PROSECUTION OF THE CRIMES OF THE REGIME

CATH COLLINS

INTRODUCTION

Chile's 11 September 1973 military coup led to 17 years of right-wing military rule under General Augusto Pinochet, who created an authoritarian police state. Grave human rights violations occurred throughout the 1973–1990 period, although most acknowledged disappearances and extrajudicial executions happened between 1973 and 1978. Many were carried out by a secretive intelligence agency, the DINA, which reported directly to Pinochet. The DINA ran dozens of clandestine torture and detention centres in Chile, and hunted down officials from the previous socialist government: left wing political party activists, student leaders and anyone else deemed a threat. It also instigated the conspiracy known as “Operation Condor”, in which South American military regimes collaborated to target dissidents and exiles.

Violations carried out by the regime included the suspension of civil and political liberties (including press censorship, curfews, and the banning of all political parties), massive social welfare cuts, and regressive privatisation of health, education and pensions. Over 3,200 people were forcibly disappeared or extra-judicially executed. Some violations were given spurious justification, using military tribunals to try civilians for imaginary crimes against the state. Others were denied, or attributed in regime propaganda to supposed armed left-wing guerrilla groups. At least 39,000 people survived torture and political imprisonment, and around 100,000 were forced into exile. In 1976, the DINA assassinated former Chilean foreign minister Orlando Letelier in Washington DC, creating a backlash from the previously supportive US government and leading to superficial reform. The DINA was replaced by a new agency, the CNI. Clandestine burial sites were dug up, and the bodies of the disappeared were removed and hidden elsewhere. An amnesty law was passed, for “politically motivated crimes committed between 11 September 1973 and 10 March 1978”. It was used solely to the benefit regime agents. A highly deferential court system invoked the amnesty to pre-emptively close or suspend investigations against members of the security services or police, none of whom were ever successfully prosecuted, even for atrocities which fell outside the amnesty law. In 1980, a new Constitution imposed by the regime passed many of its authoritarian innovations into law. Protests triggered by a 1983 economic crisis produced renewed repression, but eventually paved the way toward a return of elected democracy. A 1988 plebiscite, narrowly lost by Pinochet, led to democratic elections in 1989 and a controlled handover of power to a centre-left coalition, the Concertación, in 1990.

LEGAL RESPONSES DURING THE DICTATORSHIP PERIOD

Legally framed defence of human rights was attempted almost immediately, spearheaded by the Catholic Church. The specially

created Vicariate of Solidarity, Vicaría, which provided social, medical and legal assistance to victims and relatives, emphasising legal responses in order to maintain an apolitical stance. Habeas corpus writs (*recursos de amparo*) were submitted to the courts in almost every known case of disappearance or detention, and the Vicaría carefully amassed documentation allowing it to denounce violations abroad. Although the Vicaría closed its doors shortly after transition, the human rights lawyers who had worked under its auspices, and its extensive archive of testimonies, and court documents, were key to the later revival of efforts at justice.

TRANSITION AND TRANSITIONAL JUSTICE

Most centre and left wing political parties – except the Communist Party – had agreed to accept the legal and constitutional framework laid down by the outgoing regime. So although the incoming government had a clear opposition identity, it had limited freedom to act. Pinochet, who continued as Army Commander in Chief, famously threatened that “the day they touch any of my men, the rule of law is over”. Early revelations such as the discovery of mass graves therefore made headlines, but did not lead to prosecutions. Efforts to investigate financial fraud involving Pinochet's son meanwhile produced a virtual military rebellion. Newly elected president Patricio Aylwin dropped a campaign promise to repeal the Amnesty Law, declaring instead that justice would be pursued only “insofar as is possible” (*en la medida de lo posible*).

Instead of prosecutions, an official truth commission was held, and some financial reparations were offered to relatives of the dead and disappeared. Although human rights lawyers and relatives continued to demand justice, judges were unwilling. Aylwin's plea that amnesty should only be applied after investigations did, however, see some limited reopening of cases. One breakthrough came with the 1993 conviction of former secret police chief Manuel Contreras over the 1976 Letelier assassination. Military authorities, however, refused to hand Contreras over until a specially built military prison was provided. It was widely rumoured that the armed forces had also obtained guarantees that there would be no more prosecutions. The human rights issue was not given social or political priority. The new government and the public seemed preoccupied with other matters, while the military and the political right vigorously opposed the occasional efforts to revive prosecutions. Relatives' organisations grew steadily more disillusioned by the ruling coalition's refusal to act more strongly against the impunity. The courts, the civil service, the police and the military were not purged, and many former regime figures or supporters continued to hold political, social and economic power.

1998 was a pivotal year for transitional justice in Chile. Pinochet was due to retire from the Army in February 1998, and he made a lifetime “honorary Senator”. Disgust at this possibility led

to the first full criminal complaint ever lodged directly against Pinochet. It was brought by the president of the Communist Party (in her capacity as a relative of a victim of disappearance). In September that year, in a separate case, domestic courts upheld lawyers' long-standing argument that disappearance was an ongoing crime not fully covered by amnesty. On 16 October, Pinochet was arrested in the UK for human rights violations committed in Chile, against victims of Spanish nationality. The case was later expanded, invoking universal jurisdiction principles. It became a test case for the enforceability of international human rights law. The Chilean government invoked sovereignty and pressed for Pinochet's immediate return, offering veiled assurances that he would face justice at home.

Released by the British Home Secretary on medical grounds in March 2000, Pinochet flew home to a triumphant military reception. During his absence, however, victims and relatives had made hundreds of new or renewed criminal complaints against him, and human rights lawyers began to formally request his impeachment and indictment. In August 2000 the Supreme Court ruled that Pinochet could be charged in at least one case. In 2004, a US money laundering investigation revealed that Pinochet had secret million-dollar accounts in the US Riggs Bank. He was being investigated for financial crimes and tax evasion, as well as human rights crimes, at the time of his death, age 91, in December 2006. In conservative circles, the allegation of corruption was more damaging to Pinochet's prestige than accusations of torture and repression had ever been. He was not granted a state funeral, though he was afforded full military honours.

In the interim, the courts had finally been prodded into taking more decisive action. In 2001, a group of special investigative magistrates was appointed to oversee an ever-expanding case universe, involving not only Pinochet, but dozens of other former regime officials, some still in active military service. Renewed campaigning by survivors led to the holding of a second truth commission to document political imprisonment and torture. In the same year, 2004, the Supreme Court upheld for the first time, the argument that disappearance constituted both an ongoing crime and a crime against humanity, which could not be amnestied. By December 2006, this interpretation was extended to cases of extrajudicial execution. These majority (though not unanimous) progressive interpretations of international law were encouraged in September 2006 by the Almonacid verdict of the Inter-American Court of Human Rights. The Court ruled that Chile's 1978 self-amnesty contravened its international treaty commitments.

The part of the ruling requiring Chile to change the law was never complied with, but judicial interpretation continued, on balance, to favour the view that dictatorship-era violations can be investigated, and their perpetrators punished, if they constitute crimes against humanity, or war crimes. By September 2019 a total of 365 criminal cases involving such crimes had been resolved. The vast majority (322) were for victims of execution or disappearance, although cases are increasingly also brought by torture survivors.¹ Official data on the number of former regime agents charged, sentenced or imprisoned is not available, but by late 2019 over 150 individuals had served or were serving prison sentences. Around 300 more had been found guilty, but given lenient, non-custodial sentences, and approximately 1,000 had cases still ongoing or sentences pending appeal. Almost all were former intelligence service operatives with backgrounds in the armed forces or police.

LEGAL INSTITUTIONS AND INVESTIGATIVE AUTHORITIES

Chile is a civil law tradition country. Until the year 2000, its criminal justice system was written and inquisitorial. Cases were conducted by investigative magistrates, with almost no role for state prosecutors. This system was reformed and replaced after 2000, but the old system is still used for dictatorship-era crimes. This system allows victims of crime to petition judges directly and to participate actively in subsequent investigations. It also allows a wide array of documentation and past witness statements, including the Vicaría archives, and first truth commission files, to be admitted as potential evidence. In these ways, the old system has been useful for prosecuting past crimes. However, authoritarian continuity, past judicial collusion, political pressure and lack of institutional replacement, or reform, impeded justice progress at and after transition.

From 1998, a mix of judicial reform, international attention, and renewed civil society justice activism, has produced gradual improvements. Removal of old cases from military court jurisdiction, and the designation of special magistrates for human rights cases, also helped, although case progress has been far too slow, with many cases taking decades. Cases also use criminal law prevailing at the time of the offence, i.e. during the dictatorship. This is often insufficient, leading to low sentences. Judges investigating human rights cases are assisted by specialized detective police and the state forensic service, Servicio Medico Legal. The higher courts, police and SML, have improved their treatment of witnesses and understanding of human rights principles through the investigation of these cases. This has been positive for rights progress and democratization in general.

IDENTIFICATION OF THE CRIMINALS OF THE AUTHORITARIAN REGIME

Almost all perpetrators identified and convicted by post-transitional prosecutions were former military or security service (secret police) operatives. As of end 2019, only one civilian has been sentenced to a prison term. His crimes were committed in collusion with the police. Identification and prosecution of perpetrators has been done with little or no cooperation from the Armed Forces. Although they supposedly acknowledged, in 2004, their part in past repression, their position has been ambivalent, with many subsequent public statements and actions showing support and sympathy for perpetrators currently in prison. A roundtable effort convened in 2000, supposedly to help find the remaining disappeared, foundered when the information proved meagre and inaccurate. Military installations and training facilities still render tribute to Pinochet and other notorious human rights abusers. Right wing political parties also often defend the dictatorship and deny or downplay its crimes. Present-day policing of protests shows that the uniformed police also suffer from persistent authoritarian legacies. Evidence and testimonies for prosecuting dictatorship-era crimes have mostly come from survivors and civil society human rights organisations. Human rights lawyers acting for families, relatives' associations or survivors have been the main protagonists of justice progress.

¹ According to the Supreme Court, 1,459 criminal cases were ongoing at 30 April 2019.

Only after 2009 did the state begin to generate new cases ex officio; most current cases were instead begun by civil society petitions – *querellas*. A state Human Rights Programme does act on behalf of the state in prosecuting new and pre-existing cases. However, Programme lawyers only act in criminal cases for death or disappearance; they are not authorized to act in cases involving survivors. The archives of the first truth commission are fully available to the courts and the Programme, but those of the second commission (“Valech Commission”) are not. Moreover, state lawyers from another official institution, the Consejo de Defensa del Estado, “defend” the state against civil suits for damages brought by relatives or survivors. They argue that the state does not have liability, that the statute of limitations has lapsed, or that administrative reparations are sufficient. At present (2019) the courts do not accept these arguments and often award damages.

THE RULE OF LAW AND THE PRESENT-DAY INVESTIGATION OF DICTATORSHIP-ERA CRIMES

Rule of law reforms in Chile gradually overcame some dictatorship-era legacies and allowed past impunity to begin to be dismantled. Subsequent prosecutions have been slow and uneven, depending on judicial discretion and interpretation instead of the active and thorough replacement of dictatorship-era laws and personnel. The long delays have led to “biological impunity” whereby elderly perpetrators and/or survivors are unfit to testify, or die before cases can be concluded. Early sentences were also very lenient. Recent sentences are more proportional to the gravity of the crimes committed, but guilty parties use delaying tactics, appeals to the Constitutional Court, or alleged illness to escape justice. They also serve sentences in privileged conditions in special prisons, and apply continually for sentence reductions or

early release on parole. Changes in the composition of the higher courts also affect prevailing interpretations of international law, and therefore change case outcomes, sometimes favouring accountability, sometimes favouring impunity. These dynamics, plus the secondary role played by the state in pressing for prosecutions, have muted the social impact of atrocity crime prosecutions. On the positive side, this gradual approach has led to Chile becoming a world leader in using domestic courts to successfully try international human rights crimes. The fact that verdicts are so conservative, careful to respect existing legality and perpetrators’ due process rights, makes them less susceptible than in other countries, including Argentina, to accusations of political bias.

LESSONS LEARNT AND RECOMMENDATIONS

Chile’s cautious approach to transition and reform allowed authoritarian legacies, including impunity for past state crimes, to persist for too long. Although the gradual approach has allowed later change to be largely consensual or at least tolerated, justice has been too little, too late, for many victims and families. A more vigorous initial approach might also have helped change authoritarian institutions, including the Armed Forces and judiciary, more quickly, although reaction would also have been stronger. Emphasis on general democratization, and on generational replacement and technical improvements in the justice system, forensic medical service and detective police, helped to create a situation where continued impunity became indefensible. These emphases, combined with persistent civil society activism, also helped produce needed changes in institutional culture and behaviour, although these changes are still absent, and overdue, in some institutional and political sectors.

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REHABILITATION OF VICTIMS

MARÍA LUISA ORTIZ, RODOLFO IBARRA, DANIELA FUENTEALBA

INTRODUCTION

In this chapter we will describe the rehabilitation, or reparation of victims and how the Chilean State has been able to take measures, during the transitional process, to carry out the process in the face of the diverse consequences of the dictatorial period, through public policies, between September 11, 1973 and March 11, 1990.

Related concepts will be explained, from the point of view of various actors and/or victim care bodies, in order to explain the context that leads to the promotion of public policies after the recovery of democracy, their progress in society, and the impact at the state level of the strategies suggested by the different truth commissions.

To conclude, we will look at the role played by civil society, and organizations of surviving family members and victims, in the development of compensation policies and the lessons they have learned during the democratic process, observing whether or not they fulfill their objective.

WHAT IS REPAIR AND REHABILITATION?

In Chile, the concept of repair, to a greater extent, has been used; with respect to rehabilitation, since it has been understood that this second term is contained in the first, it implies a broader level of action. According to Alejandro Guajardo,¹ occupational therapist at the Centre for Mental Health and Human Rights CINTRAS: *“Rehabilitation refers to a concept that comes from medical practice in health and, in particular, from a specific level of care (tertiary). Tertiary care is understood to be the processes through which people whose performance has been affected by some morbid process are assisted. The aim is for the subject to function in the best possible way, deploying to the maximum his/her operational capacities, both in terms of cognitive functions and in emotional and interpersonal relationships, thus allowing the reconstruction of a life project that favours the capacity of the subject to be an active and productive being.”* Whereas, the same author defines reparation, as the following: *“It seems to be a broader concept, which escapes the scope of the actions of the health sector and positions the subject in a more encompassing field. [...] It implies the possibility of amending, correcting the damage caused, making reparations, satisfying, compensating and indemnifying the affected subject or group. In this sense, we could understand that reparation entails not only medical, psychological and social aspects, but also value, moral, cultural, political and material aspects that require much broader action than that of a specialized medical team.”*

Both concepts are necessary to develop in this chapter, since they focus on the same objective from different levels, and as these measures have been translated into reparation laws, they have historically been demanded by groups of victims' family members and organizations of surviving victims.

On the other hand, with the intention of referring more specifically to the field of reparation policies in Chile, it is useful to review

the definition recognized by the United Nations, which indicates that reparation for human rights violations: *“are all those actions that are the result of recommendations, social policies, measures and laws aimed at restitution, compensation, rehabilitation and satisfaction and guarantees of non-repetition to family members and survivors”*.² The areas of reparation, according to this body, could be grouped into two fronts, the material and the symbolic. In the Chilean case, reparation policies have been carried out at both levels, on the one hand those that seek to improve the survival conditions of the families of those affected, as can be seen in the case of pensions, scholarships or other initiatives, and on the other hand the symbolic dimension referring to subjective aspects such as the recognition and awareness of the damage caused to family members, direct victims and society as a whole.

POLITICAL CONTEXT

The coup d'état of September 11, 1973 marked the beginning of the military dictatorship in Chile, and of the systematic violations of human rights, which compromised state responsibility for crimes against the population by torturing, exiling, executing and making people disappear.³ After the recovery of democracy and the discovery of mass graves, plus the pressure exerted by human rights organizations and the families of victims; initiatives were necessary to investigate and demonstrate these crimes that would lead to reports emanating from the truth commissions: The National Truth and Reconciliation Commission (1990–1991), the National Corporation for Reparation and Reconciliation (1992–1996), the National Commission on Political Imprisonment and Torture (2003–2005) and the Advisory Commission for the Qualification of Disappeared Detainees, Executed for Political Reasons and Victims of Political Imprisonment and Torture (2010–2011). As a result, these commissions officially established recognized numbers of victims,⁴ to which was added a review of the social and political situation of the time, in addition to this, cataloguing the types of human rights violations that occurred,

1 Member of the CINTRAS-Tarapacá team. Paper on Rehabilitation and Reintegration presented at the International Conference “Consequences of Torture on the Health of the Chilean Population: Challenges of the Present” held by the Ministry of Health on 21 and 22 June 2001 in Santiago de Chile

2 Yuri Cristian Gahona Muñoz in his thesis “Reparation for human rights violations”, thesis for his master's degree in Psychology, mention in Community Psychology, University of Chile, 2009, <http://repositorio.uchile.cl/handle/2250/105763>. He mentions Theo van Boven's document. Study on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. The document was submitted to the United Nations, Economic and Social Council, Commission on Human Rights, 45 sessions: 64

3 The texts of the truth commissions can be reviewed at: <http://www.cedocmuseodelamemoria.cl/otros-recursos/>

4 This number is used as a reference, since not all the families of victims testified and not all the surviving victims wanted to attend the call of the commissions to give an account of their cases. However, thanks to the archives of the human rights organizations that existed during the dictatorship and provided assistance to those whose rights were being violated, it is believed that the figures presented in the reports are reliable.

along with defining the different types of victims. These reports also establish a series of recommendations, addressed to the Chilean State, regarding material and symbolic reparations.

Some of these will be expressed in various initiatives, focused on policies that seek to recognize and mitigate the effects of repression, especially on victims and their immediate families.

The recommendations for material and symbolic reparation, addressed to family members of the disappeared, or executed, and victims of political imprisonment and torture, were added to others specifically designed for Chileans in exile: for farmers expelled from the land and for workers expelled for political reasons.⁵

SCOPE AND TYPE OF REPAIR

Reparation can take various forms, since its scope is necessarily broad, in order to achieve its objective, and progress in the rehabilitation of those who have been harmed by human rights violations during the military dictatorship. What, how, who and for what? These are questions that the various transitional reparation policies have sought to answer on a permanent basis over time, and motivated both by the particular will of governments, and by pressure from civil society organizations that maintain current demands to this day.

The reparation proposals of the truth commissions establish the political and social responsibility of the State. In this way, it is pointed out that reparation is a task that must be intervened in a conscious and deliberate manner, and a series of measures⁶ are proposed and implemented, aimed at victims qualified by the commissions and their family group:

- Reparation pension for family members of recognized victims (spouse, mother of children, children, mother of victim, father of victim, only if victim's mother waives the pension or dies).
- Scholarship for the children of victims recognized by the commissions.
- Exemption from compulsory military service includes grandchildren and nephews of victims.
- Health benefit through the Reparation and Health Care Program PRAIS, implemented by the Ministry of Health of Chile.
- A one-time bonus of US\$ 13,850 for the children of non-survivor victims who did not receive a reparation pension (because they were of legal age) and for those who stopped receiving it (because they reached the legal age), the difference was granted until the aforementioned amount was completed. This is done through the Social Security Institute.
- Scholarship for the surviving victim of political imprisonment and torture, or the possibility of transferring it to a child or grandchild.
- Elimination of entries in the records of surviving victims of political imprisonment and torture.

Symbolic and collective reparation

- Creation of memorials and memorial sites for victims of human rights violations and political violence.
- Protection and safeguarding, declaring the main torture centres as national monuments.
- The creation of the Museum of Memory and Human Rights inaugurated on 11 January 2010, to raise awareness of the systematic violations of human rights by the State of Chile between 1973 and 1990, and to safeguard the archives of memory.

Reparation from justice

- Creation of the Human Rights Program of the Ministry of the Interior.
- Forensic Identification Policy, in charge of the forensic medical service.
- Creation of the Undersecretariat of Human Rights, under the Ministry of Justice and Human Rights of Chile.

Institutionality in the area of Human Rights

- Creation of the National Institute of Human Rights NHRI, Law 20.405 as an independent body of the government.⁷
- Principles, rules and legal mechanisms for the protection of the rights of individuals.

Among the recommendations of the truth commissions are considered measures that guarantee the non-repetition of human rights violations, through modifications to national legislation, and the incorporation of rules of international human rights law. The aim is to establish legal guarantees that refer to the situations described in the reports, as well as any other type of crime against humanity.

Through different initiatives, the necessary institutional framework was established to gradually implement the suggested reparations. To date, a series of reparation laws⁸ have been enacted focusing on the relatives of disappeared detainees, the relatives of executed politicians, returnees and exonerated persons. In addition, other reparation measures have been provided through administrative channels, such as Law 18.979, enacted in May 1990, which restored Orlando Letelier del Solar's nationality. To date, no other similar actions have been taken for other Chileans who lost their nationality after September 11, 1973.⁹

LEGAL FRAMEWORK FOR REPARATION

In 1990, a few months after Patricio Aylwin Azocar was democratically elected,¹⁰ he created the National Truth and Reconciliation Commission (CNVR).¹¹ This commission conducted a 11 month investigation into the arrest, forced disappearance, post-arrest execution and torture resulting in death, committed by State agents or civilians in their service. It also investigated abductions and attacks carried out for political reasons, with similar consequences for people.

This commission had to gather antecedents that would allow for the identifying of its victims and determine their whereabouts. The investigation period covered by this investigation

5 Op.cit. Yuri Cristian Gahona Muñoz, thesis "*Reparación por violaciones de derechos humanos*", 2009

6 Several other remedial provisions had already been generated since 1990 for other areas. Exile, former political prisoners; exonerated persons, restitution of property, among others. Volume 2 Report of the National Truth and Reparation Commission, part IV, chapter I, p. 823

7 See <https://bibliotecadigital.indh.cl/bitstream/handle/123456789/75/ley20405.pdf?sequence=1>

8 Law 19.123 and others. At www.leychile.cl

9 See Supreme Decree of the Ministry of the Interior No. 588, 1976 At www.leychile.cl

10 President of Chile between March 11, 1990 and March 11, 1994. He died in 2016

11 Led by the radical politician Raul Rettig, who had also been an ambassador of the Popular Unity government in Brazil and in his capacity as such had known about situations of human rights violations in this country

was from September 11, 1973 to March 10, 1990. Once its work was concluded, it prepared a report that included 2,296 victims recognized by the State, which are categorized as follows:

Reparation measures were suggested, and the information gathered was sent to the courts of justice.¹² It was also recommended that all necessary measures be taken to prevent new episodes similar to those that had occurred.

The National Corporation for Reparation and Reconciliation, which operated for 4 years, was created accordingly. Its objective was to comply with the recommendations contained in the report of the CNVR, regarding the need for a state body to qualify the possible condition of victims of those for whom it was not possible to form an opinion, or whose cases it was unable to examine, due to a lack of sufficient information, and to implement reparation measures for the families of the victims.¹³

This second body recognized 899 victims of human rights violations and political violence, leaving a total of 3,195 victims recognized by the State.

Between August 1999 and July 2000, President Eduardo Frei¹⁴ called for a “Human Rights Dialogue Table”¹⁵ to make progress in the clarification of the final fate of the disappeared detainees. The proposed objective was to obtain from the high authorities of the country, civil, military, religious and ethical institutions, information to establish the whereabouts and fate of the disappeared detainees. During this instance Law No. 19.687¹⁶ was approved that guarantees the obligation for confidentiality of those who received the contents issued by this body.

As a result, in 2001, the armed forces provided information on the whereabouts of approximately 200 disappeared detainees, 180 of them were identified, the rest were named N.N. The report acknowledges the illegal detentions, deaths, burials and exhumations, and details that most of these victims had been thrown into the sea, rivers, lakes, or would be in mass graves. To verify the information, the Supreme Court appointed judges with exclusive dedication, and the related cases were accumulated.

The results delivered by the armed forces and the Carabineros were rejected by the groups of family members of the victims and some human rights lawyers, due to the insufficiency of the information provided, it has not been possible to verify some of these antecedents, and in cases of disappeared detainees, errors have been detected.

In 2003, President Ricardo Lagos created the National Commission on Political Imprisonment and Torture (CNPPT), which functioned until May 2005. Its objective was to advance in the process of healing wounds produced by human rights violations, aiming to qualify, according to the antecedents they present, persons who suffered deprivation of liberty and torture, by the acts of State agents or civilians in their service, for political reasons.

The investigation covered the same period as the CNVR, and based on its results the National Commission on Political Prisoners and Torture Report (CNPPT) was prepared. This report includes 28,459 people recognized as surviving victims. It is fundamental to emphasize at this point that this commission determined by law,¹⁷ the protection of the archives that conform it, for 50 years, which does not allow the dissemination of the knowledge of the testimonies and antecedents compiled during the investigation, until that term has expired. This situation is still widely questioned today, especially by organizations of the civil society, since it contradicts the principle of the search for justice.¹⁸

From this work it was possible to compile various testimonies of people who were arrested and tortured. Those who testified did

so, not only in reference to the suffering of physical and psychological torture, but also expressed themselves about the rupture of their life projects.

During the investigation carried out by the CNPPT, more than a thousand detention and torture facilities throughout the country were searched. Reparation policies were proposed at institutional, collective, individual and legal levels. There were also a series of proposals related to the prevention of human rights violations, through the incorporation of rules of international law. These laws aspire to guarantee that these events do not happen again: measures of diffusion, education in human rights, and the creation of a public law foundation in charge of reflecting and promoting initiatives that aim at a respectful coexistence of people's rights, as well as to continuing the work aimed at discovering the truth about past violations and obtaining justice with respect to them.

During 2010, and until August 2011, the Advisory Commission for the qualification of disappeared detainees, politically executed and victims of political imprisonment and torture (colloquially known as the Valech II Commission) was reopened, recognizing 9,795 new victims of political imprisonment and torture, and 30 new cases of political executions and disappeared detainees.

As a result of the work of these four commissions, developed at different stages of the post-dictatorial period, a total of 3,216¹⁹ disappeared or executed victims were qualified, as well as 38,254 victims of political imprisonment and torture. A summary table of truth commissions by year is presented below:

Truth and Reconciliation Commission²⁰ (1990–1991)

- Victims of serious human rights violations: **2,130**
- Victims of political violence: **168**

National corporation for reparation and reconciliation (1992–1994)

- Victims of serious human rights violations: **644**
- Victims of political violence: **255**

12 The CNVR handed over 221 cases to the courts of justice for investigation (most of these corresponded to the period covered by the self-amnesty law; that is, they were cases that were reopened but promptly amnestied). The records were sent without even, in most cases, personally notifying the families, who mostly found out when a court summons arrived, reviving their fears and insecurities.

13 The corporation became a party to the judicial proceedings investigating the forced disappearance of persons and to the trials resulting from the discovery of human remains. It was subsequently replaced by the Human Rights Program of the Ministry of the Interior, which exists to date, whose function is expressed in article 6 of Law No.19,123: “the localization of disappeared detained persons and of the bodies of executed persons as well as the clarification of the circumstances of the disappearance or death constitute an inalienable right of the relatives of the victims and of Chilean society”.

14 President of Chile from March 11, 1994 to March 11, 2000

15 It continued working during the mandate of Ricardo Lagos, who was president of the country from March 11, 2000 to March 11, 2006.

16 See Law No. 19.687, http://pdh.minjusticia.gob.cl/wp-content/uploads/2015/12/Ley_19687_Del_Secreto.pdf

17 Law 19.992, Title IV of the secret, article 15, promulgated in December 2004. At www.leychile.cl

18 For more information see chapter Archives of the regime

19 Between 2007 and 2009, a correction was made for qualification errors, reducing the total to 3,186 non-survivor victims. Reparation measures in Chile since 1990, Human Rights Observatory, Centre for Human Rights

20 Roblero Walter, “Número de víctimas calificadas por las Comisiones de Verdad en Chile”, Internal Working Document June 2019

Dialogue Table (1999)

- Identified disappeared or executed detainees

Commission on political imprisonment and torture (2003)

- Victims of political imprisonment: **28,459**
- 94 % victims of torture

Presidential Advisory Commission for the qualification of the detained, disappeared, executed for political reasons and victims of political imprisonment and torture (2010–2011)

- Victims of political imprisonment and torture: **9,795**, totaling **38,254**
- **30** cases of new non-survivor victims (executed or disappeared detainees), totaling **3,216**

EXPULSED POLITICIANS

One of the forms of repression was the dismissal of workers in public administration and from some companies intervened by the State during the government of popular unity, which were accused of being members or supporters of the Salvador Allende government.

Expulsion took various forms, whether through forced signatures of resignations, settlements or dismissal records, the elimination of charges, or the prohibition of entry to workplaces, in addition, detention and non-attendance were reasons for layoffs. The difficulty of finding stable jobs, or prolonged unemployment due to political persecution, meant years of unemployment, and jobs without welfare, so that the conditions for retirement were very precarious for the expelled.

According to the figures in Lira and Loveman's book²¹ for 2003, the number of people who benefited in 1993 by Law 19.234 was 14,508, and those covered by Law 19.582 of 1998, were 59,444 people, according to a report by the Undersecretary of Social Welfare. In the presidential human rights proposal "*No hay mañana sin ayer*"²² (There's no tomorrow without yesterday), between 1993 and 2003, 86,208 people were recognized as politically expelled.

It should be noted that those who qualify in more than one category of victim, for example as a survivor of political imprisonment and torture; and at the same time as expelled; the law states that they must opt for one of the economic benefits.

HERITAGE DESIGNATION OF SITES OF MEMORY

By heritage designation we mean the official recognition of values of various types attributed to a cultural good, and the application to it of specific procedures, protocols, modes of visibility and access included in its valorization, and which include a series of processes and interventions, including identification, registration, conservation and dissemination. (CNCA. UMDDHH, 2017:13; CNCA, 2017: 6)²³

Sites of memory are places that have managed to remain over time, and that have a history linked to human rights violations under a dictatorship. Broadly speaking, most of them were detention centres, both official and clandestine, as well as places where victims were found, such as mass graves.

It has been mainly civil society organizations that have maintained a constant demand for the protection and recognition of these sites, necessary to keep the memory alive, as spaces of record of our recent history.

In this sense, one of the first steps taken was by Sola Sierra and Viviana Díaz, who belonged to a group of family members

of disappeared detainees. They had warned about the Lonquén Furnaces²⁴ situation, which had already been damaged in previous years. The site was going to be sold to create a new landfill in Santiago. Under this context, the alternative of legal protection is stipulated by exemption decree No. 24.²⁵ The Furnace was later declared a monument.

From this first declaration, a registry of significant sites related to human rights violations entailed the identification of 21 monuments, which was carried out until 2016. This has made it possible to set up projects for sites of memory, organizing various activities to remember the victims.

According to Garretón, González and Laufan,²⁶ there is a record of 31 public policies, of line of heritage designation sites made between 1990 and 2009. It is also clear that 2006 marks the greatest number of initiatives registered under the first year of Michelle Bachelet's²⁷ presidential term.

Currently, they have been identified as sites of memory, spaces that made possible the social and political resistance to the dictatorial regime, which broadened the vision of a site of memory, and has allowed for the inclusion of new discourses. To date, there is no cataloguing of heritage, but civil society claims its protection and official valuation.

Sites of memory have been designated heritage sites throughout the country, which does not always imply the existence of resources for their maintenance and dissemination.

Public policies of memory have the purpose, not only to promote the memory and honour of the victims, but also to install a message of rejection of crimes that repudiate the conscience of humanity. At the same time, some sectors have argued that memory divides, that the memory of human rights violations during the 1973–1990 military dictatorship cannot be exposed without understanding the causes of the institutional breakdown. It must be recognized that Chilean society is divided, and that on certain commemorative dates, or in spaces that promote memory, there are confrontations relating to different positions and readings of the recent past.

LAW ON PRESUMED DEATH

The disappearance of hundreds of people did not only have effects on human rights issues; along with the pain, the family

21 Elizabeth Lira, Brian Loveman, *Políticas de Reparación Chile 1990–2004*, Santiago: Editorial Lom, 2005

22 See <https://bibliotecadigital.indh.cl/bitstream/handle/123456789/183/no-hay-manana.pdf?sequence=1>

23 Gloria Elgueta, "*Institucionalización y patrimonialización de sitios de memoria en Chile. Una lectura desde la experiencia de Londres 38*", in *Aletheia*, volume 8, No. 16, June 2018, http://www.londres38.cl/1934/articles-101160_recursos_1.pdf

24 Lonquén Furnaces is a place where the remains of people who disappeared in Chile were found on November 30, 1978. These people had been arrested in the town of Isla de Maipo on October 7, 1973. After this discovery, the place that belonged to a private person, was put up for sale to transform it into a landfill. A situation that was stopped by a group of family members, opening the debate and demanding the safeguarding of sites like this one all over the country

25 Council of National Monuments "Heritage of human rights in Chile 1996–2016"

26 Francisca Garretón, Marianne González, Silvana Lauzán, "Políticas Públicas de Verdad y Memoria en 7 países de América Latina (Arg, Bol, Br, Ch, Per, Par y Uru)", Human Rights and Democracy programs, Centro de Derechos Humanos, Universidad de Chile Law School, Santiago, March 2011

27 President of Chile between March 11, 2006 and March 11, 2010 and then a second term between March 11, 2014 and March 11, 2018.

members also had to deal with legal, patrimonial and private issues.

After the end of the dictatorship, the only way to give legal status to the rights of family members over the property of a disappeared detainee was to acknowledge their natural or presumed death. Many refused to do so, since it was neither possible nor acceptable for them to acknowledge the death of their family members, without clarifying the circumstances and those responsible. They also pointed out that the use of this concept could also weaken the demand for truth and justice.

For this reason, in June 2008 the Executive proposed a bill establishing a new legal concept to regulate these issues: forced disappearance, a concept that was not recognized in national law, as defined in the international field of human rights.

Thus, Law 20.377, published in August 2009, defines enforced disappearance as *“the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which occurred between 11 September 1973 and 10 March 1990”*.²⁸

The law establishes that the spouse or children of the disappeared person may request a declaration of absence due to enforced disappearance, and if they do not exist, the descendants or their ancestors may request it, and in the absence of these, their collateral relatives.

With the accreditation of this application by means of the corresponding certificates issued by the Civil Registry and Identification Service, or by services of a similar nature of foreign states, the judge will decide on the admissibility of the application, within a maximum of 30 days.

Sufficient proof of enforced disappearance shall be the inclusion of a person in the report of the CNVR, or in the National Corporation for Reparation and Reconciliation report, as well as in reports of commissions of the same nature that may be created, either as a disappeared detainee or as having been executed, in the case in which a corresponding death certificate does not exist.²⁹

SOCIAL SATISFACTION

The idea of creating a Human Rights Institute was first born in a project presented by parliamentarians, and then by an executive proposal in 2005. This carried out part of the recommendations made by the CNPPT and sought to strengthen the institutionality of human rights, given the recent dictatorial experience in Chile. The purpose of this body is to deal with education, prevention, promotion and protection of human rights in the country. Law No. 20.405 created the National Institute of Human Rights, published in the Official Gazette on December 10, 2009.

EDUCATION PROGRAMS

The National Human Rights Program PNDH stipulates the creation of the Undersecretary of Human Rights through Law No. 20.885. This law has the mission of proposing to the Ministry of Justice and Human Rights the definition and execution of the policies that are guaranteed in the promotion and protection of human rights. The law contemplates aspects

such as: *“guidelines on objectives and targets, identification of those responsible, financial resources available, and mechanisms for monitoring and evaluating results, in order to identify difficulties and take appropriate corrective or complementary actions”*.³⁰

The PNDH will carry out the guidelines emanating from the NHRI and international organizations. Among the fundamental aspects we can emphasize the points aimed at the development of investigation, punishment and redress of crimes of the dictatorship (1973–1990), conservation and defence of the historical memory around the violations of human rights, education and formation in this matter, at the levels of kindergarten, primary, secondary and higher education. In addition to this, the training, formation and improvement programs of the authorities and officials of State bodies and armed forces, Carabineros, Investigations Police and Chilean Gendarmerie.

REHABILITATION STATUS

There are no official figures. When consulting the NHRI, it was indicated that the responsible bodies should be notified, to gain more information on the use of the benefits of each one of the recommendations of the truth commissions indicated in the previous points. This is mainly due to the fact that the institutionality has concentrated on implementing the measures, and there have not yet been any analyse that officially define their level of impact.

The systematization of information on the use of reparation policies is a debt maintained by the agencies in charge of supervising their execution and implementation. Official information from the Transparency Council indicates that there are 613,460 users of the Reparation and Health Care Program PRAIS, while the body indicates that there are 784,300 beneficiaries, the difference of 170,840, is due to the prior registration of users, in the computer system of the National Health Fund FONASA.³¹

FORMER VICTIMS' ORGANIZATIONS

Groups, both of families of the detained-disappeared AFDD, and of executed politicians of AFEF formed in the first days of the dictatorship, in order to respond and help those who were having their basic rights violated. Those who were looking for their family members found themselves in the small spaces of welcome that existed, first under the protection of the churches, and later over the years, thanks to the creation of different human rights organizations that were founded. The national dimension of the demand for truth and justice, carried out by

28 At www.leychile.cl

29 “Law regulates property and family matters of missing detainees”. Chilean Chamber of Deputies, February 2010, https://www.camara.cl/prensa/noticias_detalle.aspx?prmId=

30 First National Human Rights Plan, <https://planderechoshumanos.gob.cl/files/plan.pdf>

31 Boris, Yaikin, “Las cifras ocultas del PRAIS: El programa de salud para víctimas de la dictadura con fecha de vencimiento”, in *El Desconcierto*, 22. 8. 2016, <https://www.eldesconcierto.cl/2016/08/22/las-cifras-ocultas-del-prais-el-programa-de-salud-para-victimas-de-la-dictadura-con-fecha-de-vencimiento/>

the families of victims, grew stronger and stronger, and the body was formally established, with a central directive and regional representatives. This structure was maintained after the end of the dictatorship, and even managed to further consolidate, as many of these groups were establishing dynamics of increasingly systematic work, keeping to this day the demand for truth, justice and memory, as alive as in the early years of the dictatorship.

At the same time, during the 1980s, Groups of Families of Political Prisoners began to emerge, which organized themselves to take legal action, to raise funds to improve the quality of life of those in prison, and to help each other, especially those in the most vulnerable economic situations.

Part of the common work of these types of civil organizations, which had their origins during the dictatorship, some of which were maintained after the recovery of democracy, was the reporting of human rights violations that were experienced in Chile, and that the world should know about in order to support and apply pressure to end the dictatorship.

Subsequently, groups of former political prisoners, along with family members, and part of the community aware of the issue, began work to recover the historical memory of the various detention centres. According to the report of the CNPPT, there were 1,132 detention centres,³² places that were intended for disappearance or simply demolition, as was the case of the barracks Terranova, better known as Villa Grimaldi.³³

It should also be mentioned that the work of the truth commissions also motivated many former political prisoners to group together and present their demands for reparation to the State, jointly, in order to strengthen their resources and mutually support each other after the difficult process of reliving what they had experienced.

Currently, the majority of these groups work in different ways, but there are commemorative dates and places that bring them together in a transversal way. The struggle for truth, justice and memory is a common task, which is projected from different sides, especially aimed at educating about human rights, and increasing awareness among new generations.

LESSONS LEARNED – EXPERIENCE GAINED

It is necessary to recognize that the greatest value of the truth commissions is the act of reparation. The fact that the State is in charge of recognizing the crimes and publicly reporting the facts, dignifying the victims and proposing reparation measures, has in itself a value and impact on society, and especially on the victims and their families.

The acceptance of monetary compensation by families was not easy. At the beginning there was resistance, since it was thought that it could be interpreted as a renunciation of justice. It has been recognized as a right of the victims and their families, and a responsibility of the State in the face of the damage caused.

JUSTICE PROCESSES

Based on the truth reports of the commissions, judicial lawsuits were initiated on the particular decision of the family members and human rights organizations. In most cases, it has been the persistence of the family members that has allowed the processes to be carried out and the justice to be advanced.

The jurisprudence of the Chilean courts has developed progressively; first, by applying the amnesty law and not by processing the complaints of the families of executed and disappeared detainees; second, by applying the so-called “Aylwin doctrine”: that investigated the facts, and once established, the participation of persons applied for amnesty; third, it received complaints for the disappeared, understanding that the crime was of permanent execution, and therefore not covered by the amnesty of 1978; finally, after Pinochet’s arrest in London in 1998, judgments were issued that applied principles of international law; the most serious crimes were not considered to be subject to amnesty or the statute of limitations.

Convictions generally do not exceed 5 years, and those found guilty have easy access to prison benefits such as probation or house arrest. In this respect, civil society exercises control and denounces these irregularities.

There is a great annoyance expressed in demonstrations of repudiation rejecting the privileged locations that have been created in prisons for the criminals of human rights violations. Until September 2013, one of the prison facilities was located inside an army barracks. This was closed by President Sebastián Piñera,³⁴ due to the context of the 40 years of the coup d’état, and the condemned were sent to an exclusive facility for those accused of crimes against humanity.

REPARATION MEASURES

The perception of reparation is diverse for the beneficiaries. For most of them, having been received, listened to, and recognized by the State that had previously acted against their dignity, and so severely and dramatically affected their lives, as well as receiving the reports of the truth commissions with their names or those of their families and the public recognition of the authorities, had a high significance, but at the same time regarding the issue; a critical stance is known. *“The reparation measures adopted by the Chilean government and parliament for people particularly qualified about political imprisonment and torture are flanked by permanent criticism by the victims, who find them insufficient, unsuitable and partial. This criticism may be seeming worthy of consideration, but it is not a fault that can be attributed to the commissions themselves”.*³⁵

The reparation implemented attempts to compensate, in some way, these serious crimes. However, the challenge is to further integrate the victims, and create conditions that allow them to feel more and more part of the society that once excluded them. It is necessary to do so in the area of truth, justice and reparation.

ADMINISTRATIVE PRACTICES OF THE STATE

It is necessary that the persons in charge of the administrative management granting reparation benefits to the victims know and assume the meaning of their role. Although it is a right, it is always painful for the victims and their families to face the formalities they must carry out. It is linked to trauma, pain, loss and therefore must be treated with respect and dignity.

32 The number increases as the years go by

33 See <http://villagrimaldi.cl/historia/>

34 President of Chile between March 2010 and March 11, 2014. He is currently serving his second term as president-elect.

35 Presentation Maria Luisa Ortiz Seminar on Truth Commissions, Brazil 2014

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EDUCATION AND PRESERVATION OF SITES OF CONSCIENCE

OMAR SAGREDO MAZUELA

INTRODUCTION

This chapter analyzes the general course followed by the social and political process of the preservation of sites of conscience and memory¹ in Chile between 1990 and 2018, emphasizing three aspects: the redefinition of the former repressive centres of the civil-military dictatorship (1973–1990); the role and main characteristics of the diversity of existing places of memory; and the development of educational proposals arising from both the State and the sites of conscience for the teaching of the recent past.

To address these issues, the paper describes three areas. First, the actions of civil society in terms of the creation of memorials and the recovery and repurposing of former detention and torture centres, under the demands for truth, justice and reparation. Second, the political-institutional provisions deployed by the State of Chile to address the protection of material memory from dictatorial repression. Finally, according to the Chilean experience, some lessons and recommendations are presented in the field of the heritage designation of memory, highlighting the main strengths and threats that exist in Chile with respect to the future of the various sites and their pedagogical proposals.

HISTORICAL BACKGROUND

During the civil-military dictatorship, the State of Chile deployed a massive and transversal repressive policy, seeking to discipline society as a whole ideologically, articulating the application of repression with the introduction of its political project.² In order to meet that objective, it relied on the measures implemented by security agencies specializing in political persecution and torture: The National Intelligence Directorate (DINA) and the National Information Centre (CNI).

In 2004, the National Commission on Political Imprisonment and Torture Report addressed the existence of kidnapping, torture and extermination centres,³ determining that during the years of the authoritarian government, a systematic policy of torture of opponents was pursued, identifying the existence of 1,132 centres (official and clandestine) used for these criminal practices. The fate of these places, during and after the dictatorship, has been diverse. Since the beginning of the transition to democracy, the recovery and public opening of these sites as sites of conscience and memory has been one of the main objectives of the human rights movement in Chile.

TRANSITIONAL CONTEXT AND SITES OF MEMORY

During the dictatorship, and especially during the last years of government, the *de facto* authorities destroyed or covered up the centres used for kidnapping, torture and murder, through various mechanisms: intentional demolition, alteration of addresses of public office buildings, barred access through geographical

barriers (in sites located on islands in the south of the country), avoiding admitting their existence mainly due to the absence of surviving prisoners, the centres belonging to agents, mostly military, who are opposed to facilitating their access or the transfer of property to civil actors, who directly or indirectly prevent public actions on the site and overlapping efforts that attempt to annul the identity of the centres.⁴

Once the transition to democracy had begun, the recovery of the former repressive centres was not part of the measures proposed by the government of President Patricio Aylwin (1990–1994). The opening of the only memorial officially built in that period (the monument to the detained, disappeared and politically executed at Santiago's general cemetery), did not have official recognition of the government. During the presidency of Eduardo Frei Ruiz-Tagle (1994–2000), for the first time, a historic site related to human rights violations was declared a National Monument: Hornos de Lonquén.⁵ However, this measure did not respond to a State policy on the recovery of historic centres associated with the humiliations of the recent past, but was an initiative of the National Monuments Council⁶

1 In conceptual terms, “sites of memory” means “any significant entity, whether material or non-material in nature, which by dint of human will or the passing of time has become a symbolic element of the memorial heritage of any community”. Pierre Nora, *Les lieux de mémoire*, Paris: Gallimard, 1997, 17. As for the notion of “sites of memory”: “physical spaces where serious human rights violations were committed, or where these violations were resisted or confronted, or that for some reason the victims, their families or communities associate with these events, and that are used to recover, re-think and transmit traumatic processes, and/or to pay tribute and reparation to the victims”. Fundamental Principles of Public Policies on Memory Sites, The MERCOSUR Institute of Public Policies on Human Rights (IPPDH), Buenos Aires: Ediciones IPPDH, 2012, 12. Finally, regarding the definition of “sites of conscience”: those in which history is reinterpreted through the relationship with spaces and materials; audiences engage in programs that foster dialogue on pressing social issues; opportunities are provided for collective participation in issues raised at the site; and democratic and humanitarian values are promoted as a fundamental objective. International Interpretation of Sites of Memory, Coalition of Sites of Conscience, online, 2018, 14–15.

2 In order to delve deeper into the political-institutional characteristics of Pinochet's regime, it is recommended reviewing the chapters “Dismantling the state security apparatus” by Claudio Fuentes and “Transformation of the political system” by Mireya Dávila, corresponding to this dossier.

3 National Commission on Political Imprisonment and Torture Report, National Commission on Political Imprisonment and Torture, Ministry of the Interior, Government of Chile, 2004, 261.

4 Macarena Silva, Fernanda Rojas, “*El manejo urbano-arquitectónico de la memoria urbana traumatizada*”, in Carolina Aguilera, Carolina Cárcamo, *Ciudad y Memorias. Desarrollo de Sitios de Conciencia en el Chile Actual*, Santiago: Ediciones de la Corporación Parque por la Paz Villa Grimaldi, 2011, 78–84.

5 An old facility located on the outskirts of the city of Santiago, in which, in 1978, the remains of detainees murdered by the dictatorship were found.

6 Public institution, under the Ministry of Culture, Arts and Heritage, which aims to protect and teach about the cultural and natural heritage of a monumental character. See <https://www.monumentos.gob.cl/acerca/quienes-somos>

and the Directorate of Libraries, Archives and Museums (DI-BAM), which received a request from the Group of Families of Detained-Disappeared and the Group of Families of Political Prisoners Executed.⁷

In official terms, the 1991 National Commission on Political Imprisonment and Torture Report recommended publicly, referring to the good name of the victims and remembering what had happened, entrusting the State with the task of committing acts and creating symbols to give national meaning to reparation.⁸ The National Commission on Political Imprisonment and Torture Report proposed the “[d]eclaration of the main torture centres as national monuments and the creation of memorials and memorial sites for victims of human rights violations and political violence.”⁹ However, these approaches were not translated into specific regulations or public policies.

During the government of President Ricardo Lagos (2000–2006), in the framework of the second line of action (“Improving social reparation measures for victims”) of the policy entitled “*No hay mañana, sin ayer*” (There is no tomorrow without yesterday), an agreement was reached in 2003 between civil society human rights organizations and the Executive Branch to promote the construction of memorials. However, civil society has criticized this policy, since it did not involve the development of places that could be projected as sites of conscience. For the first time since the end of the dictatorship, the second term of President Michelle Bachelet (2014–2018) proposed in her government program, a plan of “recovery of all sites of historical memory where human rights were violated, ensuring their basic and permanent maintenance.”¹⁰ However, there were no concrete measures that achieved that objective.

THE NEED TO PRESERVE SITES OF MEMORY: CIVIL SOCIETY AND PUBLIC HERITAGE POLICIES

In the absence of an adequate law for the recovery of former detention centres and the opening of sites of memory, the protection of sites through existing regulations for historic monuments has been the main mechanism provided by the State to resolve civil society demands. In this regard, the most important task has been developed by the National Monuments Council,¹¹ through the implementation of Law No. 17.288 on national monuments, a regulation promulgated in 1970, which does not include references to historical sites associated with human rights violations.¹² The former repressive centres that have been recognized as national monuments, as historic monuments through this law, have followed an application process beginning with the entry of the application to the National Monuments Council by civil society organizations. The request is evaluated and if it is accepted, a resolution is issued that identifies delimitations and attributes of the site. Finally, the declaration must be ratified by the Ministry of Culture, Arts and Heritage.

After the first declaration issued (Lonquén furnaces in 1996), during the government of President Lagos, in 2002 and 2003, respectively, similar declarations were issued about the José Domingo Cañas and Estadio Nacional sites; two former detention, torture and extermination centres of the dictatorship. Both declarations were based on citizen movements composed mainly of survivors and their families, who put pressure on the State to protect and guarantee the sustainability of these sites.¹³ In 2004, Parque por la Paz Villa Grimaldi was declared a national

monument, being the first place to receive this recognition when it was already a site of memory open to the community.¹⁴

In continuity with these experiences, subsequent national monument declarations have replicated the social and institutional procedures described above (i.e. through civil society denunciation campaigns, submitting the request for a declaration to the National Monuments Council and giving new meanings to the sites). Thus, more than 30 civil society organizations have been formed at the national level with the aim of recovering certain centres or installing memorials. These groups are characterized by being related: a) to repressive experiences (direct victims and/or families of victims); b) to some emblematic repression place (survivors and neighbours of the centre); c) to political militancy (militants who seek to value the memory of fellow party members who were victims); and d) to the promotion of human rights (extending the work of memory to more general issues such as justice and truth).¹⁵

7 Ángel Cabeza, “Introducción al Patrimonio de los Derechos Humanos en Chile”, in Ángel Cabeza et al., *Patrimonio de la Memoria de los Derechos Humanos en Chile. Sitios de Memoria protegidos como Monumentos Nacionales 1996–2016*, Santiago: Consejo de Monumentos Nacionales, 2016, 15.

8 National Commission on Political Imprisonment and Torture Report, National Corporation for Reparation and Reconciliation, Vol. 1, Vol. 1, Santiago: 1996, 824.

9 National Commission on Political Imprisonment and Torture Report, National Commission on Political Imprisonment and Torture, Ministry of the Interior, Government of Chile, 2004, 528.

10 Michelle Bachelet’s Government Program 2014–2018, 165, http://www.subdere.gov.cl/sites/default/files/noticias/archivos/programamb_1_0.pdf

11 According to this law, what can be recognized as “Historical Monuments” are “those movable and immovable properties such as ruins, constructions and objects – among others – of government, municipal or private property, which for their historical or artistic value or for their antiquity must be conserved for the knowledge and enjoyment of present and future generations” Law 17288, November 3, 2017, <https://www.leychile.cl/Navegar?idNorma=28892>.

12 At the time of preparation of this paper a bill sent by President Sebastián Piñera in May 2019 is under parliamentary discussion, which seeks to update these regulations. The objective of the bill is to modernize the institutional framework that regulates national monuments, update the categories and provide effective protection to the cultural heritage in Chile through its identification, preservation, enhancement, management and promotion. Sites of memory are defined as “goods of cultural interest”, meaning: “all places where serious violations of human rights have been committed, or where such violations have been resisted or confronted, or which for any reason the victims, their family or the community associate with such acts, declared such in order to provide symbolic reparation to the victims and their families, to stimulate knowledge and reflection on what has happened and to avoid its repetition; or which make it possible to promote processes for the construction of linked memories, such as human rights education” (see https://www.camara.cl/pley/pley_detalle.aspx?prmID=13243&prmBoletin=12712-24).

13 Cabeza, op. cit., 59–73.

14 Villa Grimaldi, one of the most important repressive centres of the dictatorship, was recovered by a citizens’ movement. In 1994, by coordinating public denunciation actions and institutional dialogues with representatives of the Parliament and the Municipality of Peñalolén, it was possible for the State to expropriate the site and give it to a civil association composed mainly of survivors of the site. After a process of symbolic redefinition, in 1997 the site was inaugurated with the title of Parque por la Paz Villa Grimaldi. Corporación Parque por la Paz Villa Grimaldi, *20 Años Sitio de Memoria. Villa Grimaldi Parque por la Paz, Santiago: Corporación Parque por la Paz Villa Grimaldi, Consejo de la Cultura y las Artes*, 2017, 69–75.

15 Evelyn Hevia, Las organizaciones, los lugares y sus usos, in Isabel Piper, Evelyn Hevia, *Espacio y recuerdo*, Santiago: Ocho Libros, 2012, 32.

Until 2014, the reactive state provision regarding the protection of the sites was clearly observed, achieving under this scheme the declaration of twelve monuments. These places correspond to centres linked to the repression in the period immediately following the coup d'état and during the operation of the DINA. Of the twelve, ten are in the city of Santiago. In the period between 2015 and 2018, the situation has shown some changes. The National Monuments Council has implemented a participative methodology, through which it has worked with family members, groups and state agencies in order to generate a representative scheme at the national level of the different repressive periods.¹⁶ Under this criterion, twenty-seven historical monuments relating to human rights violations have been declared; fourteen are in Santiago and thirteen in other regions and rural areas. Progress was also made in recognizing archives and centres that are still used by the armed forces as national monuments.

In addition to the National Monuments Council, two public bodies have contributed to the development of sites of memory. First, the Human Rights Program of the Justice and Human Rights Ministry,¹⁷ which, especially through their projects, memorials and institutional management area, has generated funding for the preparation of memorials, testimonial archives, research and other initiatives to which sites of memory must have access through public procurement. Second, the Culture, Memory and Human Rights Unit of the Ministry of Culture, Arts and Heritage, a body that has developed extension and training opportunities for workers and site representatives, mainly in the cultural management area, with a special focus on direct dialogue with organizations.

Of the thirty-nine sites declared as national monuments, only seventeen have been recovered as sites of memory, after the Ministry of National Assets, through expropriations, swaps or purchases, acquired the properties to then deliver them in concessions or free loans to civil society organizations that have mobilized for their rescue. Among the latter, only thirteen sites are open to the public, with the development of commemorative and educational activities, in addition to other initiatives such as publications, archives and museum displays. The management of these sites of memory is carried out by non-profit private law organizations, which can access funding through two channels: collaboration agreements (signed with the former DIBAM, currently the National Heritage Service of the Ministry of Culture, Arts and Heritage)¹⁸ and competitive funds (particularly through resources competed for by the Human Rights Program and the Heritage Fund of the Ministry of Culture, Arts and Heritage). The organizations that do not own the sites to which they appeal, in addition to not being able to access the centres, do not have concession contracts that allow them to obtain resources.

In 2018, during the second administration of President Bachelet, the National Human Rights Plan was designed and promulgated under Law No. 20.885, within which, with respect to the safeguarding of memory, the following goal was set: "To preserve the historical memory of massive and systematic violations of human rights, ensuring the safeguarding of historical heritage in this matter, and the articulation of public institutions dedicated to the rescue, conservation and dissemination of this heritage."¹⁹ Within this objective, to date, five measures have been launched concerning the strengthening of the "Memory Routes";²⁰ the publication of texts on sites declared as National Monuments, the protection of heritage and the financing of new sites, and the transfer of some properties associated with human

rights violations owned by the Army to the Ministry of National Assets. On the other hand, five other committed measures have not yet been carried out, the most relevant being the bill that identifies and guarantees preservation and defines the management of sites of memory.

TYPES OF SITES OF MEMORY AND NATIONAL AND INTERNATIONAL NETWORKS

Thanks to the conceptualizations proposed by the National Monuments Council, the patrimonialization of sites of memory in Chile has been generated from the notion of "human rights heritage", understanding places as "cultural heritage that corresponds to archaeological and systemic or contemporary sites, to movable and immovable property that are material and symbolic testimony of various processes related to human rights, civil and political from the point of view of their violation, defence and promotion in general terms".²¹ In specific terms, the National Monuments Council has created a typology of Chilean sites of memory, based on the role they played during the dictatorship. This scheme is made up of five types of heritage: a) sites linked to intelligence and counterintelligence actions (barracks, brigades and intelligence schools); b) sites where repression was carried out (clandestine detention, torture and execution centres, burial/exhumation graves, prison camps, public prisons, military regiments and bases, stadiums, gymnasiums and public infrastructure); c) places where human rights violations were resisted (union and social headquarters, human rights NGOs); d) archives of repression and human rights memory; e) memorials and marks (informative plaques and memorials, sculptures and memorial sites).²²

Most of these sites share the characteristic of being "site museums", i.e. spaces designed and organized to protect a cultural heritage, movable and immovable, preserved in its place of origin.²³

16 Annual report on Human Rights in Chile 2018, Human Rights Centre, Santiago: Universidad Diego Portales, 2018, 100.

17 The Human Rights Program is an official body created to continue the work of the National Corporation for Reparation and Reconciliation, providing legal and social assistance to the families of disappeared detainees and political prisoners who have been described as victims of human rights violations, promoting, disseminating and supporting symbolic cultural and educational reparation actions. See: <http://pdh.minjusticia.gob.cl/verdad-y-justicia/>

18 This funding is discussed annually in the National Congress. Between 2010 and 2017, these resources were granted to the sites through the Directorate of Libraries, Archives and Museums (DIBAM). After the creation of the Ministry of Culture, Arts and Heritage, these funds were relocated to the National Service for Cultural Heritage, the successor to DIBAM.

19 National Human Rights Plan, <https://planderechoshumanos.gob.cl/plan-nacional-de-derechos-humanos>

20 The Memory Heritage Routes are schemes proposed by the Ministry of National Assets to know and visit various places of memory in the city of Santiago. *Ruta de la Memoria*. Santiago 1973–1989, Ministry of National Assets, Santiago: Government of Chile, n/f., 16.

21 Working Document on Human Rights Heritage. Sites of memory, memorials, archives and objects of memory, National Monuments Council, Santiago: Cultural Heritage Service, Ministry of Culture, Arts and Heritage, Government of Chile, 2018, 28.

22 Ibid., 44–45.

23 The full definition of "site museum" proposed by the International Council of Museums is "Museum designed and organized to protect a natural and cultural heritage, movable and immovable, conserved in the place where this heritage has been created or discovered".

However, the definition of “museum” is a complex issue, some sites of memory reject the association of this term with memorialization work.²⁴ Although some sites have chosen to approach the definition of “museums”, only the Parque por la Paz Villa Grimaldi has developed museological management and organizational tools, being the only place of memory in Chile that has a conservation area. This definition has allowed this site to link with international networks through the International Council of Museums (ICOM), being part of this global conglomerate since 2010 and participating, in addition to the headquarters of ICOM-Chile, in two thematic bodies that have national representation: the Committee for Education and Cultural Action (CECA) and the International Committee for Memorial Museums in Remembrance of the Victims of Public Crimes (ICMEMO). In the same sense, not all sites of memory have decided to be called “sites of conscience”. Currently, in Chile there are only six sites affiliated to the International Coalition of Sites of Conscience.

In terms of collective organization, in Chile there is a network of sites of memory that brings together representatives of sites (recovered or not), and whose main lines of action are the recovery of former detention centres and the acquirement of guarantees for the survival of the recovered spaces, through stable state funding.²⁵ At a regional level, the Latin American and Caribbean Network of Sites of Memory (RESLAC) operates, a conglomerate in which most Chilean sites of memory participate.

ROLE OF SITES OF MEMORY

In general, sites of memory in Chile highlight three key elements in their functioning. First, the representation not only of historical values associated with the recent past, but also the evocation of the cause for a public memory of respect for human rights in the present. With regard to the materialization of the right to the truth, certain sites have carried out public campaigns to gain access to the archives of former repressive bodies (as part of the demand for the opening of all sources of information on human rights violations held by the State),²⁶ the prosecution of all repressors who have not been convicted and the demand for the definitive clarification of the whereabouts of the disappeared detainees.²⁷ Another action to highlight in this sense, is developed by some collectives of activists and survivors who manage or participate in certain sites of memory, who have organized groups of “human rights observers”, with the aim of monitoring and reporting possible police abuses during the development of public demonstrations.²⁸

Second, in terms of symbolic repair, commemorative actions and the development of audiovisual archives stand out. All Chilean sites have calendars to commemorate both emblematic events of their own history (for example, the date of its opening as a site of memory or certain repressive events that occurred while operating as detention centres), and to commemorate some victims who were killed or disappeared in their facilities during the dictatorship. Currently, all sites commemorate the day of the coup d'état with different activities, and many of them have joined the celebration of Cultural Heritage Day,²⁹ the International Day of the Disappeared Detainee and the International Human Rights Day. Recognizing that the main substance of the content at the sites is the testimony of the survivors and the families of the victims, several collections that tell the stories of these subjects have been put together by the management teams of

the sites of memory. These testimonial archives are often constituted to recreate the history of the sites, to identify the practices of resistance and solidarity of the detainees and, are being created on a biographical basis, to address the phenomenon of militancy, and the social and political activism of the actors who have fought to recover the sites. Currently, there is a conglomerate that brings together these initiatives: The Oral History Network and Oral Archives.³⁰

Finally, in Chile there are two aspects of the role of sites that have not been addressed adequately. First, their function as judicial evidence of human rights violations. Recently, several investigations in the field of archaeology have been developed that have generated proposals on the preservation of remnants and the recovery of diverse materials, from a historical perspective (even, a specific section of this subject was created in the College of Archaeologists).³¹ Second, the eventual contribution of national reconciliation has not yet been addressed. Although the sites have not yet stated that their objectives include the contribution to “reconciliation” (considered, in some cases, to be contrary to this idea),³² their aims relating to the promotion of a “democratic and human rights culture”,³³ indicate an intention to influence the ethical-political future of Chilean society. However, there is not enough evidence to determine the extent to which sites are appreciated by society as spaces that work on a divided memory of the recent past.³⁴ Anyway, in practice, it is clear that sites of memory represent the public struggle between oblivion and the commemorative and pedagogical meaning of memory. Proof of this controversial situation is found in the attacks on the sites

24 In the discussion about its projection, the institution Londres 38 stated: “[...] a site of memory should not be a museum, understood as a place where there is an exhibition of objects and little interaction between visitors and these objects [...]”. Gloria Ochoa, Carolina Maillard, *La persistencia de la memoria: Londres 38, un espacio de memorias en construcción*, Santiago: Edición de Londres 38, 2011, 104–105.

25 Mariana Zegers, “Sitios de Memoria en Chile”, in *El Desconcierto*, 12. 14. 2017, <https://www.eldesconcierto.cl/2017/12/14/sitios-de-memoria-en-chile/>

26 “No more secret files. Interview with Gloria Elgueta”, in *Revista de Gestión Pública*, Vol. III, No. 1, Santiago, 2014, 199–206.

27 Cath Collins, Katherine Hite, *Fragmentos de memorias, silencios monumentales y despertares en el Chile del siglo XXI*, in Cath Collins, Katherine Hite, Alfredo Joignant, eds., *Las políticas de la memoria en Chile: desde Pinochet a Bachelet*, Santiago: Ediciones Universidad Diego Portales, 2013, 178.

28 Human Rights Observers in Chile, <http://www.observadoresddhh.org/>

29 Official body inviting civil society to visit historical monuments, museums and public and private heritage zones or buildings. It is held annually, during the last weekend of May.

30 Oral History Network and Oral Archives, <https://rhoao.wordpress.com/>

31 Adriana Goñi et al., *Sitios de Memorias, Arqueología y Conservación Propuesta conceptual de orientación y directrices de trabajo*, Santiago: National Conservation and Restoration Centre, 2017.

32 The site of memory Londres 38 is the main exponent of the criticism of the politics of reconciliation that would have developed the State of Chile. Ver <http://www.londres38.cl/1937/w3-article-93690.html>

33 This objective is mentioned in the mission and vision of several memorial sites, such as the Parque por la Paz Villa Grimaldi, Paine Memorial, Ex Clínica Santa Lucía and Estadio Nacional-Memoria Nacional.

34 A pioneering study in this field was carried out in 2017 taking as a sample the Museum of Memory and Human Rights. Although it is not an investigation of a site of memory, the results of the study are relevant, pointing out that this museum moves visitors to less confrontational attitudes, beyond their ideological positions. Elsa Voytas, Laia Balcels, Valeria Palanza, “Do Museums Promote Reconciliation? A Field Experiment on Transitional Justice”, in *Empirical Studies of Conflict Project (ESOC) Working Papers* 10, 2018, online.

and memorials by individuals and groups who exalt the dictatorial government and criticize the use of public resources for the development of these initiatives. In 2018, the National Institute for Human Rights counted at least eight instances of attacks and vandalism on memorials and sites declared National Monuments in different cities of the country.³⁵

SITES OF MEMORY AND EDUCATION

The National Truth and Reconciliation Commission report recommended strengthening human rights education at all educational levels, as well as in the training of the armed forces and internal security forces, as a mechanism for contributing to the generation of a culture of peace, respect and tolerance.³⁶ This approach implied, in practice, reforming the Organic Constitutional Law on Education (LOCE), inherited from the dictatorial regime. This regulation established that the Ministry of Education (MINEDUC) could not prepare national programs and plans, and that the curricular framework (made up of transverse fundamental objectives (OFT) and mandatory minimum contents (CMO)) would be determined by the Higher Education Council (CSE), an autonomous body headed by the Ministry of Education, and made up of representatives of the armed forces, the Catholic Church and the Supreme Court, as well as academics and scientists.³⁷

Particularly with respect to the teaching of the recent past, in 1999, as a result of the work of the Technical Advisory Committee for the National Dialogue on the Modernization of Chilean Education (a body created by presidential decree), an adjustment to the transverse fundamental objectives, and mandatory minimum contents of the History and Social Sciences courses was approved, determining the approach to the dictatorship in the sixth year of basic education, and the second year of high school education, in two units, respectively: “Democratic crisis and military regime: new political constitution and new economic model”, “The transition and the recovery of democracy” and “The twentieth century: The pursuit of economic development and social justice”.³⁸ The mandatory minimum content for the study of the recent past in the second year of high school indicated that the revision of the period of the dictatorship was not mandatory. Proposing instead, in case teachers deciding to work on the historical stage, the thesis of the report of the National Truth and Reconciliation Commission, about the polarization prior to the coup d’état, should be used. Regarding the contents of the sixth year of basic education, the approach to human rights violations, the operation of repressive bodies and the action of bodies for the defence of fundamental rights were approved.

This last situation generated intense polarization between the College of Professors, which defended the reform, and conservative sectors of the Chilean right, who objected to it. Faced with the demands of the Jaime Guzmán Foundation and the rejection of the application of historical content by various municipalities governed by right-wing mayors, in 2000, the Ministry of Education decided to replace the text for the sixth grade of basic education.³⁹ Despite this, between 2004 and 2007, new adjustments were introduced, and promoted in response to the massive student mobilizations that were generated in that period for the demand of better conditions for access to public education.⁴⁰

In 2009, during the first administration of President Bachelet, the replacement of the Organic Constitutional Law on Education

by the General Education Law (LGE) was enacted. By means of these regulations, the Ministry of Education incorporated into formal education, at the basic and intermediate levels, a series of fundamental transverse objectives regarding the approach to human rights and the recent past. The training plans directly oriented to these courses are presented in the third and fourth years of high school education.⁴¹ In response to these important reforms, in 2011, at the request of the Executive Branch, the National Education Council (the successor body to the Higher Education Council) approved a conceptual modification to the History texts that replaced the term “dictatorship” with “military regime”. The situation generated intense controversy both in society and in government, against which the Ministry of Education promoted the possibility of the texts mentioning the period 1973–1990 in both forms.

The National Institute for Human Rights has periodically issued criticisms of the State’s educational policy on human rights and recent history. Specifically, the primacy of these contents in the History course has been highlighted with concern (with the approach to human rights violations committed by the dictatorship on issues such as economic, social and cultural rights predominating) and the weak introduction of human rights in higher education, and in the training of the armed forces and internal security forces.⁴²

However, regarding sites of memory, most declare that education is one of their main tasks.⁴³ The sites, in general, have adopted the definition of human rights education proposed by UNESCO.⁴⁴ However, the use of the concept of “memory pedagogy” has been consolidated among the educators of the sites, to refer to an “educational proposal that uses the memory of traumatic events for the teaching and promotion of peace and human rights, “focused” on the development of values and, therefore, with a strong component sustained in emotiveness, making it possible “that from the perspective of learning there is the need to

35 Annual Report. Human rights situation in Chile 2018, National Institute for Human Rights, Santiago: Ediciones del Instituto Nacional de Derechos Humanos, 2018, 91–92.

36 National Truth and Reconciliation Commission Report, op. cit., 1263–1264.

37 National Education Council, <https://www.cned.cl/quienes-somos>

38 Leonora Reyes, “A 40 años del Golpe de Estado: el debate curricular inacabado”, in *Docencia*, No. 50, 2013, 36.

39 *Ibid.*, 42–43.

40 These reforms to curricular frameworks were not limited to the History course, but also incorporated the Language and Communication, Orientation and Philosophy sectors, adding qualitative elements of learning, such as tolerance and skills for the exercise of rights. Enrique Azua, “Educación en Derechos Humanos en el currículum chileno”, in VVAA, *Pedagogía de la memoria. Desafío para la Educación en Derechos Humanos*, Santiago: Heinrich Böll Stiftung Cono Sur, 2010, 121–123.

41 In the first case, fundamental objective 4 of the History, Geography and Social Sciences course reviews humanity’s efforts to build a world of peace, following the horrors of world wars, genocides and totalitarianism. While in the second, in the framework of fundamental objectives 1, 3, 4 and 5 of the same course, learning about the rule of law is addressed as the legal framework that protects the exercise of human rights. Human Rights Report for Students, National Institute for Human Rights, Santiago: Ediciones del Instituto Nacional de Derechos Humanos, 2014.

42 Human Rights Annual Report 2012, National Institute for Human Rights, Santiago: Ediciones del Instituto Nacional de Derechos Humanos, 2012, 308–310.

43 According to a 2018 survey of sites conducted by the National Institute of Human Rights, 82 % of the sites recovered and open to the community put on tours for students.

44 UNESCO and human rights education, UNESCO, Digital Library UNES-DOC, https://unesdoc.unesco.org/ark:/48223/pf0000131836_spa

build knowledge from the memory of the subjects.”⁴⁵ Particularly, in the Parque por la Paz Villa Grimaldi, this proposal has evolved, complementing itself with thematic activities for students of different educational levels, now called “pedagogy of place of memory.”⁴⁶ Similarly, Memorial Paine has developed areas of reflection around memory and human rights, conducting site tours and art workshops with mosaics, exploring with students the current state of human rights.⁴⁷ From the emergence of these and other educational programs at various sites, a collaborative work of teams and educational areas has been generated, which has materialized in the creation and management of the network of educational areas of Sites of Memory and Conscience.⁴⁸

At the time of writing of this document, three issues are seen as relevant to the development of human rights education in Chile. First, its inclusion in the National Human Rights Plan, through the introduction of the citizen training plan, as a complement to the existing contents of the History course. Second, a proposal by opposition deputies for the incorporation of a compulsory course on human rights and historical memory in formal education is under discussion at the National Congress. Finally, there is a growing preference of students for a dictatorial regime over a democratic one.⁴⁹

LESSONS LEARNED AND RECOMMENDATIONS

In Chile, the development of sites of memory and the educational proposals associated with them on education of the recent past, and human rights has followed a complex process, relatively dissociated from the democratizing progress of the political transition. In this sense, the main lesson of the Chilean experience is the lack of a uniform and long-term public policy regarding both the recovery of the old detention, torture and extermination centres, and the opening and maintenance of sites and memorials. It is possible to affirm that sites of memory have developed in a context of “post-transitional justice,”⁵⁰ that is, under a socio-political scheme in which memory initiatives are articulated not only by the State, but also in dialogue with civil society (and often under its leadership), through transversal organizations of activists, victims and family members, overcoming the political-institutional limitations and official reconciliation logics of the first stage of the transition.

This situation has generated at least two scenarios. On the one hand, that the process of rescuing material memory, its redefinition and opening as public historic spaces, is primarily a matter for civil society. Therefore, the work of “memory entrepreneurs” has been vital.⁵¹ On the other hand, the official heritage designation of memory is a reactive policy, reducing itself to the application of the Law on National Monuments, decreeing expropriations, financing limited spaces and generating public procurements in which the sites must compete for resources.

Both situations have generated three determining consequences for the development of sites of memory in post-authoritarian Chile. First, a tense relationship between sites of memory and the State, characterized by the questioning by some representatives of the sites, and how they express the heritage designation process, considering it a demobilizing body of the political cause for human rights,⁵² and an ineffective measure for concrete redefinition,⁵³ since the declaration as a National Monument does not guarantee access to space, nor does it guarantee permanent resources. Second, it has reinforced the differentiation

between sites of memory recovered and open to the public, and those that have only been declared as sites but whose access is not allowed. This makes evident the necessary participation of permanent actors in the management of the sites, so that they can operate as public spaces of historical redefinition and education in human rights. This last criticism also extends to the differentiation between recovered sites and memorials. Finally, due to the absence of effective punishment for those who damage national monuments, it has caused sites and memorials to be prone to political attacks.

However, the sites also face challenges, related to the impact of their messages and educational proposals. Some recent research has indicated that there would be difficulties for sites to activate memory and learning processes in people who are not victims or family members, and who did not live through the dictatorship or the first stage of the transition.⁵⁴ In this sense, it is important that sites constantly adjust their teaching strategies, trying to incorporate methodologies that strengthen the link between past and present, emphasizing the approach to current humiliating situations, and promoting open discussions on the socio-political divisions that exist about the understanding of the recent national past.

In summary, the Chilean experience in this field reveals: a) the need for an active role for both the State and civil society, with respect to the consolidation of protected and projected sites of memory; b) the dynamic reality of places of memory, associated both with the quality of heritage policies and with generational differences; c) the need for a Sites of Memory Law that guarantees the safeguarding of sites and considers civil society organizations

45 Luis Alegría, *Una didáctica posible para la enseñanza del terrorismo de Estado en Chile: fuentes para la enseñanza de la dictadura*, in Karen Cea, Roberto Retamal, eds., *Pedagogía de la memoria. Historia, memoria y derechos humanos en el Cono Sur*, Santiago: Ediciones de la Corporación Parque por la Paz Villa Grimaldi, 2012, 146–147.

46 Karen Bascuñán, *Educación en derechos humanos en el contexto de la post-dictadura en Chile. La propuesta desde el sitio de memoria Parque por la Paz Villa Grimaldi*, in Abraham Magendzo, Paulina Morales, eds., *Pedagogía y Didáctica de la Declaración Universal de los Derechos Humanos a setenta años de su promulgación (1948–2018)*, Santiago: Ediciones de la Universidad Academia de Humanismo Cristiano, 2018, 110–112.

47 Educational program for youth, Memorial Paine, a place for memory, <https://www.memorialpaine.cl/programa-educativo-jovenes/>

48 Education and memory, <http://www.educacionymemoria.cl/>

49 Paula Yévenes, “El 57 % de alumnos de 8º básico aprobaría una dictadura”, in *La Tercera*, 12. 4. 2018, <https://www.latercera.com/nacional/noticia/57-alumnos-8-basico-aprobaria-una-dictadura/131606/>

50 Cath Collins, *Post-Transitional Justice. Human Rights Trials in Chile and El Salvador*, Pennsylvania: Pennsylvania State University Press, 2010, 21–22.

51 “[...] subjects who act in a political scenario of the present, who through their actions link the present with the past (paying tribute to the victims) and the future (transmitting a message to the ‘new generations’).” Elizabeth Jelin, *La lucha por el pasado*, Buenos Aires: Siglo XXI Editores, 2018, 163.

52 Gloria Elgueta, “Institucionalización y patrimonialización de sitios de memoria en Chile. Una lectura desde la experiencia de Londres 38”, in *Revista Aletheia*, Vol. 8, No. 16, 2018, online.

53 Daniela Bracchitta, Fernanda Espinoza, Valeria Godoy, Roxana Seguel, “Propuesta metodológica para el análisis de transformaciones diagnósticas en inmuebles utilizados como centros de detención, tortura y exterminio durante la dictadura cívico-militar en Chile (1973–1990)”, in *ROMVLA*, No. 17, 2018, 218.

54 María Reyes, María Cruz, Félix Aguirre, “Los lugares de memoria y las nuevas generaciones: algunos efectos políticos de la transmisión de memorias del pasado reciente de Chile”, in *Revista Española de Ciencia Política*, No. 41, 2016, 93–114.

in terms of site management and; d) the importance of the sites for human rights education, as a complement to official educational programs and a deepening of the approach to the past, through the testimony of the victims and their own dynamic strategies. The value of sites of memory lies in the realization of citizens' efforts towards non-repetition and the promotion of human rights; therefore, their protection and enhancement should be a fundamental objective for any transitional government that

seeks to ensure that its population values democracy over any form of authoritarianism.

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TIMELINE OF THE MAJOR EVENTS

BORIS HAU

September 1970	Socialist Party candidate Salvador Allende wins the presidential election, heading the Popular Unity coalition
September 11, 1973	A violent coup deposes President Allende, initiating right-wing dictatorship by a military junta, headed by General Augusto Pinochet
June 4, 1974	Creation of the DINA secret police, headed by General Manuel Contreras, to repress, torture, disappear and eliminate left-wing activists and other regime opponents
January 1, 1976	Creation by the Catholic Church of the emblematic human rights defence organisation the “Vicaría de la Solidaridad”
August 13, 1977	The DINA is replaced by a new organisation, the CNI. Disappearances and politically motivated executions become less frequent, though repression continues
April 19, 1978	Decree Law 2.191 extends amnesty to perpetrators of politically motivated crimes committed between September 1973 and March 1978. A clause excluding people currently under charges makes the law a self-amnesty, designed to protect regime agents while excluding opponents.
September 11, 1980	A new, authoritarian, Constitution is “ratified” by a fraudulent plebiscite
January 22, 1982	Christian Democrat politician and former president Eduardo Frei Montalva (1964–70) died in hospital. A later judicial investigation concluded, in 2019, that he had been poisoned by regime agents
May 1983	A wave of social protest and civil unrest in opposition to the regime began with a national strike day, called by the copper workers’ union
September 7, 1986	Assassination attempt on Augusto Pinochet by a left-wing armed opposition movement. Five of his bodyguards were killed, but Pinochet survived.
October 5, 1988	A second plebiscite narrowly rejects conceding eight more years in power to Pinochet, meaning open elections would be held.
March 11, 1990	After Chile’s first free elections in 17 years, centrist Christian Democrat candidate Patricio Aylwin became president, representing a 17-party centre left coalition known as the “Concertación”.
April 25, 1990	Presidential Decree No. 355 creates Chile’s first Truth Commission, the National Commission on Truth and Reconciliation (“Rettig Commission”), to document grave human rights violations and acts of political violence committed during the dictatorship. The “Rettig report” was published on March 4, 1991. Victims of extrajudicial execution or disappearance were individually named. Totals, updated in 1996, came to stand at 3,195 individuals: 2,008 people executed; 1,183 detained-disappeared, and 4 unborn children killed or disappeared along with their mothers.
February 8, 1992	Law 19.123, the first of various reparations laws, set out some entitlements for relatives, returning exiles, and others. It also created a National Corporation for Reparation and Reconciliation, which operated until 1996 to complete victim registers and administer reparations.
1990, 1993	Two sets of military manoeuvres were ordered by Pinochet, still the Army Commander of Chief, to express military disquiet over truth and justice efforts and to intimidate the new democratic authorities.
May 30, 1995	The first significant criminal conviction for dictatorship-era violations: former secret police chief Manuel Contreras and his second in command were jailed over the 1976 car bomb assassination, in Washington DC, of former Chilean foreign minister Orlando Letelier and a colleague.
December 5, 1995	For the first time, the Supreme Court upheld a guilty verdict that classified disappearance as an on-going crime, to which the 1978 Amnesty Decree Law could not apply.
March 1997	Inauguration of the Villa Grimaldi Peace Park, the first former clandestine detention centre in the Americas to be recovered by survivors and opened to the public as a site of memory.
1997–1998	Judicial reforms dilute the power of Pinochet-era appointees in the Supreme Court

January 1998	Criminal complaints naming Pinochet directly are admitted, for the first time, to the investigation stage. The two cases were brought by the Communist Party president, and by relatives of victims of the so-called “Caravan of Death” killings of 1973.
March 1998	Under the terms of the 1980 Constitution, still in force, Pinochet retires as Commander in Chief of the Army and becomes an honorary Senator.
September 9, 1998	The Supreme Court for the first time orders the reopening of a case previously amnestied by military courts: it rules that amnesty can only be applied after a full investigation, and that international human rights law requires that war crimes be punished.
October 16, 1998	Augusto Pinochet is detained in London, under the terms of an international arrest warrant requested by Spanish judge Baltazar Garzón. The request is for his extradition to Spain to stand trial for crimes against humanity, committed against Spanish citizens and others, during the Chilean dictatorship.
August 21, 1999	The Chilean government instigates a “Roundtable Dialogue” with the Armed Forces, the Catholic Church, and some human rights lawyers, supposedly to find the disappeared. Relatives’ associations refused to take part. The outcome was a list stating that dozens of victims had been “thrown into the sea”. Some of the information was later proven to be false.
March 3, 2000	After 503 days of house arrest in London, Pinochet was allowed to return to Chile for “humanitarian reasons” even though the UK’s highest court, the House of Lords, had approved his extradition to Spain
December 1, 2000	Pinochet was charged for the first time, by Chilean courts, for his part in the disappearance or execution of 74 victims of the Caravan of Death. The Supreme Court later named special investigative magistrates to investigate all open or reopened cases for dictatorship-era human rights violations, nationwide.
August 2003	In the run-up to the 30th anniversary of the military coup, Socialist President Ricardo Lagos proposed a second truth commission and expanded existing reparations programmes.
November 2004	The Army made its first ever explicit public recognition of involvement in “criminal and morally unacceptable acts” during the dictatorship
November 17, 2004	Investigative magistrate Alejandro Solís passed the first verdict explicitly recognising unresolved dictatorship-era “kidnappings” as enforced disappearance, which under international law cannot be subject to amnesty or statutes of limitation.
November 28, 2004	Chile’s second truth commission, the National Commission on Political Imprisonment and Torture, “Valech Commission”, published its report. Almost 29,000 individuals were named as survivors of political imprisonment and torture during the dictatorship. A new law, Law 19,992, provided reparations but set a controversial 50-year embargo preventing public or judicial access to the commission’s records.
March 11, 2006	Socialist Party candidate Michelle Bachelet, daughter of an Air Force General who died after being tortured by the regime, became Chile’s first woman president.
September 26, 2006	The Inter-American Court of Human Rights condemned Chile’s application of amnesty to the 1973 extrajudicial execution of Luis Almonacid. President Bachelet promised legislation to “bring the amnesty law into line with” Chile’s international obligations, but did not keep her promise.
December 10, 2006	Augusto Pinochet died, at the age of 91, under charges in 3 cases of crimes against humanity, and one case of tax fraud and money laundering (the Riggs Bank case).
December 10, 2009	Ley 20.405 created Chile’s first state National Human Rights Institute, and a new repetition of the Valech Commission (officially called the “Presidential Advisory Commission for the Qualification of Victims of Extrajudicial Execution, Disappearance, Political Imprisonment and Torture”, known as “Valech II”).
January 11, 2010	Inauguration of Chile’s national Museum for Memory and Human Rights
March 11, 2010	Sebastián Piñera became President of the first democratically-elected right wing administration in Chile for 50 years
August 18, 2011	The “Valech II” report added almost 10,000 names to the “Valech list”, and 30 victims to the “Rettig lists”. The final total became 38,254 acknowledged survivors of political imprisonment and torture, plus 3,216 acknowledged victims of disappearance and execution.

August 28, 2013	The Inter-American Court of Human Rights ruled, in the García Lucero case, that investigation of torture is a state obligation that should be done <i>ex officio</i> , without waiting for survivors to bring criminal complaints
September 2013	On the 40th anniversary of the military coup, Chile's Supreme Court issued its first ever <i>mea culpa</i> for its "actions and omissions" over human rights during the dictatorship.
March 11, 2014	Political alternation: Michelle Bachelet became President for the second time, heading a centre-left coalition which, for the first time, included the Communist Party.
December 2014	The Supreme Court decided to unify criteria in civil claims, declaring statutes of limitation inapplicable even in civil cases and awarding damages even if other reparations had been received.
March 11, 2018	Political alternation: Sebastián Piñera became President for the second time, heading a right-wing coalition.
July and August 2018	The " <i>Supremazo</i> ": Chile's Supreme Court controversially conceded early release or parole to six former agents in prison for crimes against humanity.
August 10-13, 2018	Mauricio Rojas, who had previously accused the Museum of Memory and Human Rights of falsifying history, was named Minister of Culture and the Arts but had to resign after only three days, due to protests.
October, 2019	Major social unrest, met with disproportionate police violence, threatened Chile's carefully cultivated image of success and stability. Political elites grudgingly conceded the need for a new Constitution, to replace the authoritarian-era one still in force.

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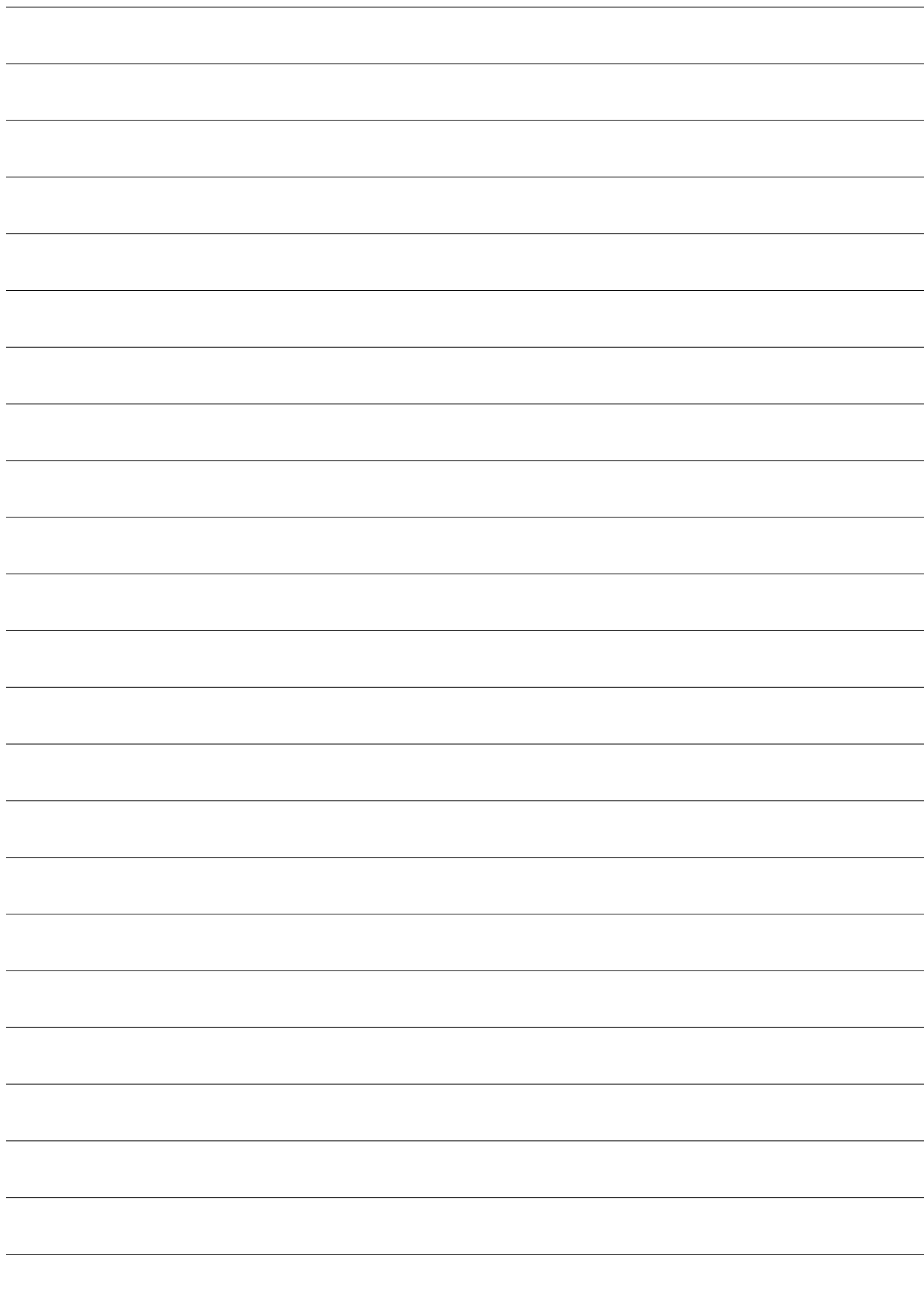
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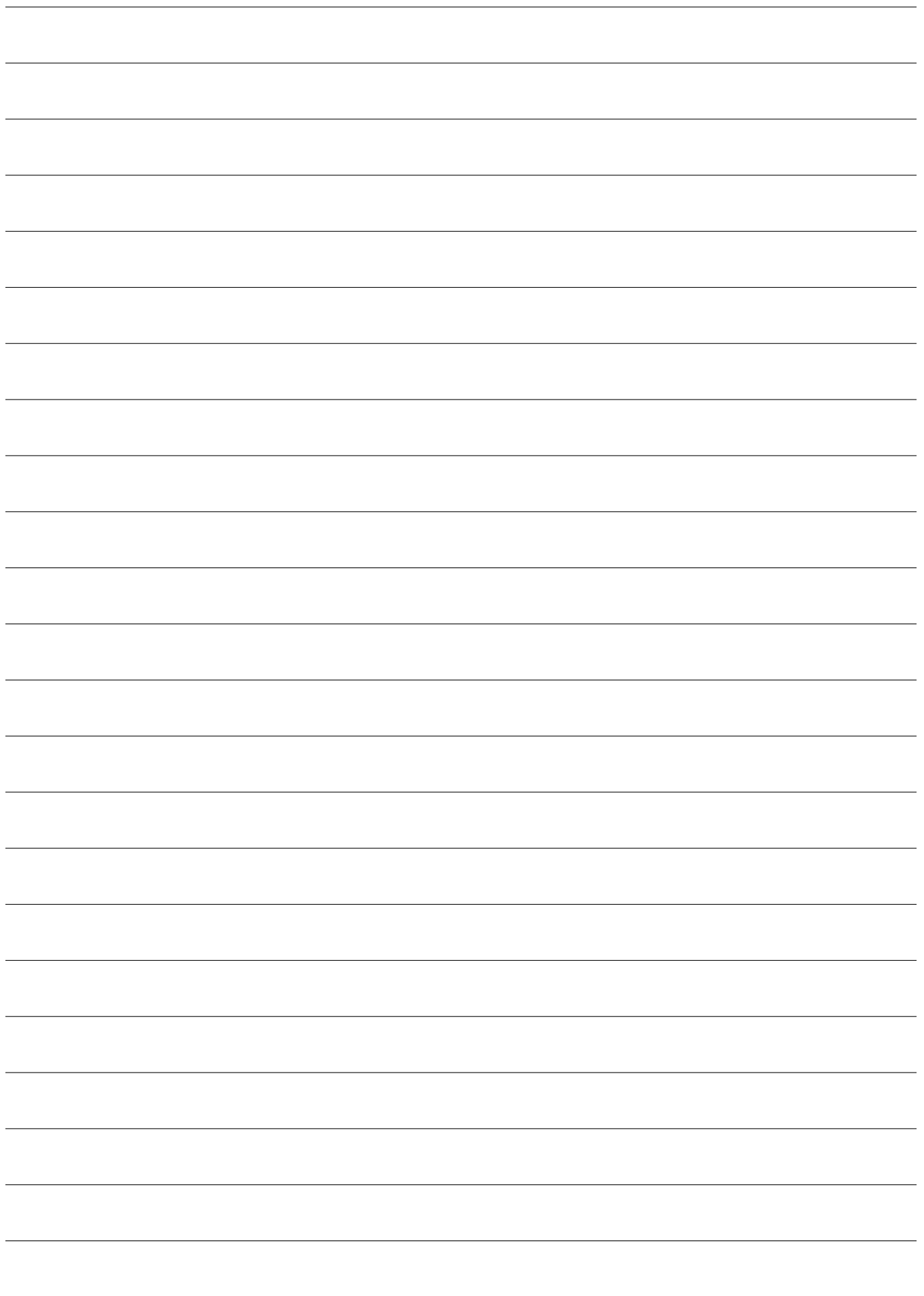
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MEMORY OF NATIONS

Democratic Transition Guide

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AUTHORS

MARKÉTA BÁRTOVÁ

Member of the Section for Research on the Resistance Movement against the Communist Regime of the Ministry of Defence in the Czech Republic (since 2014). Head of the Section for Research on the Resistance Movement against the Communist Regime of the Institute for the Study of Totalitarian Regimes (2012–2013).

LADISLAV MRKLAS

Political Scientist, Vice-President and Lecturer at the private university, the CEVRO Institute, Prague. His main research interest is comparative politics with a focus on the Czech political system, European political parties, electoral and party systems, local and regional politics, and political marketing.

PAVEL ŽÁČEK

Historian, Publicist and Government Official. First Director of the Security Services Archive (2007) and the Institute for the Study of Totalitarian Regimes (2008–2010). Member of the Learned Committee, Estonian Institute of Historical Memory, and Scientific Board of the Romanian Consiliul Național pentru Studierea Arhivelor Securității (since 2009).

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TRANSFORMATION OF THE POLITICAL SYSTEM

LADISLAV MRKLAS

COMMUNIST REGIME IN CZECHOSLOVAKIA (1948–1989)

The beginning of the communist regime in Czechoslovakia can be dated from 25 February 1948 when the resignation of democratic parties' ministers was accepted and a new government of the "revived" National Front was appointed, and its end can be set on 17 November 1989 when an authorised student demonstration commemorating 50 years from the death of Jan Opletal, a student killed by the occupation totalitarian regime of Nazi Germany (1939), was dispersed. The intervention against the student gathering launched the fall of the regime which had been in power in Czechoslovakia for more than four decades.

Over these decades, the nature of the regime changed several times, totalitarian phases alternated with post-totalitarian and democratising ones. In its first phase, until 1956 (1958), the regime is designated as a classic communist totalitarian model and its beginning may be identified as the most repressive period, ending by the death of the soviet dictator Joseph Stalin and then by the death of the first national communist leader Klement Gottwald. In the 1960s, at first, there was a phase of loosening which ended when a unique attempt at democratization from the inside was made (post-totalitarian democratising regime, also called "socialism with a human face").¹ On 21 August 1968, the armies of five states of the Warsaw Pact with the Soviet Union in the lead entered Czechoslovakia and ended the democratisation process. From 1969, at first, we can talk about the period of purges from the reformist powers and of consolidation of the regime (normalization) which was replaced by the freezing of the regime in the first quarter of the 1970s, i.e. stabilisation of the positions created during normalization. It is not until the end of the 1980s and mainly under the influence of Perestroika by Mikhail Gorbachev, but also thanks to the ongoing transition in other former Eastern-Bloc countries (Poland, Hungary, the German Democratic Republic), that the dynamics of the society development started to increase which the regime was no longer able to react to.

DEVELOPMENT OF CONSTITUTIONAL AND LEGAL FRAMEWORK OF THE COMMUNIST REGIME

The constitutional and legal framework of the political system was changing quite significantly, too. Until June 1948, the Constitution of 1920 was formally in force; however, many of its parts were not implemented any more. The Czechoslovak coup d'état in February 1948 was crowned by the adoption of the "May Constitution" (on 9 May 1948), drafted entirely by the Communist Party of Czechoslovakia. The Constitution already mentions the "people-democratic" nature of the state, the initiated journey towards socialism and the power of the working class.

However, the top constitutional document became the "Socialist Constitution" approved in July 1960, many times and quite significantly amended later on, but formally in force until the dissolution of Czechoslovakia at the end of 1992. It mentioned not

only "building up socialism" which corresponded to the change of the official name of the state to the Czechoslovak Socialist Republic, but especially Article 4 anchoring the leading role of the Communist Party of Czechoslovakia which is designed as the "vanguard of the working class" and a "voluntary union of the most active and most conscious citizens who are labourers, peasants and intellectuals." Article 6 furthermore limits the plurality in the field of social organizations, as it defines the "National Front of Czechs and Slovaks uniting social organisations". In practice, it meant that no association or interest organisation (including, for example, animal breeders, gardeners, fishermen or hunters) could exist outside the framework of the National Front. The Constitution also includes a declaration of Marxism-Leninism with the binding state ideology and a single scientific opinion. This constitution does not mention the traditional concept of the division of powers any more.

As of 1 January 1969, the amendment of the Socialist Constitution came into effect thus making a federation of what up to then used to be a unitary state. Although it was a partial victory of the autonomously-minded part of the Slovak Communists, federalization took place already when the reformist movement was defeated, and thus, it had actually no impact on the real division of powers.²

1 Discussions about the nature of the Prague Spring and its direction have been going on until today. It is certain that within the competition of various influential groups and dodges in the leadership of the party and the state, the reformist wing got a lot of important positions in the party and state hierarchy. Antonín Novotný left his position as the leader of the party and later his position as the President of the Republic. The reformist Oldřich Černík became the Prime Minister, Ota Šik, the author of the economic reforms proposal, became the Deputy Prime Minister, Josef Smrkovský was elected the president of the National Assembly and Alexander Dubček, a Communist from Slovakia, became the General Secretary of the Communist Party of Czechoslovakia and even though he was not directly a member of the reformist wing, thanks to his age and unique manners he soon became one of the symbols of the political loosening. He was active in the following fields: criticism of the existing direction of the regime as a deformation of socialism, democratization of public life, official abolishment of censorship, rehabilitation of a part of the victims of repressions, opening the space for many forbidden and new social and political organisations (Sokol gymnastics movement, Scout Movement, Club of Committed Non-Party Members, Social-Democratic Party, K 231 – Association of former political prisoners), a shift in the foreign policy from the direct vassalage to the Soviet Union, state-law transformation of Czechoslovakia into a federation, but also the program of economic reform which aimed to introduce limited market mechanisms, widen the autonomy of businesses and the renewal of small business.

2 Formally, a federation of two republics was created – the Czech Socialist Republic and the Slovak Socialist Republic. This way, three political structures emerged – federal (federal government and two-chamber Federal Assembly), Czech and Slovak (with their own governments and parliaments – National Councils). This amendment proved itself to be a very important element especially in the period of political transformation. State law questions became, especially for the Slovak part of the society, one of the key points of their political agenda. It was prohibited to get a majority in one of the Chambers (House of Nations) of the Federal Parliament which became one of the breaks of a faster transformation of the legal order and, as a matter of fact, also one of the factors of the process that culminated in the division of the federation following the parliamentary elections in 1992.

If we think about the legal framework of the regime, it is necessary to take into account especially its ideological foundations. Legal thinking was based on the ideology of Marxism-Leninism built on social class stratification being the basic standard. It is very well illustrated by its characteristics written by the important communist law theoretician Viktor Knapp who wrote in 1950: “similarly as the state power in our people’s democratic republic is the only and unified power, our people’s democratic law is also the only one law, being the will, functioning as a law, of the governing working class and all the working people, defined by the material living conditions of our society.”³ This corresponded to the significant superiority of the public law over private law, which very strongly reflected the idea of common ownership. After 1948, acts and later codes reflecting these ideological foundations were gradually adopted. Some legal fields were degraded or almost disappeared (administration law, commercial law, the majority of the civil law), others were “blossoming” (criminal law, labour law, etc.).

In this context, it is necessary to recall that one of the essential requisites of the communist regime in Czechoslovakia was the almost 100 % nationalisation (or other forms of collectivisation, such as creating cooperatives) of the economy and its strict subordination to the state planning (especially to the five-year plans). In this respect, Czechoslovakia was sadly at the top of the countries in the whole Eastern Bloc. This fact answers the question why it was the economic transformation, including an extensive privatisation of state property, market liberalisation and deregulation, which became the key issue of the whole democratic transition.

LEADING ROLE OF THE COMMUNIST PARTY

Until November 1989, the real power was fully in hands of the party leadership, the Presidium of the Central Committee of the Communist Party of Czechoslovakia which started again to use the extensive repressive apparatus (state political police, special units and party militias). This time, the Communist Party of Czechoslovakia did not use the massive and drastic repressions already known from the turn of the 1940s and 1950s. It did not even strive for the active participation of the masses in building socialism. The motto was rather passivity and depoliticization of the society. Repression was used to bully those who did not want to accept the conditions established by the normalization regime. Non-conformists were denied various material advantages, the possibility of further education and a professional career, and only the most escalated cases ended up in criminalisation, usually by using flexible provisions of the Criminal code on disorderly conduct, incitement to riot or parasitism.

On the top of the power pyramid, there was the General Secretary (formerly the First Secretary) of the Communist Party of Czechoslovakia. From April 1969, this position was executed by Gustáv Husák, a Slovak Communist and originally a moderate supporter of the reforms. He remained in this position until his abdication in December 1987 when he was replaced by Miloš Jakeš who would be the leader of the Communist Party of Czechoslovakia until November 1989. The key decisions were taken by the Presidium of the Central Committee of the Communist Party of Czechoslovakia, usually consisting of 11–12 members. From the beginning of normalization until the late 1980s, the composition of this body did not change very much. It was

dominated by people linked with the suppression of the revival process and close cooperation with, or more precisely vassalage to, the Soviet communist leadership. Formally, the party power was in the hands of the party congresses organised approximately once in five years, announcing long-term goals, including the five-year economic plans, and praising the successes in building socialism.

There was no political pluralism in the period of 1969–1989 in Czechoslovakia. Elections to the Federal Assembly and to both National Councils, as well as to lower-level representative bodies, were held, nevertheless, they represented a mass manifestation of loyalty towards the regime rather than being true elections. The reason for this was not only the absence of any alternative to the candidate lists of the National Front, but also the absence of many other institutes typical for a democratic establishment (free press, legal opposition, judicial control over the power, etc.) Political parties united in the National Front, i.e. the Czechoslovak People’s Party, the Czechoslovak Socialist Party, the Freedom Party and the Revival Party, were just satellite organisations of the Communist Party of Czechoslovakia. There were independent candidates and representatives of social organisations (trade unions, youth or women organisations, etc.) in the unified candidate lists of the National Front as well, but these candidates were always carefully vetted and appropriately conformed to the regime.

The number of members of the Communist Party of Czechoslovakia evolved in cycles corresponding to important development phases. In the time of its creation (1921), the Communist Party of Czechoslovakia united about 130 thousand members, however, after Bolshevization in the end of the 1920s, many of them left the party and their number dropped to 40 thousand. After WWII, the Communist Party of Czechoslovakia became a mass organisation and on the eve of the 1946 elections, it comprised of more than one million members. The absolute maximum number of members was achieved in 1948, when the coup d’état took place and the member base had almost 2.5 million individuals. Consequently, the number of its members was steadily dropping. In the time of the revival process at the end of the 1960s, the Communist Party of Czechoslovakia had almost 1.7 million members. After the purges within normalisation, their number dropped to 1.15 million members, and then it immediately started to increase. In the period of the fall of the communist regime in 1989, the party had about 1.5 million members.

POWER AND REPRESSIVE STRUCTURE OF THE COMMUNIST REGIME

After February 1948, the nature of the National Front changed. From the originally people-democratic coalition of political parties which was created as a result of the cooperation of the London and Moscow exile centres of the resistance against the Nazi regime,⁴ and partially of the national resistance as well,

3 Viktor Knapp, “Právo veřejné a soukromé” in *Právník*, 1950, No. 2, 98.

4 During WWII, there were two exile resistance centres abroad and their ideas about the after-war development differed significantly. The exile centre in London with the ex-president Edvard Beneš in the lead and including the representatives of the majority of democratic parties was very shortly acknowledged as the representative body of the Czechoslovak statehood. It strived to remove the real and alleged imperfections of the political system of the First republic, including the ostracism of a part of the centre-right parties (especially the Agrarian Party) that were not to be renewed after ►

the National Front was transformed into an institution with various organisational levels and apparatus. In the first days and weeks after the coup d'état, Action Committees were being formed. They carried out purges in the whole of society, especially at the levels of individual enterprises, factories, offices, at schools, medical facilities, simply at the lowest levels. Hand in hand with these, the National Front did not serve as a real power centre determining the basic political line any more. This role was assumed by the Communist Party of Czechoslovakia itself. On the other hand, the National Front became a power tool for enslaving the civil society. Out of more than 60 existing organisations and associations, only 683 remained legal and these were obliged to become a part of the National Front.

Other important segments of the power structure were the National Committees, i.e. quasi-constitutional bodies at the community, town, district and regional levels, inspired by the soviet model of public administration. In fact, they had very limited power and they served as a leverage of the regime. Regional National Committees were subordinated to the Ministry of the Interior and individual departments of the Regional National Committees were subordinated to departmental Ministries. A similar relationship of subordination was established between the Regional and District National Committees. This was particularly apparent in financial issues being dealt with a clear hierarchy.

Right after February 1948, the public opinion itself ceased to fulfil its role of political pressure and control of power. Not only its freedom, but in the end also the public truth disappeared. The communist leadership monopolised the creation and influence of the public opinion via public meetings that usually published various consenting resolutions to individual events and happenings, and also via the media. The press, radio and later on television, run by the state or official political and social organisations, stopped to fulfil their function of non-distorting informers and were turned into tools of spreading the official ideology, adoration of the government and party politics, celebration of friendly countries with the Soviet Union and its Communist Party in the lead. All the media, including the press office, were subject to a rigid censorship. The leadership of the Communist Party of Czechoslovakia determined what the media should write and broadcast and how to interpret individual situations and phenomena.

Very soon, the communist regime destroyed the principle of judicial independence. This part of the power structure was attacked in two ways. The independence of judges was destroyed, many of them were "acted-out"⁵ and replaced by reliable successors, people who were not qualified,⁶ but devoted to the party. Judges of the Supreme Court were elected by deputies of the National Assembly (later on called the Federal Assembly) and judges of the District Courts even directly by citizens. Their mandate was imperative, they answered to their electors with reports on their activities and the activities of the court. They could be repealed on the basis of such a report. Besides these, there were also exceptional courts in the form of a State Court, a special court for "the fight against reaction",⁷ and also exceptional People's Courts that were already used before 1948 to judge people accused of collaboration with the Nazi regime. In court proceedings, prosecutors became the key and de facto superior institution; their suggestions were binding for courts. The 1960 Constitution already with no scruples at all proclaimed the position of courts and prosecutor's office that "protect the socialist

state, its social establishment and rights and legitimate interests of citizens and organisations of the working people". In various phases of the development of the communist regime, the judicial system, of course, underwent certain changes. Thus, it experienced a period of certain unbinding from the direct political power of the Communist Party at the end of the 1960s; nevertheless, the direction of justice in the period of normalisation was again very directly pro-regime.

A specific role within the communist regime was played by the armed forces: the army, police, prison service and party militias. In the army, which had already been subject to political supervision since 1945, there was a purge at first, after February 1948, that focused mainly on the Officer's Corps with experience from the western resistance and repressions did not exclude even many soldiers fighting on the Eastern Front. The purge was followed by a strict Sovietization, i.e. full subordination of arms and powers to the Soviet leadership which was embodied by Soviet counsellors in Czechoslovakia. The police was organised according to the Soviet model and in cooperation with Soviet counsellors, too. The National Security Corps was established already in 1945 consisting of two forces: the Public Security (VB) and the State Security (StB). Whereas, the Public Security executed activities that are usually undertaken by the police, the State Security served as the political police. Its importance culminated after February 1948 when it participated in many judicial murders. It was the most feared element of the repressive apparatus. Investigation methods used by the State Security did not differ from the methods already known by many people who were imprisoned during the period of the Nazi regime. The main mission of the State Security in the first years after the coup d'état was to prepare and control political procedures that revealed saboteur and opposition centres, either real or completely concocted. The position of the State Security in

► the war. The communist emigration in Moscow was entirely dependent on the Soviet Union and its leader – Stalin. Together, they perceived the war as an opportunity to easily export the communist revolution into a restored state. Their cooperation was reflected in the Friendship Agreement on Mutual Aid and After-War Cooperation between Czechoslovakia and the Union of Soviet Socialist Republics which was concluded in December 1943, and mainly by the creation of the National Front government in April 1945 which adopted the "Government programme of national and democratic revolution of Košice" on the basis of which the restoration of power in the territory of the liberated state was carried out from May 1945. For the first time, Communists were represented in the government, executing the very important positions of two Deputy Prime Ministers, the Minister of the Interior, the Minister of Education, the Minister of Agriculture and the Minister of Information. General Svoboda, the commander of the army section of the exile in Moscow who was very close to the Communists, became the Minister of Defence.

5 That is removed from office on the basis of their class or political unreliability which was usually proclaimed by the locally competent bodies of the National Front, now fully in the hands of the Communist Party of Czechoslovakia or its agents in other political parties and organisations.

6 Many new judges and prosecutors were labourers with no secondary school education and their only qualification was graduation from the Law School of the Working People under the Ministry of Justice where the education usually lasted only a few months and focused mainly on Marxism-Leninism studies. Such "educated labourer prosecutors" consequently occupied the vast majority of leading positions.

7 In the four years of the State Court existence (1948–1952), almost 27 thousand individuals stood trial at this court and it delivered in total 249 death sentence verdicts out of which only a few were granted pardon and changed into life imprisonment sentences. The State Court trial had a purely formal character as it had previously been prepared in meetings of judges and procurators.

various phases of the regime fluctuated; however, it remained the strongest one among all the elements of the repressive apparatus. The State Security got new tasks during normalisation and especially in fighting the opposition which started its formation in the mid-1970s. Even though the methods of its work consisted much more in psychological rather than physical terror, many violent excesses committed by the State Security investigators against dissidents are known. The State Security also had another function, that is to get selected individuals from all social layers, people of many different political opinions, including representatives of the academic spheres, culture, sport, and last but not least, members of the dissent itself, to cooperate with the regime. The role of informers aimed not only to get the information about developments in various segments of the society, but also to sow distrust among the opponents of the regime. At the same time, many prison guards, especially those who worked in forced labour camps⁸ in the 1950s were detrimentally known for their brutality. And finally, the last important repressive force were the People's Militias, i.e. labourer combat units created by a decision of the Central Committee of the Communist Party of Czechoslovakia in February 1948 when they played an important role in demonstrations to support the coup d'état, as well as being the deterring element of the upcoming new regime. In later phases of the regime, they played an important role especially at times with a certain revolutionary drive, i.e. in times of normalization and in the final phase of the regime when they were repeatedly used to disperse demonstrations in 1988–89. At that time, they consisted of about 80 thousand members.

OPPOSITION AGAINST THE COMMUNIST REGIME

Similarly to all segments of the political system, the opposition, too, had significantly developed during the forty years of the regime. To understand the transition towards democracy, the important phase is the period interconnected with normalisation and the following 1980s. The opposition was not formally organised in any way. This was caused both by many objective and subjective reasons. Whereas the opposition activities against the Soviet invaders and their allies in the state and party governance were of a mass uprising kind (petitions, demonstrations, strikes) at the turn of the 1960s and 1970s, after the suppression of the demonstrations in August 1969, the mass opposition activities disappeared for almost two decades. Following the *intermezzo* when the last remnants of the student movement were destroyed, as well as the seeds of the radical-left youth movement and the remnants of resistance inside some official organisations, the opposition activities were subdued until 1977.

There were several impulses for the new phase of the opposition activities – the Helsinki Process,⁹ as well as interventions against the remains of the unofficial culture (mainly the trial concerning the musical underground). The declaration of Charter 77 was drawn up at the turn of 1976 and 1977 and it pointed out the contradiction of the communist regime propaganda and reality. It called for the dialogue of the regime governance with the citizens who were willing to get engaged. The reaction of the regime was very sharp, the initiators and spokespersons of the Charter (Václav Havel, Jan Patočka, Jiří Hájek and others) were watched, interrogated, imprisoned and otherwise bullied.

There was a media campaign against Charter 77. Despite a certain kind of suppression, Charter 77 succeeded in pursuing its activities until 1989. Later on, other initiatives were created, especially the Committee for the Defense of the Unjustly Prosecuted in 1978. Nevertheless, the circle of dissidents remained limited and quite isolated until the mid-1980s.

The nature of the opposition movement started to change only in the second half of the 1980s when the number of citizens involved increased and the scope of opposition activities was widened, too. Some of them even gained a true political drive and various ideological streams started to shape them.¹⁰

TRANSITION TO DEMOCRACY

In November 1989, the political regime in Czechoslovakia changed. This change was quite quick, mainly in comparison with the neighbouring countries. The democratisation itself was preceded by a certain level of liberalisation of the public space which occurred more or less spontaneously, often despite the leadership of the Communist Party of Czechoslovakia. The key impulse was the change in the leadership of the Communist Party of the Soviet Union – that is the arrival of the reformist group with Mikhail Gorbachev in the lead. Its reformist course was received by Czechoslovak Communists with embarrassment. This was only very logical, as the majority of the communist leaders in power gained their positions during the normalisation process, i.e. when the results of similar revolutionary processes from the end of the 1960s were eliminated.

Although the normalisation leadership of the party resisted the changes, gradually, some cosmetic compromises had to be taken. Under the reconstruction¹¹ slogan, the position of a part of businesses changed and there was new space for small business from 1987. The changes were largely cosmetic ones. The media, more and more accentuating the critical tone towards various abuses, opened more space for discussion. Inside some power structures, interesting analysis materials were created and they

8 According to realistic estimates, as the exact data are missing, about 100 thousand citizens went through the forced labour camps ("communist camps"), many of whom had already experienced the Nazi concentration camps during WWII. Many prisoners never came back from the camps, or they did, but their health was in such a bad state that they died immediately after their return from the camp.

9 The Helsinki Process refers to a system of international negotiations and agreements issuing from these negotiations the objective of which was to ensure peace and deepen the cooperation between the European states, the USA and Canada which were usually on opposite sides of the bipolar division of the world. This process culminated in the formation of the Conference on Security and Co-operation in Europe and its main result was the signing of the Helsinki Accords on 1 August 1975. In Helsinki, the highest representatives of 33 European states, Canada and the USA signed a document consisting of 5 parts. One of them was also the principle of respecting human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief. Opposition leaders in several countries referred to the signature of this very document, in which the communist countries as well, including Czechoslovakia, committed themselves to respect human rights.

10 The Movement for Civic Freedom attempted to make a broad association of various streams, the most important of which were the social-democratic, Christian-democratic and liberal-conservative ones. Compared to that, the Democratic initiative composed of "realists" represented a more streamlined movement which was to a great extent in opposition to Charter 77.

11 The then analogues of the Soviet Perestroika.

– sometimes very openly – named the economic and societal problems.¹²

Rather silent or politically resistant parts of the society became active as well – young people and students, ecology activists, a part of the culture community. The number of various petitions demanding the release of political prisoners, dialogue of the political regime, reforms, respecting human rights, increased very sharply. The *Několik vět* (A Few Sentences) Petition drawn up in June 1989 had several tens of thousands of signatories and the petition on the separation of the church from the state and on religious freedom was signed by 600 thousand citizens of Czechoslovakia.

At the beginning of January 1988, mass demonstrations against the regime started again, organised not only in Prague, but also in other towns. The majority of them were not authorised, they were dispersed and their participants persecuted. However, the regime was not strong enough any more to prevent effectively the repetition of demonstrations and an increase in the number of their members.

Real changes were launched by the already mentioned violent suppression of an authorised demonstration. Two days later, two umbrella movements were created, representing a broad civic platform. The Civic Forum in the Czech part of the federation and Public Against Violence in Slovakia took over the initiative and demanded an open dialogue on democratisation. The creation of the Civic Forum was very spontaneous and its activities were spreading quickly from Prague to other bigger towns and from there all over the country. From the beginning, there was a strong centre created within its framework created by representatives of the dissent together with a part of the cultural front¹³ and also by personalities from the grey zone.

An important point in the development of the transition was the establishment of a dialogue between the federal government led by Ladislav Adamec and the Civic Forum representatives with the aim of government reconstruction. At that moment, the party leadership was dragged into the events and was not capable of reacting appropriately any more. A week after 17 November, Miloš Jakeš, the General Secretary of the Communist Party of Czechoslovakia, resigned together with many other of the most compromised representatives of the governing party.

The development was further accelerated by the increasing demands of the Civic Forum and Public Against Violence to create a “Government of National Understanding” with an important representation of the opposition. However, it was already led by a member of a younger generation of the communist nomenclature, one of the important players in the peaceful transition towards democracy, Marián Čalfa. Following the creation of the new government, Gustáv Husák, the former General Secretary of the Communist Party of Czechoslovakia and President, stepped down.

Another important milestone in the way towards political plurality was the removal of articles regarding the leading role of the Communist Party of Czechoslovakia and the National Front in Czechoslovakia and also the removal of the article concerning Marxism-Leninism. Many other partial changes to the federal constitution and other acts followed, regarding the direct functioning of the pluralist democracy which was being born. From this point of view, co-options of new Deputies of all the legislative assemblies were especially important, as, besides the fundamental change of their political composition, they led towards the real renewal of Parliamentarism.

The transition towards democracy in Czechoslovakia is usually described in foreign literature as a “shift” characterised by the cooperation of the old communist elite and the opposition (Huntington), “transition by reform” when mobilisation of the masses forces the governing regime to compromise (Karl-Schmitter), or “collapse” mainly characterised by an important change of all structures that moves the representatives of the previous regime to the edge of events (Linz-Stepan). Mr. Novák, a Czech political scientist, calls it a transition “forced” by the mobilisation of the masses, opposition powers and international circumstances. The fact is that one of its important characteristics is its high speed that resulted in the blending of the liberalisation phase with the democratisation phase, and also in forming the strategy of individual players only during the transition. With regard to this point, it is very often mentioned that neither the opposition, nor the Communist Party of Czechoslovakia leadership were prepared for the revolutionary situation, even though they could have expected it. Thus, in different phases of the transition, anti-authoritarians represented by the anti-party and anti-hierarchy movements of the Civic Forum and Public Against Violence, and especially their moderate parts, inclined to negotiate with the pragmatic part (however, not with the reformist one, because, as was already said, it de facto did not exist) of elites of the departing regime.

The cooperation of the main players, including the leadership of the Civic Forum and Public Against Violence and a part of the communist government representatives (initially with Adamec, and later with Čalfa in the lead), and also the representatives of the revived parties of the National Front, was reflected, for example, by the already mentioned repeated reconstruction of the legislative assemblies which enabled not only constitutional changes to be carried out, but also Václav Havel, the opposition leader, former spokesperson of Charter 77 and repeatedly imprisoned playwright, to be unanimously elected as the President of the Republic. He was even elected by the Federal Assembly, at that time only partially reconstructed, already at the end of December 1989. At the beginning of 1990, a bill of the “small act on political parties” was prepared for negotiations, enabling the creation of new political parties and movements, and also a constitutional act on shortening the election period of all three parliaments which opened the way towards free elections and stipulated that the first freely elected legislative assemblies will have only a two-year term of office.¹⁴ Furthermore, the existing parties and movements agreed on the form of the electoral system to be a proportional representation system, partially

12 As an example we can mention the Prognostic Institute of the Academy of Sciences with its many economists of very different opinions on the socialist economy. Many of them gained positions in high state functions after November 1989 (Prime Ministers and Presidents Václav Klaus and Miloš Zeman, and ministers Dlouhý, Komárek, etc.)

13 Theatre actors were the first ones to support the representatives of students in November 1989 who entered into a strike and demanded an investigation of the intervention of the repressive apparatus against the student demonstration on 17 November.

14 The act stipulated the conditions of the legal creation of new political parties and movements. The present parties of the National Front were proclaimed as already existing parties and movements that were not obliged to meet these conditions and could immediately start to prepare for the first free elections. These were namely the Communist Party of Czechoslovakia, the Czechoslovak People's Party, the Czechoslovak Socialist Party, the Democratic Party, the Party of Freedom and also both movements – the Civic Forum and Public Against Violence.

modified by an inclusion of the election threshold of 5 % for getting represented in the Chamber.

Therefore, the transfer and taking of power in Czechoslovakia was to a great extent quite improvised. A lot of things remained untouched institutionally. This was also reflected by the fact that until the division of Czechoslovakia after elections in 1992, or more precisely at the end of 1992, the constitutional deed consisting mainly of the “Socialist Constitution” from 1960, complemented by later adopted amendments, although ideologically built on the complete opposite to liberal democracy, still remained in force. The second very important result of such improvisation and of the fact that a part of the communist elite continued to participate in establishing the new democratic rules is the successful survival of the practically non-reformed communist party to this day. Contrary to many countries of Central and Eastern Europe where the communist state parties were banned, their property confiscated, or they at least changed fundamentally (“socio-democratised”) and distanced themselves from their past, the Communist Party of Bohemia and Moravia is the direct successor of the former Communist Party of Czechoslovakia.

The birth of the new system of political parties took place in several important phases. The first one dates from November 1989 to the first free parliamentary elections in June 1990. In this period, institutional foundations were laid, as was described above. Until the elections, it is not possible to call it a party system in the strict sense of the term, as it is not clear which of the formations might be considered as relevant at all. However, the important thing is that the development of the political spectrum was going on separately in Bohemia and in Slovakia.

The crucial moment of this phase was a decision of the Civic Forum and its sister Slovak movement Public Against Violence to participate in the elections and to represent both various political and in fact non-political streams of the opposition against the Communist Party, or more precisely against communism. Their overwhelming victory in the elections only highlighted the predominance of the Civic Forum on the Czech side and the very good position of Public Against Violence in Slovakia. Other relevant formations that obtained representation in the Federal Parliament were the Communists that as the only party stood for the elections as a single party in both parts of the federation, the Christian-democrats standing separately and with different political programmes, and the “Moravians” demanding the autonomy of the historical territory of Moravia and Silesia within the Czech Republic, Slovak nationalists in Slovakia with their program of independence, and a movement defending the interests of the Hungarian minority. After the elections, the Civic Forum, Public Against Violence and the Slovak Christian-Democratic Movement made a coalition at the federal level. Marián Čalfa again became the head of the federal government, this time already as a nominee of Public Against Violence.

The second phase of the birth of the spectrum of parties takes place in parallel inside and outside the framework of both “catch all movements”. Parties already created before the elections function within the Civic Forum and besides these, there are new political streams being created, some of which will turn out to be essential. Moreover, conflicts inside the wide-spectrum Civic Forum and Public Against Violence are increasing as well. Besides the left-right conflicts about the speed and depth of the economic transformation which became the most important topic in the Czech part of the federation, there are more and more disputes concerning the idea of the constitutional arrangement

of Czechoslovakia. And these disputes turn out to be the principal division factor within Public Against Violence which forms two main streams – supporters of the federation and the federal government model of a quick economic reform versus a very nationally oriented part that together with larger independence demands the right for Slovakia to choose the course of the economic transformation. The Civic Forum is further divided by the question of the future of the movement itself with supporters of the transformation towards a standard, but still relatively widely anchored party on the one hand, and on the other hand with those who are persuaded that the Civic Forum should continue to represent the widest spectrum and provide space for strong individuals to succeed. Moreover, some already well-shaped political parties leave the Civic Forum and set off on their individual paths. Other streams are formed in parallel with the already existing parties outside the Civic Forum which is best proved by the existence of several “groupings” of a social-democratic type.

In the end, the Civic Forum breaks up in winter 1991 into two successor entities which commit themselves to finish the term of office in cooperation. That is the Civic Democratic Party which became the most centre-right, liberal-conservative force for more than the next 20 years, and the Civic Movement which represents the supporters of the further existence of the movement, however, experiencing a bitter defeat in parliamentary elections in 1992.

Public Against Violence also divides into two different formations – the national-authoritarian Movement for a Democratic Slovakia which later on brings the already independent Slovakia into international isolation, and the Civic Democratic Union which loses the 1992 elections and consequently disappears, merging with other centre-right parties.

Outside the framework of both catch all movements, various political parties and movements dynamically revive, appear, regroup, merge, dissolve and disappear. Within the majority of the federation, they can be divided, for example, according to their origin to historical ones, out of which only the Social Democratic Party succeeded; to parties created within the dissent, including primarily the Civic Democratic Alliance, the second liberal-conservative party created originally within the Civic Forum; and to completely new parties which include, for example, the Green Party, the cooperative-peasant Agrarian Party, the above mentioned “Moravians” or extreme-right republicans. The development of Christian-democratic politics stands as a specific chapter. In the 1990 elections, it was represented by the coalition of the People’s Party (which used to be a part of the National Front), the anti-communist Christian Democratic Party with roots in dissent and several smaller interest groupings. Later on, the Christian Democratic Party became closer to and finally merged with the Civic Democratic Party, and the People’s Party appropriated the brand of “Christian and democratic” and became an integral part of the political scene with a high potential of making a coalition. Even more interesting is the revival and development of the Czech Social Democratic Party. The Czech Social Democratic Party is actually the only historical party of this type in Central and Eastern Europe which succeeded without the need of having to change its policy in any significant way. It was revived thanks to the activity of the exile social democrats as well as to various domestic sources. First of all, many people with family ties to historical social democracy joined the party, and later on, members of the “Obroda” (Revival), a group of reformist Communists created in 1968, entered the party, and finally,

many deputies elected under the Civic Forum and later under other political parties joined the party as well.

The real and symbolic end of this development phase was the second free elections in 1992. They brought very different results in both parts of the federation which significantly contributed to the dissolution of the common state, but also completed the phase of the dominance of the forum-type movements. Elections in the Czech Republic were clearly won by the Civic Democratic Party in coalition with the small Christian Democratic Party, winning 30 % of votes and an even higher number of seats. The Communist Party of Bohemia and Moravia came second again, but it associated with other left-wing parties and formed the Left Bloc. This period can be described as the only period when the Communists under their former leadership tried to distance themselves from the past. The election threshold of 5 % in these elections was also achieved by the Czech Social Democratic Party, the Liberal Social Union,¹⁵ the Christian and Democratic Union – the Czechoslovak People's Party, The Republicans, the Civic Democratic Alliance and the Moravians, getting from 5.9 to 6.5 % of votes. Nevertheless, the latter two parties were not represented in the Federal Parliament, but only in the Parliament of the Czech Republic which, however, proved to be the most important one after the dissolution of Czechoslovakia. The new government coalition at the national level was formed by the Civic Democratic Party, the Christian Democratic Party, the Christian and Democratic Union – the Czechoslovak People's Party and the Civic Democratic Alliance. Václav Klaus, the head of the Civic Democratic Party and one of the symbols of a quick and deep economic reform, became the Prime Minister. At the federal level, a transient government was created and its only task was to prepare the dissolution of Czechoslovakia.

LESSONS LEARNT

Analyses of the Czech political system from the beginning of the new millennium agreed that the Czech political system was, apart from minor exceptions, a consolidated democracy. They stated that the constitutional system and positions of specific players, e.g. the media, the armed forces or the intelligence services, were transformed successfully, the consolidation of the main political players was on the right track with the success of political parties that were relatively standard or shaped by their programs or interests, and the consolidation of interest groups was also quite successful, even though both types continued to have problems with a lack of interest in membership. Certain problems were experienced in the party system, too. The opposition of the Communist Party remained strong and other parties refused to make coalitions with it, thus making it impossible for the parties to fully alternate in power or to create coherent and operational governments.

Unfortunately, the indicated difficulties have not disappeared ever since, quite the contrary. Many new issues showed up and the old ones even deepened. The instability of governments, the real and alleged corruption excessively presented to the public and internal relations caused that standard political parties lost a lot of their popularity. Their ideological emptying and preferring the technology of power proved to be one of the legacies of the past. The institutional set-up of conditions for the functioning of parties and their cooperation, starting with the constitutional definition of the Prime Minister position and

too strong positions of individual legislators, and ending with the inconvenient form of the representative system for elections to the Chamber of Deputies, were found as problematic. Again, however, it is the relic of negotiations with the departing political power at the turn of 1989–1990. Moreover, recently there has been an unusual problem of interconnecting the power of the media, economy and politics which is also linked with the process of economic and political transformation. Many of the “oligarchs” embodying the concentration of power of today are the results of the processes from the period after the coup d'état when especially the younger generations of the nomenclature cadres and children of representatives of the communist regime participated successfully in the privatisation of the huge state property. To be able to do this, they benefited from their old contacts and social capital. Thus, more than 25 years after November 1989, people connected with the regime more than anyone else ever before are now pushing themselves to power.

To this must be added the influence of the developments in European countries on the national politics, as these countries are more and more confronted with not having been solving many problems which resulted in the feeling of estrangement, populism and political and religious radicalism and search for alternatives to the liberal democracy. The existing political parties are not able to face this and they succumb to fashion waves. This is most typically proved by changing the way of electing the President by a parliamentary vote into a direct vote which led to many principal shifts on the political scene towards a fundamental division of the society into uncompromising camps and to an increase in authoritarian moods in certain segments of the society.

RECOMMENDATIONS

Extensive compromise with the representatives of the past regime in issues regarding the institutional set-up of the political system is not a good deal. In most cases, it is not possible to totally eliminate the representatives of the departing regime, however, it is necessary to remove them from the real decision process regarding the constitution, electoral system, conditions of political parties functioning, their funding, but also from the course of the principal transformation processes.

There is a need to strictly insist either on banning the former state party, or at least on its effective transformation, including its public distancing from the past and the nationalisation not only of its property, but of the property of its branches as well (youth, women and other organisations).

It is absolutely necessary to carry out an exhaustive check-up of the former representatives of the regime, and possibly to confiscate their property, not only at the level of party representatives, but also of members of the nomenclature and leadership of the repressive forces.

When creating the constitutional system, it must be assumed that the executive power has to be strictly controlled, and on the other hand, it must be able to make operational solutions. This must be reflected in the powers of the Prime Minister, as well

¹⁵ That is quite a bizarre union of socialists who used to be in the National Front, Green Party and the already mentioned Agrarian party that represented the interests of the management of the disintegrating farmer cooperatives.

as in the electoral system which should support the competition of parties anchored by their programs and the formation of stable and operational governments.

Each important change of the constitution must be considered with a cool head, especially the issues concerning the system of checks and balances of individual parts of power, and should not succumb to the pressure of the “streets”.

The positions of the legislative assembly and its members must be defined, corresponding to the fact that it is supposed to

be a control body in the first place, not a body where legislation is created and modified to a great extent and where government deputies often plot against their own government for their direct benefits.

Even in the case of very serious economic problems which often accompany the democratic transition, it is not possible to underestimate and to ignore its other features, starting with the legal environment and ending with the purification and transformation of the education system.

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DISMANTLING THE STATE SECURITY APPARATUS

PAVEL ŽÁČEK

POSITION AND STRUCTURE OF THE STATE SECURITY APPARATUS PRIOR TO THE TRANSFORMATION

The last major reorganization of the communist security apparatus pertaining to the Federal Ministry of the Interior of the Czechoslovak Socialist Republic (ČSSR) took place in August 1988. The State Security, the secret police was part of the National Security Corps (*Sbor národní bezpečnosti*, hence the abbreviation SNB), and formed a conspiratorial part of the Federal Ministry of the Interior but it was also present in the regional and district administrations (and borough administrations in cities) of the National Security Corps. The central security services staff number peaked in that year: altogether, there were 16,783 personnel assigned to the ministry, 5,345 of which belonged to the State Security units, 5,358 to the Border Guards and the rest to the Public Police (*Veřejná bezpečnost*, hence the abbreviation VB) and to other units governed by the Federal Ministry of the Interior.¹ In total and including educational facilities, military conscripts and civil employees, there were 18,107 personnel in November 1989.²

The State Security structure within its headquarters was as follows:

- Main Intelligence Directorate (1th SNB Administration),
- Main Counter-intelligence Directorate (2nd SNB Administration),
- Main Military Counter-intelligence Directorate (3rd SNB Administration),
- Surveillance Directorate (4th SNB Administration),
- Directorate for the Protection of Party and Constitutional Officials (5th SNB Administration),
- Directorate for Intelligence Technology (6th SNB Administration),
- Counter-intelligence Directorate in Bratislava (12th SNB Administration),
- Special Directorate (13th SNB Administration), for radio intelligence and radio counter-intelligence,
- State Security Investigations Directorate and the
- SNB Passport and Visa Directorate.

At the beginning of 1989, the SNB Directorate for the Development of Automation became another State Security Directorate. As far as the National Security Corps Academy is concerned, the State Security Faculty functioned as its first faculty.

At the end of April 1989, Lieutenant General František Kincl, the Minister of the Interior of the Czechoslovak Socialist Republic was managing the 1th and 5th SNB Administration of the State Security units, and furthermore – he was in charge of the statistical records department he operated via the Internal and Organizational Directorate of the Federal Ministry of the Interior (State Security Operational Archive); Lt. Gen. Alois Lorenc, the first Deputy Minister was governing the 2nd, 3rd, 4th, 12th SNB Administration; and the SNB Passport and Visa Directorate; Deputy Minister of the Interior Colonel Stanislav Nezval was in

charge of the 6th, 13th SNB Administration, the SNB Directorate for the Development of Automation and the National Security Corps Academy; and Deputy Minister Colonel Otta Sedlák was ruling the State Security Investigation Directorate. Thus, the State Security was divided into several entities with the intelligence administration being divided between counterintelligence administration, the intelligence technology directorate and the investigation section.³

For the State Security, the most effective means to control the selected social groups or the respective objects was the network of confidants which consisted of secret collaborators of various categories (agent, resident, holder of a conspiratorial flat), collaborators (confidants),⁴ furthermore, there was a section responsible for the surveillance of people and objects⁵ and for the deployment of special technical means (eavesdropping, correspondence control etc.).⁶ The operational documentation from individual activities was stored in the form of files in the operational archives pertaining to the individual directorates' archives or it was stored at the statistical records department (section), which archived the counterintelligence agenda. This was done following the termination of a secret collaboration, or after the surveillance of a selected person had ended.

The Main Intelligence Directorate within the SNB, for example, had the following operative file categories in its operational archive (55th department): object-related files (order "1" files), archive-type files (order "2" files), cadre members' personal files (order "3" files), secret collaborators' personal files (order "4" files), conspiratorial flats and borrowed flats' files (order "7" files), operational correspondence files (order "8" files), active measures files (order "9" files).⁷ Counterintelligence units deposited the archived files at the statistical records department (at the regional directorates of the department) into the so-called fonds: Special Fond (Z), Secret Collaborators Fond (TS), Counterintelligence Work Fond (KR), Object-Related Files Fond (OB),

1 Jan Kalous, Milan Bárta, Jerguš Sivoš, Pavel Žáček, *Několik poznámek k vývoji organizační struktury Ministerstva vnitra a Ministerstva národní bezpečnosti Československé (socialistické) republiky v letech 1945–1989*, in Jan Kalous a spol., eds., *Biografický slovník představitelů ministerstva vnitra v letech 1948–1989. Ministři a jejich náměstci*, Praha: ÚSTR, 2009, 36.

2 Pavel Žáček, *V čele ŠtB. Pád režimu v záznamech důstojníka tajnej policie*, Bratislava: ÚPN, 2006, 153.

3 Pavel Žáček, ed., *Nástroj triedneho štátu. Organizácia ministerstiev vnútra a bezpečnostných zborov 1953–1990*, Bratislava: ÚPN, 2005, 197–199, 207–208.

4 Pavel Žáček: "Ostrá zbraň" Státní bezpečnosti. Spolupracovníci ŠtB ve směrnících pro agenturně operativní práci 1947–1989, in Petr Blažek, ed., *Opozice a odpor proti komunistickému režimu v Československu 1968–1989*, Praha: ÚČD FFUK, Dokořán, 2005, 212–215.

5 Miroslav Urbánek, "Správa sledování Ministerstva vnitra v letech 1948–89 (Stručný nástin organizačního vývoje)", in *Sborník Archivu Ministerstva vnitra*, 2005, (3), 209–213.

6 Radek Schovánek, "Organizační vývoj technických složek MV 1964–1989 II", in *Securitas Imperii*, 1994, (2), 69.

7 Pavel Žáček, "Registrace, vedení a archivace svazků ve směrnících čs. komunistické rozvědky", in *Památ národa*, 2006, (2), 66.

Tactical Fond (T), Old Documents Fond (S), Investigation Files Fond (V) and into the Historical Fond (H).⁸

Until the student demonstration of November 17th 1989 that launched the fall of the Communist regime in Czechoslovakia, but also shortly afterwards, the Federal Ministry of the Interior including the State Security governed by it worked as a stable pillar of power the totalitarian regime was able to rely on. Minister Kincl, who first collapsed on November 29th and who was removed on December 3rd was the first one to leave the Ministry, the First Deputy Lorenc was removed on December 22nd, Deputy Minister Sedlák on December 31st 1989 and Nezval as late as on January 18th 1990. From the middle of December, the organizational structure within the Ministry of the Interior started to disintegrate. Following that, František Pinc was appointed and became Minister of the Interior for just a few days and afterwards, as no successor had been named – the Ministry of the Interior started to be led by the triumvirate composed of the Prime Minister, the Communist Marián Čalfa, the Deputy Prime Minister and dissident Ján Čarnogurský and the Deputy Ivan Průša.⁹

Being under pressure, the Federal Parliament changed the leading role of the Communist Party of Czechoslovakia that had been hitherto vested in the Constitution, also abolishing the leading role of the bodies of this party, abolishing Marxism-Leninism as the state ideology as well. The Communist Party of Czechoslovakia's organizations and the political structures within the Ministry were abolished as a reaction to this development.¹⁰

REACTION TO THE POLITICAL CHANGES

During the last days in November of 1989, the management within the federal Ministry of the Interior started addressing the issue during its meetings of how to deal with the compromising documents in the agency-related operational files of the State Security. On December 1st 1989, the First Deputy Minister, Lieutenant General Lorenc issued a top-secret instruction for amending the current work in the archives and in relation to the file agenda; this meant that the State Security units were ordered to sort out the so-called active operational files, the counterintelligence work files and the records of technical activities.

Based on this instruction, the 2nd SNB Administration as well as other central units within the State Security started to selectively liquidate the file and document agenda. The units for the fight against the “enemy from the exterior” (1st–4th departments) and the economic news unit (5th–8th departments) for example, sorted out operational documents shredding them with the aid of the statistical records department. In contrast to this, the internal intelligence section (9th–12th departments) started sorting out the personal files of secret collaborators in political parties ending with the liquidation of almost the entire file agenda relating to the fight against the “enemy within”.

Officially, the mass liquidation of agency-related operational files ended on December 8th 1989 due to the pressure exerted by the students' movement and the People's Forum. The last large-scale and nationwide action made it impossible to reveal the entire scope of the unlawful activities committed by the last Communist police top-level members, including their agency network and the cooperation with the Soviet KGB units.¹¹

According to incomplete data, the following percentage of documents were shredded or burnt in the offices of the 2nd SNB Administration and its subordinate counterintelligence State

Security units in paperwork, in the Federal Ministry of the Interior's objects and in the accommodation facilities of the Central Group of Soviet Forces in Czechoslovakia: 99 % of personal files on hostile persons (i.e. 7,193), 75 % of personal files (195), 67 % of signal files (528), 67 % of confidant files (8,632), 55 % of files on checked persons (4,701), 44 % of agency files (5,179), 41 % of resident agent files (54), 37 % of object-related files (1,275) and 36 % of the personal files on candidates for the post of secret collaborator.¹² But the information systems and the registration protocols or archive protocols which included the records of the file agenda were preserved in a relatively complete scope.¹³

FORMS OF TRANSFORMATION OF THE SECURITY APPARATUS

After Václav Havel had been elected president, the first non-Communist Minister of the Interior, Richard Sacher was appointed and in the middle of January 1990, he definitively terminated the activities of the so-called State Security internal intelligence. Following this, he abolished the Federal Ministry of the Interior's units, including the State Security itself on January 15th 1990 as there was pressure exerted by the public. The Main Military Counterintelligence Directorate and the SNB Directorate for the Development of Automation became an exception to a certain extent. The latter was shifted and became a section within the Ministry for National Defense, or rather – it still had not been detected as having been part of the political police. The subsequent development of the Federal Ministry of the Interior under democratic conditions was still characterized by personnel changes, reorganization, competence disputes and fierce political conflicts regarding the proper shape.

On January 10th 1990, the leaders in the Federal Ministry of the Interior presented a document to the federal government leadership. This document addressed the direction the Federal Ministry of the Interior including its sections was heading in during the period when the government of national understanding was in office. Within this document, the Ministry committed itself to carrying out democratic processes, to the Czechoslovak Socialist Republic's international commitments especially as far as human rights were concerned and also in relation to the concept of a constitutional state.

The consistent termination of the repressive bodies' activities within the State Security in the field of the fight against the “enemy within” was listed as the most important task. This was meant to prevent these forces being misused against the citizens and

8 Pavel Žáček, “Administrativa písemností kontrarozvědné povahy II. Jednotný evidenční, statistický a archivní systém StB v letech 1978–1989”, in: *Sborník Archivu bezpečnostních složek*, 2013, (11), 207.

9 Kalous, Bárta, Sivoš, Žáček, *Několik poznámek k vývoji organizační struktury*, 37–38.

10 Pavel Žáček, “Třídní boj po 17. listopadu 1989 v dokumentech politického aparátu ČSLA”, in: *Historie a vojenství*, 2005, (1), 110; Pavel Žáček, “Demontáž a očista bezpečnostních struktur. Počátek roku 1990 z pohledu federálního ministerstva vnitra”, in: *Paměť a dějiny*, 2010, (1), 74.

11 Pavel Žáček: “‘Můžou přijít, jsme hotovi...’ Tzv. Lorencova ‘skartace’ v dokumentech”, in: *Paměť národa*, 2004, (0), 28–41; Pavel Žáček, “Zamětaní stop v prosinci 1989. Vytřídování svazkové agendy na centrále Státní bezpečnosti”, in: *Sborník Archivu bezpečnostních složek*, 2015, (13), 268.

12 Pavel Žáček, *Boje o minulost*, Brno: Barrister & Principal, 2000, 42.

13 For comparison, see Petr Rendecký, “EZO – Evidence zájmových osob”, in: *Sborník Archivu bezpečnostních složek*, 2012, (10), 285–287.

to please the public at the same time. Thus, the Federal Ministry of the Interior decided that mainly members from the Public Police (*Veřejná bezpečnost*) would be appointed to the offices of the chiefs of regional and district SNB Directorates.

Furthermore, checking commissions were to be established in order to give proposals to the respective chiefs whether State Security members would be fired or remain in service. Civic Commissions were to be established and to operate as a controlling and initiative body. These commissions would be composed of representatives from the public and from political forces and the commissions would serve to cooperate with the respective chiefs in solving current issues arising from the performance of the security service. Furthermore, there were proposals being made for the establishment of the Ministry of the Interior of the Czechoslovak Socialist Republic specialist commissions – both within the Federal Ministry of the Interior and in the regional administrations. These commissions would be mainly composed of former security forces members who left following the occupation in 1968 or of those who were forced to leave due to their political opinion. Apart from their controlling function, these commissions were to actively contribute to reevaluating the security forces' activities.

It was indispensable to defend the constitutional basis of the republic, its sovereignty, economic stability, to fight against terrorism, drug consumption, to protect the country's borders etc. in order to protect the new democratic principles the country was built upon and to safeguard its national interests. Taking into consideration the previous negative experience, it was necessary to legally amend the role and the powers given to the security forces, which especially referred to defining the scope of entities entitled to make use of intelligence-technical means (eavesdropping etc.), to exhaustively define the reasons for the application of these methods, to condition the use thereof by an approval granted by the territorially responsible prosecutor, or the territorially responsible court, and to declaring any other use of the information that would be collected via intelligence methods as unlawful. A parliamentary committee was to be entrusted with controlling the intelligence activities.

Purifying the National Security Corps of people who had discredited themselves through misusing their power was declared to be the immediate task. Furthermore, the requirements for the selection and the hiring of new National Security Corps members were to become more rigid, paying particular attention to their moral qualities, integrity and expertise. Furthermore, being part of the Federal Ministry of the Interior or of the security forces precluded any type of political activity. In order to provide for the government of national understanding's policy line being put through, there were – among others – proposals being made to establish a new operational concept for the intelligence and also for other security forces serving the protection of the constitutional basis and the republic's democratic regime.¹⁴

Two days later, Minister Sacher terminated the activities of the internal intelligence section of the State Security, which meant halting the activities of the respective departments and sections within the Main Counterintelligence Directorate (2nd SNB Administration), within the Counterintelligence Directorate in Bratislava (12th SNB Administration), within the regional State Security administration and the subordinate district or borough organizational units. Furthermore, the posts for political police personnel within this section were abolished, the agency-related operational activities of the abolished units were stopped,

the documents and aids of the abolished units were to be immediately stored, locked and sealed and the service weapons were to be locked in arsenals.

The next day hosted a meeting of the chiefs of the central units of the National Security Corps' regional and district administrations *which served for negotiating the activities performed by the Federal Ministry of the Interior and the National Security Corps during the period when the government of national understanding was in office*. Minister Sacher informed the leading representatives of the security forces about the most important principles, highlighting especially *that any political activity within the Federal Ministry of the Interior including all of its units represented a reason for exclusion; the security policy within our Ministry is going to be a security policy that's not going to be governed by a party – by any party – but this security policy shall be the security policy driven by the government*.¹⁵

Also Josef Kuracina, a former State Security member and one of Minister Sacher's advisors, stated that undoubtedly, the State Security's activity discredited itself to such an extent *that even pronouncing this title literally repels the public*, while adding at the same time that not a single state can work without the basic functions the Communist political police had been performing, if such a state consistently protects its own national sovereignty.¹⁶

Yet neither the public nor the Civic Forum representatives would regard it as sufficient that parts of the State Security ceased to exist. Minister Sacher kept on vainly convincing the public that any units that were focusing – to use the former regime's wording – on “the fight against the enemy within”, which means those that were focusing “on counterintelligence activities or the protection of churches, on anti-socialist groups, on ideodiverse centers and on emigrant groupings, on controlling the youth, science, education, the mass-media, healthcare and sports had been abolished.” *Until this date, all members of the State Security were dismissed from managing posts in the headquarters, in the regional and in the district administrations. Their further development following the checks will be taken care of by newly appointed workers from the Police staff (Veřejná bezpečnost)*.¹⁷

In January 1990, Zdeněk Jodas, a former member of the intelligence services recommended that the Federal Ministry of the Interior leadership carry out further decisive steps as the pressure from the public was growing. *There will be individuals coming from the [security] apparatus who are going to organize active measures for nurturing the atmosphere of uncertainty and as fear among the people will grow, the public will become more prone to believe that rumors regarding the threat which the apparatus represents are true and the public will even be prone to augment the rumor that the apparatus actually is dangerous, which in turn won't improve political stability*. Undoubtedly, the structures within the Ministry of the Interior were still linked to the Communist Party apparatus. It was presupposed that Post-Communist political powers would use disinformation applying their knowledge about the State Security for scandalizing new personalities in the political spectrum.

Although he was convinced that the former political police staff leaving on a mass scale would not happen, he proposed not

14 Žáček, “Demontáž a očista bezpečnostních struktur”, 61–63.

15 Pavel Žáček, “‘Sachergate’ První lustrační aféra. Nesnáze postkomunistické elity (nejen) se svazky Státní bezpečnosti”, in *Paměť a dějiny*, 2007, (1), 51.

16 Žáček, “Demontáž a očista bezpečnostních struktur”, 66.

17 Žáček, “Sachergate”, 52.

to behave naively and to demonstrate the necessary determination and hardness as far as the key units of the State Security were concerned. *It is necessary for the public to feel that the government is keeping the situation entirely under control and that there are no reasons for fear as the State Security apparatus has been neutralized entirely.* According to him the main threat was that a significant volume of information was concentrated in the State Security files, and also in the hands of individual members, and he also regarded as a threat that the connections to the ideological agency network and the links to the old Communist Party of Czechoslovakia were being upheld.

Apart from removing all chiefs within the State Security and apart from dissolving the internal intelligence working against the opposition, he proposed to entirely disarm all intelligence forces, to prohibit activities led against embassies of Western democratic countries, and to prohibit any surveillance activities or eavesdropping without the prior consent granted by the new leadership in the Federal Ministry of the Interior. Surveillance measures were to be made use of also against removed State Security functionaries in order to become aware of activities that could lead to anti-government actions; additionally, an overview of the conspiratorial flats was to be kept and the locks to these flats were to be exchanged in order to prevent the agents meeting the informers.

Colonel Jodas stressed that removing the chiefs created the conditions for dismantling the State Security apparatus: *losing their commander always leads to the fact that any inhibitions the workers perceive fall away and the workers start accusing each other, (...) the compact structures disintegrating into competing groups* creates conditions for detecting workers that will be useful and usable within the new apparatus. Furthermore, it will become possible to gather the latest information on the State Security, in spite of the materials on this issue having been destroyed in December 1989. As far as this phase was concerned, he counted on a certain percentage of the State Security members being taken over by the criminal police – he regarded this as a way *leading to weakening possible hatred directed against the new political system and to preventing these people committing hostile activities.*

The preparation for establishing a new secret service model for the protection of the constitution was to be carried out as a parallel process. The basic outline was to become evident by the end of March, yet it was clear that the actual construction of this new secret service would begin only after the elections in June 1990.¹⁸

Within the next memorandum, Colonel Jodas addressed the Main Intelligence Directorate (I. SNB Administration), which was much more linked to the foreign policy and foreign trade policy promoted by the state leadership. *The consequences of each piece of information leaking through intentionally or unintentionally, each piece of information about an operational agency, each piece of disinformation sent through the information channels, each cadre member's emigration (...), actually anything one could interpret as the continuation of work led against the countries with whom we intend to cooperate both on the political and economic level, can have serious consequences.* According to him it was no problem triggering an anti-Czechoslovak campaign at the most inconvenient moment. He proposed a fundamental solution: the prohibition of operational work abroad, under the threat of criminal sanctions. *Thus, the responsibility is to be shifted to the old governmental and security structures. These facts are to*

be taken seriously even after the date when the new intelligence service starts working. According to him, anything old was potentially dangerous.

Until the date of the elections, the intelligence service was to be neutralized, i.e. disarmed, its operational activities both at home and abroad were to be stopped, and the members were to be gradually and selectively dismissed. Only a very small core consisting of the most qualified personnel was to be preserved. He proposed to complete the dismantling process by the end of 1990.

During this period, the model of a new service would be created that wasn't to be constructed on the debris of the old one but parallel to it. *Evaluate the people, methods, objects, the agency, the information system during the dismantling process and do so from the point of view of evaluating the options whether it is possible to preserve them within the new apparatus.* Preserve a maximum "amount of information", but preserve the agency network only to a small extent, select several people from the apparatus by the election date and start the cautious recruitment of new personnel.¹⁹

On January 30th 1990, the Specialist Committee set up by the Minister of the Interior of Czechoslovakia was established, having vast initiative powers and controlling powers, including the option of establishing analogous institutions at the medium level within the security apparatus administration. Among others, this committee's task was to be the evaluation and the presentation of proposals *for the establishment of a new system for state security and state protection*, the control as to *whether the orders and instructions that will have been handed out were consistently fulfilled and implemented.* This service was chaired by the former First Deputy Minister of the Interior from 1968, Colonel Stanislav Padrůněk.

LEGAL AND POLITICAL FRAMEWORK OF THE CHANGES OF THE SECURITY APPARATUS

On the last day in January 1990, the Minister of the Interior, Šachar, finally abolished virtually all State Security units: the Main Intelligence Directorate, the Main Counter-intelligence Directorate, the Surveillance Directorate, the Directorate for the Protection of Party and Constitutional Officials, the Directorate for Intelligence Technology, the Counter-intelligence Directorate in Bratislava, the Special Directorate, the State Security Investigations Department (which had been the State Security Investigations Directorate until December 29th 1989), the Passport and Visa Directorate. At the same time, new units were established instead of the above-mentioned ones:

- 1/ Intelligence Service of the Federal Ministry of the Interior,
- 2/ Office of the Federal Ministry of the Interior for the Protection of the Constitution and for the Protection of Democracy,
- 3/ Office of the Federal Ministry of the Interior for the Protection of Institutional Officials,
- 4/ Office of the Federal Ministry of the Interior for the Investigation of Unconstitutional Activities,
- 5/ Office of the Federal Ministry of the Interior for Passport and Aliens Service.

The Intelligence Service replaced the 1th SNB Administration, thus becoming the new intelligence service, uncovering and

18 Žáček, "Demontáž a očista bezpečnostních struktur", 66–67.

19 Ibid, 67–69.

disabling *hostile activity led from other countries*. As part of its counterintelligence activities, the Office for the Protection of the Constitution and of Democracy was to *fight against other intelligence services on the national territory*, also with international terrorists, it was to reveal *attempts aiming at violently enforcing a change or the disturbing of the constitutional order*, it was also to reveal unlawful limitations posed to the work carried out by constitutional bodies, to reveal unconstitutional activities led against the country's unity, against nationalities, races or the religious belief of citizens of the Czechoslovak Socialist Republic. Thus, this newly established body virtually carried on the activities that had hitherto been performed by the 2nd and 12th SNB Administration. Furthermore, its tasks were the surveillance of people, intelligence activities, radio-intelligence and radio-counterintelligence. In other words, it took over the powers formerly vested in the 4th, 6th and 13th SNB Administration. The 5th SNB Administration, the State Security Investigation Directorate and the Passport and Visa Directorate of the National Security Corps were transformed into the Office for the Protection of Institutional Officials, into the Office for the Investigation of Unconstitutional Activities and into the Office of the Federal Ministry of the Interior for Passport and Aliens Service respectively.²⁰

The Main Military Counterintelligence Directorate (3rd SNB Administration) avoided being abolished, as it had been decided at the beginning of the month by the federal government leadership that this section would be incorporated into the Federal Ministry of National Defense, and also the SNB Directorate for the Development of Automation wasn't abolished – apparently, people didn't know that this directorate had become part of the State Security during the final year of the Communist dictatorship's existence.

The order not merely defined new names for the components of the intelligence and security forces that were being established and subordinate to the Federal Ministry of the Interior, but also named those units that remained untouched by the changes. The next order issued on February 15th 1990 led to the abolition of the territorial units of the Communist political police which were replaced on the next day by the Offices of the Federal Ministry of the Interior for the Protection of the Constitution and for the Protection of Democracy based in Prague, České Budějovice, Plzeň, Ústí nad Labem, Hradec Králové, Brno, Ostrava, Bratislava, Banská Bystrica and Košice. The operational archives of the statistical records departments that pertained to the abolished State Security Directorates were now organized by the newly established regional offices (in contrast to the statistical record department incorporated into the structure of the internal and organizational administration of the Federal Ministry of the Interior).

CONTRIBUTION OF CITIZENS TO THE TRANSFORMATION

The checking committees and Civic Committees became a source of information for the supreme bodies within the Civic Forum and subsequently for the national defense and security committees. On March 13th 1990, an expert commission completed the crucial document addressed to the Minister of the Interior where it criticized the slow pace of the changes carried out within the Federal Ministry of the Interior.

According to the authors, the typical situation was that the old functionaries and cadres remained virtually untouched in their

posts, and their apparatus as well. *Former State Security members are remaining in service incl[uding] the responsible chiefs. [...] Available information reveals that these people keep on meeting each other upholding contacts with former functionaries from the Communist Party of Czechoslovakia. Doing this, they rely on leading functionaries within the Federal Ministry of the Interior who still remain in the ministry and frequently, they even uphold contacts with these functionaries further on. The purification of the apparatus from people compromised by unlawful activities is not happening.* The commission members accused the units in charge – i.e. the minister's inspection, the human resources and education administration as well as other units of not showing independent initiative. *They are relying on the checks solving the whole purification issue. Given this state of affairs, establishing a counterintelligence apparatus [...] remains somewhat far off. Yet the security situation within the country urgently requires the counterintelligence apparatus to start working as soon as possible. Nevertheless, hitherto we have only a restricted knowledge of what is going on in our country.* According to the expert committee, the Federal Ministry of the Interior thus remained a significant exception as far as the movement within the society of our country is concerned. *The Ministry does not help in moving forward, but even frequently hinders the development.*

Furthermore, the committee members informed the minister that the Ministry of the Interior has documents within its operational archives that prove the totalitarian regime's activity. *Hitherto, there has been no work done with these documents and consequently, they haven't been made use of within the political struggle. These materials mainly report about unjust enrichment, corruption, provocation by the former State Security, about activities led against civic initiatives including attempts to crush the democratization process.*

During a work meeting of the Civic and Checking Committees that took place on March 17th 1990 the situation radicalized. A resolution was adopted demanding the rapid adoption of an act that would enable the immediate dismissal of former State Security members, *and to dismiss all of them by an order issued by the Federal Minister of the Interior, as the unlawfulness of the State Security's activities in general had been proven and because it is not necessary that the State Security members be employees of the Federal Ministry of the Interior in order to check their activities.* Another part of the critique was directed against the nomenclature cadres of the Communist Party of Czechoslovakia that was in charge of the Inspection of the Ministry of the Interior and of the Cadre and Education Administration. *These people, and also other persons are complicating the checking committees' work and are slowing down the State Security purification process. (...) That's why we require that all former State Security members be immediately dismissed from their posts at the Federal Ministry of the Interior and that criminal prosecution against them be commenced immediately, if there are proofs of their guilt. There cannot be any orderly state in any lower-level National Security Corps unit until order has been created at the Federal Ministry of the Interior.*²¹

At the end of March, the Deputy Minister of the Interior Ivan Průša stated that the security apparatus *is an apparatus consisting of old structures created by force*. Nevertheless, he differentiated between people in this apparatus as there were both people waiting to see how the situation develops, and servile people who put

20 Žáček, ed., *Nástroj triedneho štátu*, 213–215.

21 Žáček, "Sachergate", 57–59.

away their party ID-card and are working 16 hours a day chasing their subordinates. *Of course, even the apparatus changes and differentiates. (...) These people are dangerous because they are afraid of informing the new leadership about negative impacts resulting from the leadership decisions which in turn multiplies the mistakes.* Unfortunately, the new Ministry was overloaded with new issues to such an extent that it didn't focus on personal issues sufficiently.

He regarded the fact that the country's counterintelligence protection had been entirely paralyzed as an issue of the utmost importance. The leadership at the Ministry of the Interior neither had information of sufficient quality about internal relations, about what was emerging, where it was emerging and whether such a development could pose a threat to the state, nor did the leadership have information of sufficient quality about where the former State Security power structures were meeting former People's Militia functionaries, nor about who had contacts to the Soviet occupation forces.²²

Political affairs prior to the first free elections made it virtually impossible to find any practical solution.²³ Also the civic and checking committees' activity was complicated by several problematic issues, especially by the fact that former State Security members infiltrated into these committees, which limited their work and later on led to the results of these committees' work being subject to doubts. Furthermore, the committees' activity was limited by some documents not being accessible, especially as far as agency-related operational files were concerned and sometimes, even the different approach of individual chiefs complicated the situation.²⁴ The aim of these checks was to classify the State Security members into three groups: *a group that may go on working in the secret service sector; another group that would be assigned to police work and the last group which would have to leave entirely. Due to the fact that the civic and checking committees were working "each on their own", on an entirely decentralized principle, without management and without methodological instruction, the results were extremely diverse and highly unreliable as far as details were concerned.* In spite of this, it appears to have been the only viable step which was also necessary.²⁵

Altogether, 7,694 State Security members were checked, 3,973 of which were nominated to work in the new security service that was being created. In spite of all the insufficiencies in the Civic Commissions' work, the intelligence service purification was far more profound than in the neighboring countries of Poland or Hungary.²⁶

In the middle of 1990, most of the members in the authority were former State Security members that had been checked. To be more precise, there were 2,308 former State Security members that had been checked and who then worked in the Office of the Federal Ministry of the Interior for the Protection of the Constitution and for the Protection of Democracy, 40 new personnel who hitherto hadn't been working in intelligence services, and 38 reactivated State Security officers who had been dismissed in 1968. Newly hired people especially occupied managing posts in the service's headquarters and there were also some individuals in the regional offices' management.²⁷

The new authority was to be organized according to the territorial principle with the USA, Western European countries (especially Germany) and the neighboring countries in the Central European region remaining its main tasks. A new section – the Soviet Union was then newly added to this structure that basically corresponded to the former State Security structure.

According to this concept, the Counterintelligence was to have 6,000 employees.

Yet the dissidents opposed this, especially after Jan Ruml became Deputy Minister of the Interior and Leader of the Office for the Protection of the Constitution and for the Protection of Democracy in April 1990. *I was facing a difficult task: purifying the ministry of its old structures, establishing a new police force and laying down the foundations for new intelligence services. Basically, this meant creating a usual centralized authority for public power based on the democratic principles of a constitutional state; this meant – among other thing – placing these services under both parliamentary and public control.*²⁸ In contrast to the State Security, the new service was not to have executive powers, but was to become an unpolitical institution controlled by the parliament and the role as well as the powers of this institution were to be laid down by an act. The whole security section was to be composed of new people entirely. During the transition period, it was possible to make use of former State Security members that had been checked upon and who had been working in external intelligence, or former Border Guard members that had been checked upon, former criminal police members that had been checked upon and also some reactivated or new personnel.²⁹

According to the Civic Committee at the Federal Ministry of the Interior, 2,745 former National Security Corps members left the Ministry (including people who left upon their own request, or who retired). 1,834 personnel were dismissed upon the Civic Committee's decision that they were unsuitable for remaining in service. Another 155 members were to go or to leave within a few weeks.³⁰

The Intelligence Service of the Federal Ministry of the Interior became the successor organization of the Communist intelligence service. This new intelligence service was to temporarily remain part of the Ministry of the Interior which was also perceived as a guarantee for its purification and sufficient control. Lieutenant Colonel Přemysl Holan who had been a member of the I. Administration and dismissed following the Soviet occupation of 1968, was appointed to become the first head of this institution – he brought along a group of former State Security members from the sixties who had been reactivated. Within the following two years, the new leadership of the Intelligence Service of the Federal Ministry of the Interior had the task of entirely reforming the organization and establishing it with completely new people. Yet the first task was mapping the communist predecessor institution's activity led against Western democratic countries that gradually became allies.

Just as had happened in the Office for the Protection of the Constitution and for the Protection of Democracy, the purification in the intelligence service that was being established was

22 Žáček, "Demontáž a očista bezpečnostních struktur", 72–73.

23 Žáček, "Sachergate", 78–80.

24 Karel Zetocha, *Zpravodajské služby v nové demokracii*. Česká republika, Brno: Barrister & Principal, 2009, 50.

25 Petr Zeman, Transformace zpravodajských služeb, in *Zkušenosti české transformace*, Praha: X crossing, Praha, b.d., 70.

26 Zetocha, *Zpravodajské služby v nové demokracii*, 51–52.

27 Ibid, 59.

28 Jan Ruml, Moje působení na ministerstvu vnitra, in *Zkušenosti české transformace*, 66.

29 Zetocha, *Zpravodajské služby v nové demokracii*, 54, 56.

30 Ibid, 48.

also carried out with the aid of Civic Committees who checked individual cases and decided whether further assignment was possible. Many older members retired making use of all the benefits provided for their retirement and they had done so before any investigation started.³¹

When Jan Ruml became Deputy Minister of the Interior, Colonel Bohumil Kubík became the leader of the Intelligence Service of the Federal Ministry of the Interior, who had been replaced again for a short period by Holan after the elections. Finally, in September 1990, the long-term political prisoner Radovan Procházka was appointed to office.

Dismantling the agency network within the 1th SNB Administration started right after February 1990 when Holan, the manager in charge, immediately ordered the so-called foreign residencias (structures residing abroad) to stop all of their activities and to take an inventory of their financial assets. The cooperation with 300 agents abroad was gradually loosened, as their commanding officers were not in direct contact with them on a daily basis. Terminating the cooperation with the so-called illegals, i.e. agents or members living abroad permanently and using a false identity took almost two years.³²

In November 1990, the Office of the Federal Ministry of the Interior for Foreign Relations and Information was founded replacing the Intelligence Service of the Federal Ministry of the Interior. The staff number was reduced from the initial 1,300 to approximately one half. Thus, almost eighty percent of the members left the intelligence service during the first transformation year. Within the following years, this fundamental change was completed which not only led to the establishment of a new organizational structure, to defining its new direction, but also personnel continuity was disrupted. Thus, the break with the State Security was almost completed which was a unique approach among the post-communist countries.³³

RECOMMENDATIONS

After a security apparatus is paralyzed in the course of political changes, it is necessary to prevent (if possible) a mass-scale destruction of the secret police's operational documents, to disarm its members and to depoliticize the secret police structures. Within the next phase, after the chiefs of the central units are changed, it is necessary to individually assess the members one by one. This process actually decides upon who remains in service and who will be dismissed.

If serious crime is revealed, it's appropriate to start criminal proceedings against these individual security apparatus members.

At the same time, a system for carrying out the control of the security apparatus is to be created, bills have to be formulated and adopted to become acts on the security forces' activity (police, intelligence services) and on the specific application of intelligence means (i.e. the limitations of the right for the protection of personal rights).

In the case of Czechoslovakia, transforming the State Security into a standard counterintelligence service proved to be entirely successful, also bearing in mind the extraordinarily beneficial

foreign policy and domestic policy situation. *Within the chaos and the disintegration of leadership structures prevailing at that time, the Soviet secret services only managed to provide intelligence coverage for the retreat of the Central Group of Soviet Forces in Czechoslovakia as they didn't have enough time, means and will or opportunities to do anything beyond that. It was possible to scatter the State Security and to start establishing a service consisting of new people.*³⁴ As far as the Czechoslovak (Czech) conditions are concerned, the military secret service represented a certain exception because – at first – *it hadn't overcome its crisis of identity and didn't finish its transformation.*³⁵

After the assumption of power, the former regime's secret police needs to be abolished as soon as possible. *Yet it isn't effective to throw its members into a hopeless social situation. (...) It is necessary to differentiate between individual units of the old secret service – as some of them have been doing what the new service is going to perform as well.* Following the collapse of totalitarian regimes, the best option appears to be to establish the new service from scratch. *Yet right at the initial stage, it is hardly possible to manage this without the aid of former members from the collapsed regime. It is necessary to offer these members e.g. a 5-year grace period and (at the latest) after such a period they shall be replaced and paid off generously; of course, this promise has to be guaranteed and one has to fulfill the promise.* After the initial phase of destroying the old services and the rapid establishment of new ones – and it's necessary to mention that the whole process shouldn't consume more than one year or two – the new constitutional officials have to define the tasks and limits for these services' activities.³⁶

One of the post-revolution heads of the Czech secret service sums up: Secret services have their own mission and aim, which is why apart from a short period directly after the assumption of power when it's necessary to provide for the archives' and the assets' safety, they shouldn't fulfill the task of institutions wiping out communism. *If there's political will and the proper atmosphere in society to start the documentation and, possibly, criminal reappraisal of the former regime, then this task has to be taken care of by newly established institutions. Clashes between opposing, yet at the same time legitimate interests on both sides are going to occur among these institutions. It is not an easy task to balance these interests...*³⁷

Last but not least, an indispensable task consists of informing the public about the intelligence services' tasks and powers within the democratic system (for example – by highlighting the difference towards the executive and repressive function these services had been given by the previous regime), including an effective control mechanism, and trying to improve the intelligence services' image following their having been misused by the totalitarian regime.

31 Ibid, 128–129.

32 Ibid, 129–130.

33 Ibid, 131.

34 Jan Frolík, Transformace ministerstva vnitra a bezpečnostních složek, in *Zkušenosti české transformace*, 64.

35 Zeman, *Transformace zpravodajských služeb*, 69.

36 Ibid, 75.

37 Ibid, 73.

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REGIME ARCHIVES

PAVEL ŽÁČEK

CONTENT OF THE SECRET SERVICE ARCHIVES

During the long period of their existence, the Communist security services issued detailed documents about their activity, specifically about fulfilling the totalitarian regime repressive practice. These special character documents were set up based upon internal, relatively strictly defined, bureaucratic and conspiratorial parameters – the aim of these documents was to provide for the fundamental power conditions for the totalitarian regime's existence, which especially referred to continuous repression, prevention (intimidation) and to the need to gather necessary information. *Taking into consideration these archive documents' volume and relative completeness – they have an irreplaceable information value about the rule of the communist regime at that time.*¹

The administrative documents issued due to the activities performed by individual Czechoslovak security services (National Security Corps, Corrections Corps, Border Guard and Guard of the Interior, General Staff of the Czechoslovak People's Army Intelligence Directorate) was continuously being archived in the respective special importance archive at the Ministry of the Interior and the Ministry of National Defense.² The agency-related operational agenda of intelligence and counterintelligence State Security units, including the Military Counterintelligence, the Public Police (*Veřejná bezpečnost*, hence the abbreviation VB) and of the Border Guard was stored in secret central or regional operational archives that were closely linked to the operational records, or this agenda was stored in the operational archives themselves – i.e. among the individual directorates' records.

The Ministry of the Interior Foreign Intelligence Directorate (1th Administration) stored the agency-related operational agenda within its operational files in a specialized archive (statistic records department),³ the Counterintelligence Directorates (2nd Administration and its predecessors),⁴ the Surveillance Directorate (4th Administration) and the Directorate for the Protection of Party and Constitutional Officials (5th Administration) stored these in the operational archive pertaining to the central operational records (statistical records department),⁵ the Military Counterintelligence (3rd Administration)⁶ and the Intelligence Technology Directorate (6th Administration) stored these documents among its own special subject records⁷ and the Surveillance Directorate stored the surveillance file agenda at the Department for Surveillance and Information Technology.⁸ The Counter-intelligence Directorate in Bratislava (12th Administration) had its archive at its own analytical-information and statistical records department.⁹

The counterintelligence departments (I., II., III. department and district department) within the regional State Security units archived the agency-related operational file agenda at their evaluation and statistical records departments (groups),¹⁰ the Surveillance Directorate (IV. department) and the department for intelligence technology (VI. department) sent their files for storage to the Prague-based headquarters at the 4th or 6th SNB Administration.¹¹

The Intelligence Department of the Intelligence Directorate at the Central Border Guard and Border Protection Directorate archived its files at the statistical records department of the 1th Administration and the Counterintelligence Department at the statistical records departments within the regions.¹²

Apart from the State Security, the entities recording and archiving their agency-related operational agenda individually were the General Staff of the Czechoslovak People's Army Intelligence Directorate, the Federal Directorate of the Public Police (including the regional Public Police directorates) and the Department for the Protection of the Interior at the Corrections Corps pertaining to the Ministry of Justice.¹³

As far as the Ministry of the Interior archives are concerned, the documents were stored in fonds of individual organization units (Administrations) that focused on security or administrative issues. The operational archive specific fonds contained agency-related operational files in the fonds mentioned below:

- the Special Fond (Z), containing files of extraordinarily important and secret State Security activities, including the investigations and deployment of agents,

1 Ladislav Bukovsky, "Archivy bezpečnostních složek po dvaceti letech. Úvod k tzv. Quintanově zprávě", in *Sborník Archivu bezpečnostních složek*, 2009, (7), 7.

2 Czech National Council Act No. 97/1974 Sb., on Archiving, § 24.

3 For comparison, see Pavel Žáček, "Registrace, vedení a archivace svazků ve směrnících čs. komunistické rozvědky", in *Paměť národa*, 2006, (2), 64–65.

4 Prior to 1988, this especially referred to the Counterintelligence Directorate for the Fight Against the External Enemy (II. Administration), the Counterintelligence Directorate for the Fight Against the Enemy Within (X. Administration), the Counterintelligence Directorate for the Protection of the Economy (XI. Administration) and during the 1981–1985 period, also to the Counterintelligence Directorate for the Fight Against Extraordinary and Special Forms of Crime (XIV. Administration).

5 For comparison, see Pavel Žáček, "Administrativa písemnosti kontrarozvědné povahy II. Jednotný evidenční, statistický a archivní systém StB v letech 1978–1989", in *Sborník Archivu bezpečnostních složek*, 2013, (11), 218; Patrik Benda, ed., *Přehled svazků a spisů vnitřního zpravodajství centrály Státní bezpečnosti v roce 1989*, Praha: ÚDVZK, 2003, XII–XIII.

6 For comparison, see Pavel Žáček, ed., "Armáda pod drobnohledem. Vojenská kontrarozvědka v dokumentech, 1974–1989", in *Historie a vojenství*, 2003, (3–4), 825.

7 For comparison, see Pavel Žáček, *Přísně tajné. Státní bezpečnost za normalizace*, Praha: Votobia, 2001, 183.

8 For comparison, see Miroslav Urbánek, "Správa sledování Ministerstva vnitra v letech 1948–89 (Stručný nástin organizačního vývoje)", in *Sborník Archivu ministerstva vnitra*, 2005, (3), 210.

9 Jerguš Sivoš, ed., *XII. správa ZNB. Dokumenty k činnosti Správy kontrarozvědky v Bratislavě v letech 1974–1989*, Bratislava: ÚPN, 2008, 21–22.

10 For comparison, see Pavel Žáček, *Nástroj triedneho štátu. Organizácia ministerstiev vnútra a bezpečnostných zborov 1953–1990*, Bratislava: ÚPN, 2005, 254–255.

11 For comparison, see Radek Schovánek, "Organizační vývoj technických složek MV 1864–1989 II.", in *Securitas Imperii*, 1994, (2), 61–62.

12 For comparison, see Patrik Benda, Pavel Žáček, eds., *Denní situační zprávy StB z listopadu a prosince 1989*, in *Securitas Imperii*, 2000, (6/III), 1042; Benda, ed., *Přehled svazků a spisů vnitřního zpravodajství centrály Státní bezpečnosti*, XII–XIII.

13 Ibid, XIV.

- the Secret Collaborators Fond (TS),
- the Counterintelligence Work Fond (KR), containing the files about the persons under surveillance,
- the Object-Related Files Fond (OB), containing files about individual institutions or social groups,
- the Tactical Fond (T), containing selected documents of key importance from the destroyed files and documents,
- the Old Documents Fond (S), containing documents from the time prior to the establishment of the file agenda in the 1950s,
- the Investigation Files Fond.
- the Historical Fond.¹⁴

ATTEMPTS TO DESTROY THE OPERATION DOCUMENTS OF THE POLITICAL POLICE

During the last days of its existence, i.e. on the verge of November and December 1989, the Communist regime decided to destroy evidence about its ruling, to hush up the crimes it had committed, the continuous breach of applicable national and international norms as well as the infringement of human rights. There were documents being destroyed, both in the centres of political power – within the archives and registries of the bodies of the Central Committee of the Communist Party of Czechoslovakia and its organization departments, as well as within the operational archives and registries of the Federal Ministry of the Interior's departments which especially refers to the secret police of the State Security, and files were also being destroyed within the organization units of the Federal Ministry of National Defense, within the units and groups of the Czechoslovak People's Army which especially applies to special units of individual organizations and institutions as well as to other pillars of power.

For various reasons, the exponents of the Communist regime didn't manage to destroy all the compromising documents and archive materials. First and foremost, they didn't have enough time, sometimes their own administrative norms hindered them in destroying the documents and there were also occasions where some of the responsible functionaries resisted participating in this planned and systematic destruction.

During the first weeks and months following November 1989, it was hardly possible to ascertain the scope of documents that had been preserved or destroyed. Mostly, this referred to issues that were subject to secrecy so that neither the public nor their representatives had access to them.

Irrespective of the lustration affair, i.e. irrespective of accessing data in the State Security files about ministers and deputies in the legislative bodies, which occurred during the spring of 1990, which in turn cast shadows over the Ministry of the Interior, the public wasn't granted access to the top secret Communist regime files, not even the public comprising of specialists focussed on this issue. Yet the first politicians were compromised due to their former collaboration with the secret police. During the new security forces personnel purge, thousands of State Security members were forced to resign from their functions.¹⁵

PUBLIC CONTROL OVER ARCHIVES

The Communist archive gradually became a problem which needed to be solved, this situation was aggravated especially

after the parliamentary elections in June 1990. Although in 1990 an agreement was concluded between the Ministry of the Interior of the Czech Republic and the Central Committee of the Communist Party of Czechoslovakia about handing over the archive materials of regional and district Communist Party of Czechoslovakia committees, the Communist Party fiercely resisted handing over the Central Committee of the Communist Party of Czechoslovakia archive.¹⁶ That's why on November 16th 1990, on the eve of the first anniversary of the students' revolution, the representatives of the new democratic power put through the Constitutional Act No. 496/1990 Sb. on giving back the Communist Party of Czechoslovakia's property to the people of Czechoslovakia; this act had an introduction stating that following its coming to power in 1948, the Communist Party regarded the state as its property, handling this property as if it had been its own. In order to get rid of the impacts of such a state at least partially, the Federal Parliament decided that the Communist Party of Czechoslovakia's archive materials issued until December 31st 1989 become the state's property on January 1st 1991 without any compensation. A similar decision was made about other written, visual documents or audio documents as well as other Communist Party of Czechoslovakia documents dating back to the period until November 30th 1989 which were to be taken over by the Central National Archive or its regional branches (§ 3).

Archive materials and documents from Communist security services remained classified temporarily and were stored in the Ministry of the Interior archives or were managed by the new security services.

On October 4th 1991, i.e. following the adoption of Act No. 451/1991 Sb., determining some further prerequisites for certain positions in state bodies and organizations of the Czech and Slovak Federative Republic, the Czech Republic and the Slovak Republic, the archive materials from the former State Security that were partially managed by the Ministry of the Interior and partially by the Ministry of National Defense, were used for determining whether a particular person had been a member of the Communist secret police or a secret collaborator within the respective agency category. According to one of the paragraphs, it was even prohibited to publish documents for processing the so-called lustration certificates without the citizen's prior written approval (§ 19).

These documents were used in an identical way for the purposes of complying with Act No. 279/1992 Sb. of April 28th 1992, on some further prerequisites for certain positions filled by appointment or designation of officers of the Police of the Czech Republic and officers of the Penitentiary Service of the Czech Republic.¹⁷

Yet the post-Communist power still held the archive materials in a classified mode and they were not used in public discourse about the totalitarian regime's nature, with historians and other experts being granted access to these documents only on a very

14 For comparison, see Žáček, *Administrativa písemností kontrarozvědné povahy*, 207.

15 For comparison, see Pavel Žáček, "Sachergate": první lustrační aféra. Nesnáze postkomunistické elity (nejen) se svazky Státní bezpečnosti", in *Paměť a dějiny*, 2007, (1), 60–80.

16 Oldřich Sládek, *Ohlédnutí*, in *Archivní časopis*, 1993, (1), 19.

17 Pavel Žáček, *Lustrační zákony v České republice. Aplikace zákonů č. 451/1991 Sb. and No. 279/1992 Sb.* See <http://www.ustrcr.cz/data/pdf/konference/20let-pote/twenty-years-after-zacek.pdf>

limited scale. Not even the former political prisoners or other persecuted people gained access which gave rise to mistrust towards the bodies of the new power.

Communist power archive materials and documents, including the former security services materials and documents were used on an unlimited scale only by the employees of the new intelligence services (which were frequently the authors of these documents), and on a limited scale by police investigators, e.g. from the Office for the Documentation and the Investigation of State Security Activities (since 1995: Office for the Documentation and the Investigation of the Crimes of Communism). This state also didn't strengthen the trust put into the newly established bodies.

USE OF THE ARCHIVES DURING TRANSFORMATION

In the mid-1990s, the International Council on Archives prepared a document of major importance for UNESCO known as the Quintana Report. This report summarized the recommendations regarding the handling of former repressive regime archives. These archives were named the key instrument within the transformation era for strengthening collective and individual rights.

The following rights were described as collective rights:

- 1/ the right of the peoples to choose their own path to political transition.
- 2/ the unquestionable right of the citizens to the integrity of their written memory.
- 3/ the right to the truth.
- 4/ the right to identify those responsible for crimes against human rights.

The following rights were described as individual rights:

- 1/ the right to discover the fate of the relatives who disappeared during the era of repression.
- 2/ the right to know what information on individuals is held in the archives of repression.
- 3/ the right for historical research for the purposes of cognition.
- 4/ the right to amnesty prisoners and victims of political revenge.
- 5/ the right of restitution and compensation for the repression victims' suffering.¹⁸

RIGHT TO ACCESS THE ARCHIVES

On April 26th 1996, the parliament adopted the Act No. 140/1996 Sb., on making files resulting from the activities of the former State Security Police publicly accessible, for which the Ministry of the Interior imposed the duty to inform a citizen of the Czech Republic, or a citizen of the former Czechoslovak Republic, whether the former State Security's information system contains a file on this citizen, whether this file has been preserved and possibly to provide a copy of such a file to the citizen (§ 1).

If the citizen was listed as a collaborator, he was only entitled to access those parts of the file that were written at a time when this citizen was not listed as a Secret Service collaborator (§ 5/d).

In order to protect personal data, the Ministry of the Interior made the date of birth and the addresses of other people illegible, also making unreadable any other data about their private and family life, about their crimes, health and property.

This was done prior to making the file accessible via a copy of the file. If the file in question was one about a deceased person (i.e. when the application was filed by relatives), the data about the private life and about the family of all people were made unreadable (§ 6).

Going through the file, the applicant had the right to ask for the actual names of the people who were listed in the file under a false (a code) name to be told to him. If this was the case of a person listed as a State Security collaborator and if identifying such a person's correct name was possible, the Ministry was to immediately approve the application (§ 7).

The file an entitled applicant asked to be declassified and which was managed by the Ministry, ceased to be classified if it had been established prior to January 1st 1990. Yet the state provided for a precautionary measure, as the file could be classified again upon the Ministry of the Interior's decision, if such a thing served "*the state's security or the safety of people or property*" (§ 8).¹⁹

This act contained a lot of deficiencies. It was limited to the Czech (Czechoslovak) citizens and provided access to only a limited amount of files – roughly 60,000 – from several counter-intelligence State Security units, yet it did not refer to the personal files of the members of the secret police, but for example not even to the Surveillance Directorate's or the Intelligence Technology Directorate's file agenda.²⁰ Furthermore, the processing proved to be too expensive (even for the applicants), too bureaucratic and inefficient, being furthermore of much too low quality.²¹ This act didn't fulfil its role and became subject to criticism from society. The Act No. 107/2002 Sb. of March 8th 2002, which tried to make up for some of these deficiencies, stated that the purpose of the act is "*to reveal as much of the Communist regime practice in suppressing political rights and freedoms, as exerted by the secret repressive forces within the totalitarian state.*" The act was to provide the persecuted people with access to the documents about their persecution and to publish the data about the actors of this persecution and the activities linked to it.

Furthermore, the act stated that all preserved or reconstructed documents established due to the security services activities and managed by the Ministry of the Interior, by the Ministry of National Defense or by the Ministry of Justice during the period from February 25th 1948 until February 15th 1990, and which were recorded in the contemporary files or archive aids (the so-called registers), were subject to declassification and publication. Documents taken out of this process due to specific interests, i.e. because of the assumption that the interests of the Czech Republic in international relations – or its security interests – might be damaged, or documents where "*the life of a person might be seriously threatened*" were not to be subject to declassification and publication. Yet in order to exempt a document from

18 Antonio Gonzáles Quintana, "Archivy bezpečnostních složek bývalých represivních režimů", in *Sborník Archivu bezpečnostních složek*, 2009, (7), 22–24.

19 Act No. 140/1996 Sb., on making publicly accessible files resulting from the activities of the former State Security Police

20 Radek Schovánek, "Zpřístupňování svazků Státní bezpečnosti v České republice", in *Památ národa*, 2005, (2), 85

21 According to data provided by the Ministry of the Interior, within the period from the beginning of 1997 until the end of 1999, only 4,012 applicants received a positive answer to the question whether there was a file about them, and only 2,270 of them saw the file. Pavel Žáček, *Boje o minulost*, Brno: Barrister & Principal, 2000, 114–115.

declassification and publication, the ministries needed a consent granted by the Chamber of Deputies of the Parliament of the Czech Republic for monitoring the declassification process.

The act widened the scope of declassified files by the file (and document) agenda from the Main Directorate of Military Counterintelligence managed by the Ministry of Defense, from the Department for the Protection of the Interior at the Corrections Corps (the so-called prisoners agency, managed by the Ministry of Justice), from the Main Intelligence Directorate, from the Surveillance Directorate, from the Directorate for Intelligence Technology, from the Passport and Visa Directorate of the National Security Corps and from the Border Patrol and National Border Protection Main Directorate.

Another major change was the option to access personal (cadre) files of security services members containing data about the origin, course and termination of their service relationship, or to provide an extract of these documents in the shape of a member's personal record.

The ministries were further on obliged to hand over the information required upon an adult citizen of the Czech Republic's application, if this applicant wasn't imprisoned – or the ministries were obliged to make a copy of the preserved file accessible, including the personal files on collaborators or members of the security services, if they weren't foreigners.

Furthermore, the Ministry of the Interior and the Ministry of Defense were obliged to hand out in writing and in electronic form the register records from preserved or reconstructed protocols, volumes and other register aids of security services, with this information being handed over in the scope of object-related files or files about people listed as State Security collaborators or as Military Counter-intelligence collaborators – data about the establishment of such a volume or changes made herein, about people (if they weren't foreigners), or about objects to whom the volumes were related were to be handed over as well. Similarly, the Ministry of Justice issued in writing and in electronic form a transcript of the volumes from the Department for the Protection of the Interior at the Corrections Corps and it did so within the scope of object-related files or files about people listed as collaborators of this department, if these documents had been made use of by the State security.

The ministries were also to continuously issue lists of the declassified personnel (cadre) files of the security services members, including the date on which they became members of the security service, including the position within the security service and the date on which such an enlistment ended.

Prior to an entitled applicant being provided with access to the document, the ministries were to make the date of birth as well as the addresses of other people, including any data about their private and family life, crimes, health and property illegible when providing a copy of the document. If the declassified file was a cadre (personal) file of a security service member, also any data about people standing outside this member's service activity or public activity was made illegible.

The act enabled the citizens to hand over their own declaration about the content of the file or about the registration in the list itself, and the ministries were then obliged to add these declarations to the data about this person as an integral part of the document and to declassify them for applicants together with the documents or records in the register.

Furthermore, the legal standard amended the then applicable Act No. 97/1974 Sb., on Keeping Archives, stating that perusing the documents in the archives or the archive materials of the Communist Party of Czechoslovakia stored in the archives cannot be rejected nor conditioned by any other body's consent.²²

Especially, this act newly defined the notion of a State Security origin document, i.e. that an entitled applicant has the right to more information from the material that has been preserved than only to what is contained in his file. Furthermore, the files about State Security secret collaborators who weren't citizens of foreign countries, were opened to the public – this referred to the categories of a secret collaborator (*tajný spolupracovník*, hence the abbreviation *TS*), resident (R), Agent (A), Informer (I), holder of a borrowed flat (*držitel Propůjčeného Bytu*, hence the abbreviation *PB*) and holder of a conspiratorial flat (*držitel Konspiračního Bytu*, hence the abbreviation *KB*). Additionally, this act ordered the Ministry of the Interior, the Ministry of Defense and the Ministry of Justice to publish lists of secret collaborators (and object-related files) in counterintelligence units, in the intelligence, in the military counterintelligence and in the prisoners agency who were demonstrably cooperating with the State Security for its benefit. These lists would serve as a form of public control.

On March 20th 2003, the Ministry of the Interior published a list of secret collaborators within the above-mentioned categories. This list was published both in writing and on the internet and equalled 12 A4 notebooks with an overall page number of 6,665.²³ Within the years of 1997–2003, the respective authority made 3,391 investigation, operational and agency-related files accessible to applicants.²⁴ Within the following two years, the Ministry of the Interior presented only 108 personal files about former secret police members.²⁵

Within the period ranging from September 2002 until March 2005, the newly founded Office for the Declassification of the Documents of the Ministry of the Interior of the Czech Republic which focused on processing documents (files) written due to the counterintelligence's work, received a total of 3,671 applications, digitalized 402 documents (equalling 358,522 pages) and processed applications of 210 applicants. Furthermore, the office published data on 15,633 persons listed as members of military counterintelligence within the legally binding period, publishing also 1,881 records about object-related files within the legally binding period.²⁶

It was especially the Ministry of the Interior that was unable to raise the quality of its activities within the area of declassifying file agenda as this work remained ineffective and of low quality, the ministry didn't declassify all the file agenda (e.g. related to

22 Act No. 107/2002 Sb., amending the Act No. 140/1996 Sb., on the access to records created by the activity of the State security, and on some other acts.

23 See Jan Frolík, "Několik poznámek k 'Zveřejnění evidenčních podkladů a seznamu personálních spisů podle zákona č. 107/2002 Sb.' Ministerstvem vnitra České republiky", in *Sborník Archivu ministerstva vnitra*, 2004, (2), 311.

24 Vladimíra Vaníčková, "Odbor archivní a spisové služby MV: rok 2003", in *Sborník Archivu ministerstva vnitra*, No. 2004, (2), 308–309.

25 See Schovánek, "Zpřístupňování svazků Státní bezpečnosti", 86.

26 Jitka Pourorová, "Hlavní správa vojenské kontrarozvědky – III. správa SNB – a zpřístupňování dokumentů vzniklých její činností v souladu se zákonem č. 107/2002 Sb.", in *Sborník Archivu Ministerstva vnitra*, 2005, (3), 414, 416 and 418.

the Surveillance Directorate, to the Intelligence Technology or to the Passport and Visa Directorate).

DECLASSIFICATION AND OPENING UP THE ARCHIVES

A new Act on Archiving No. 499/2004 was adopted following several years, and this act declassified archive materials that were created due to the activities performed by organizations united in the National Front and in the Communist security services. This act significantly broadened the access the researcher public had to the Security Service file agenda as it stated that the principle according to which only archive materials older than 30 years are declassified, does not apply to these materials. Furthermore, this act stated that in this case, an exception to the restriction of access to archive materials which contain sensitive personal data applies. This seemed to have solved the blocking paragraph of Act No. 107/2002 Sb., which hindered aliens from applying for their materials filed by the State Security.²⁷

In November 2005, a group of senators presented a bill on the National Memory Institute, a memorial institute designed according to the Polish and Slovak model. Finally, in June 2007, the Act No. 181/2007 Sb. on the Institute for the Study of Totalitarian Regimes and the Security Services Archive, and on Amendments of some Acts, by which a new administration office was established on February 1st 2008, was adopted. This office managed all the document and file agenda of the former Communist security services.

This act stated that the Ministry of the Interior, the Ministry of Defense including the Military Intelligence, the Ministry of Justice, the Security Information Service and the Office for Foreign Relations and Information shall hand over all record and registration aids, archive fonds, including the agency-related, operational files, investigation or cadre files, archive collections and individual archive materials and documents established due to the activities of the security services and due to the activities of the Communist Party of Czechoslovakia and of the National Front organizations that were operating within these services from April 4th 1945 until February 15th 1990, and the act stated that these ministries shall hand over any documents they are in possession of to the Security Services Archive.

CURRENT STATUS

Altogether, the Security Services Archive took over 18,028.54 running meters of archive materials,²⁸ including 201,934 so-called micro-proposals from the intelligence (1th Administration), 141,275 micro-proposals from the Main Counterintelligence Directorate (2nd Administration), 94,503 micro-proposals from the Main Military Counterintelligence Directorate (3rd Administration), from the Military Intelligence and hundreds of other microfilms.²⁹ During the period from February 2008 until December 2012, the Institute for the Study of Totalitarian Regimes, in cooperation with the Security Services Archive, managed to digitalize almost 150,000 inventory units equalling 28,414,834 files (pages), of mostly operational files from the intelligence and counterintelligence.³⁰

Almost nineteen years following the fall of the communist totalitarian regime, the Security Services Archive took over the responsibility for declassifying and publishing documents as well as archive materials related to the security services, according to the act on making publicly accessible files resulting from the activities of the former State Security Police and according to the Act on Archiving and Document Service.

Declassifying these archive materials and documents is further on being governed especially by Act No. 499/2004 Sb. on Archiving and Document Services and on the Amendment of some Acts; and to a lesser extent by Act No. 140/1996 Sb. on making publicly accessible files resulting from the activities of the former State Security Police, as amended; and by Act No. 181/2007 Sb. on the Institute for the Study of Totalitarian Regimes and on the Security Services Archive and on the Amendment of some Acts. The act thus broadened the liberal approach according to the Act on Archiving encompassing also documents of other security services, for example, it also refers to the Police, Border Patrol, Military Counterintelligence, General Staff of the Czechoslovak People's Army Intelligence Directorate, Protection of the Interior at the Corrections Corps etc.

Thus, almost any researcher may apply for access to any material stored in the archives – irrespective of whether he stands in any relation to the person, about whom he asks to receive materials. Furthermore, he may get digital copies, scans, or ask for photocopies or digital forms to be provided to him at his own expense. This scope and access is the most liberal one among all the post-communist countries.

Furthermore, this body provides for the access to this subject and offers the necessary aid and information for state authorities that are part of the security management, or this body helps in investigations led according to the Classified Information Act (National Security Authority), it helps the Intelligence Service of the Czech Republic to fulfil their tasks and the prosecution authorities for the purposes of criminal proceedings.

As far as this act is concerned, the intelligence services didn't delimit merely those documents and archive materials which further on contained classified information if they indispensably needed them in order to fulfil their tasks. They were (are) to hand them over to the Security Services Archive *"immediately after the classification level is abolished"*.

LESSONS LEARNT AND RECOMMENDATIONS

It is necessary to prevent the archive materials and documents compromising the political and security functionaries of the totalitarian power being physically destroyed when the power is handed over and when the transformation period starts.

The archives of the authorities of power within the totalitarian (authoritarian) regime, especially the agency-related operational

27 For comparison, see Schovánek, "Zpřístupňování svazků Státní bezpečnosti", 87.

28 Ladislav Bukovsky, "Archiv bezpečnostních složek – základní informace", in *Sborník Archivu bezpečnostních složek*, 2008, (6), 17.

29 *Ústav pro studium totalitních režimů & Archiv bezpečnostních složek*. Praha: ÚSTR, 2009, 38.

30 Rafał Leśkiewicz, Pavel Žáček, eds., *Handbook of the European Network of Official Authorities in Charge of the Secret Police Files*. Prague: ÚSTR, IPN, 2013, 141–145.

fonds of the secret police need to be handed over by the Ministry of the Interior or the intelligence services into the hands of a newly established archive which is independent of the national security bodies. It is furthermore necessary to declassify this specific agenda, and to make it accessible to the people for the purpose of re-forging the totalitarian past, and simultaneously making

it accessible to the researchers due to the need of a specialized historical reappraisal.

It is further on necessary to make use of the archive materials in carrying out checks in order to comply with the rehabilitation acts, in order to investigate the previous regime's crimes and in order to reveal to the public how this regime made use of its power.

SOURCES USED AND FURTHER READING

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LUSTRATION

PAVEL ŽÁČEK

INTRODUCTION

Lustration, originally an internal technical term of the Czechoslovak secret police, has gradually become a socio-political umbrella term including legislation and power procedures of the new democratic power, with the aim of breaking down the system of the totalitarian nomenclature. It was not a revolutionary revenge of political prisoners, but a legal instrument protecting the high representatives of the state and its institutions against the representatives and officers of ideological and repressive organisations of the communist regime.

HISTORICAL BACKGROUND

The leaders of the Communist Party of Czechoslovakia ensured keeping the totalitarian power and control over the individual state bodies and political and social institutions during their rule mainly via the system of cadre nomenclature used by the relevant party body to approve staffing of the key functions at all levels (federal, national, regional, district, sub-district).¹ From the beginning of the Velvet Revolution in Czechoslovakia, i.e. from 17 November 1989, the key problem of the opposition was how to achieve the departure of representatives of the communist regime – or persons approved by the communist regime – from important political, state and later even economic positions. It was only later that preventing persons oriented on the support of the totalitarian regime from returning to high state and social functions became the main requirement – directly related with the question of national security.

At first, the student movement required only “*an immediate punishment (...) of all persons responsible (...) for initiating the Prague massacre...*”² After its creation, the Civic Forum declared a request demanding the resignation of all members of the Central Committee of the Communist Party directly linked with the preparation of the occupation by the Warsaw Pact armies in August 1968, furthermore responsible for “*devastating all parts of the social life for many years.*” Besides the members of the highest political leadership, the Federal Minister of the Interior, Lieutenant General František Kincl, was also required to step down from his function, as he was responsible for *all the interventions* of the communist police in the last months of the regime.³ The democratic initiative extended the requirements of the opposition to “*a quick resignation of the Czechoslovak government...*”⁴ Ten days after the beginning of the revolution, the Civic Forum formulated a requirement to dissolve the People’s Militias, the armed unit of the Communist Party.⁵

In the first eight days of December 1989 and on the order of the Federal Ministry of the Interior, the State Security (StB, the communist secret police) destroyed tens of thousands of operative files on the surveillance of both Czechoslovak citizens and foreigners.⁶ Meanwhile, the Civic Forum together with the Public Against Violence movement declared that “*the nomenclature has to be abolished at all levels and in all departments.*”⁷ At the same

time, both opposition movements published a request that the two highest heads of the General Prosecutor’s Office must be removed from their office.⁸ In mid-December, the opposition leader Václav Havel declared: “*However, it is true that the totalitarian system was shielding itself by the Communist Party, and therefore, all the Communists bear a higher responsibility for the decadent situation our country is now in.*”⁹

On 22 December 1989, the Coordination Centre of the Civic Forum suggested to the government to immediately stop the activities of the secret police and dissolve the units of the State Security oriented “*on the surveillance of activities of citizens and civic activities.*” Furthermore, it demanded the dissolution of the “special departments or units” creating networks of “*informers for citizens’ surveillance and reporting on their activities.*” Besides the staff changes in these units, the “*existing activities of each individual officer of the State security*” were to be examined. The communist secret police was designated as a harmful gangrene. “*Purification of our country from this gangrene is an extremely complex, but necessary step which must be carried out immediately.*”¹⁰

A few days later, the Coordination Centre of the Civic Forum changed its mind and decided not to carry out the immediate dissolution of the State Security under the existing circumstances. All its *dangerous sectors* were to stop their activities; the analysis was to be carried out in order to evaluate the state of the security apparatus on the basis of which a “*new state security and defence system*” would be created.¹¹

After staff changes in the Federal Ministry of the Interior, the reorganisation and abolishment of the State Security, the new counter-intelligence service – Office for the Protection of the Constitution and Democracy – started the reconstruction of agency networks, and, on the basis of requests made by individual constitutional officials, investigated the Register of the former State Security to find out who was a collaborator of the communist secret police (vetting). Consequently, on 22 March 1990, the Minister of the Interior Richard Sacher ordered the vetting of all deputies of the Federal Parliament, both Parliaments of the two republics and members of all the three governments.

1 Comparison Vladimíra Hradecká, František Koudelka, *Kádrová politika a nomenklatura 1969–1974*. Praha: ÚSD AV ČR, 1998; *Rudá nomenklatura*, Praha: Vydavatelství GMA 91, 1992.

2 Meaning the student demonstration on 17 November 1979, brutally suppressed by the communist security service. *Deset pražských dnů. 17.–27. listopad 1989. Dokumentace*. Praha: Academia, 1990, 31–32.

3 Ibid., 47–48, 248, 326.

4 Ibid., 90.

5 Jiří Suk, *Občanské fórum. Listopad–prosinec 1989*, Volume II – documents, Brno: Doplněk, 1998, 34.

6 Pavel Žáček, “‘Můžou přijít, jsme hotovi...’ Tzv. Lorencova ‘skartace’ z prosince 1989 v dokumentech”, in *Památ národa*, 2007, (0), 28–41.

7 Suk, *Občanské fórum*, 48

8 Ibid., 103.

9 Ibid., 245.

10 Ibid., 274–275.

11 Ibid., 291.

FORMS OF PROTECTION OF THE NEWLY ESTABLISHED CONSTITUTIONAL, POLITICAL AND ECONOMIC STRUCTURES

After an agreement with President Václav Havel, the Minister of the Interior issued an instruction by which he allegedly wanted to prevent the vetting of the President of the Republic, members of the federal and national governments, deputies of the federal and nations' Parliaments and leaders of the political parties, in order to "immediately ensure the stability of the political development." Consequently, he even stopped all the lustration processes and provision of archive documents.¹² However, such provisions of the Minister – particularly the lustration of Members of Parliament – provoked an extensive political crisis. The fight for the State Security archives and their content touched the highest political functions, including the President of the Republic.

On 8 May 1990, the president of the Security and Safety Committee of the Federal Parliament Ladislav Lis who criticised the insufficient changes in the Federal Ministry of the Interior, declared: "If we wish to remove the influence of the Communist Party on the activities of the Ministry of the Interior, we have to remove the apparatus that ensured its unlimited power. (...) The aim is to destroy the system of the State Security which proved to be the support of the totalitarianism of the Communist Party and to have fascist tendencies."¹³

Under the pressure of the situation, on 21 May 1990 the Czechoslovak government authorised the lustrations of candidates of individual political entities into Legislative Assemblies, provided, however, that they agreed with it and that the result would be handed over to the management of the party that asked for the vetting. Inconsistency and extra-judicial handling of the lustration data and sometimes of archive files of the State Security culminated shortly before the first free elections when the former cooperation of political parties or leaders of movements with the communist secret police was made public (Bartončík and Budaj affairs).¹⁴

LEGAL REGULATION OF LUSTRATIONS

In fact, from November 1989 to September 1991, the post-communist political elite was addressing the issue of whether and how the new democratic constitutional establishment should protect itself from the residues of the communist totalitarian regime. Since the Communist Party of Czechoslovakia was not abolished at the turn of 1989/1990, all the attention focused on the Federal Ministry of the Interior and structures managed by it. At the same time, the form of the possible legislation and what it should stipulate was being discussed.

Due to many political affairs of the post-communist power linked with the purification of the central state bodies, political life and public administration, revealing the specific activities of the highest communist nomenclature, publicizing crimes and violations of human rights by its power pillars (particularly by the State Security), using mass agency and an intelligence network of the soviet type to control the state and society, in the period of 10 to 16 months after the Velvet Revolution to the conclusion that it was necessary to adopt the legal regulation to protect what was a very fragile democratic constitutional arrangement regime at that time.

After a huge public discussion and on the basis of the findings of the parliamentary investigation commission of the Federal Assembly of the Czech and Slovak Federative Republic (ČSFR) to clarify the events of 17 November 1989, the federal and national parliaments adopted what we called "lustration acts" in order to legally change the existing high representatives of the state apparatus who were persons compromised by their service and cooperation with the communist totalitarian power between 1948–1989 and to settle the conditions of staffing certain functions.¹⁵

On 4 October 1991, the Federal Parliament finally adopted the Act No. 451/1991 Sb., *on determining some further prerequisites for certain positions in state bodies and organizations of the Czech and Slovak Federative Republic, the Czech Republic and the Slovak Republic*, relating to certain positions staffed by election, designation or appointment in the bodies of the state administration, in the army,¹⁶ in the information services, the police force, the Office of the President, Office of the Parliament, Government Office, Office of the Constitutional and Supreme Court, in the Presidium of the Academy of Sciences, in national radio and television, press agencies, and heads of organisations and chief executives in state enterprises and state organisations, joint stock companies where the state is the majority shareholder, foreign trade corporations, state railways, state funds, state monetary institutions and in the state bank. In universities, the act applied to positions of elected academic officials.

Similarly, the act also determined some further prerequisites for the positions of a judge, lay judge, prosecutor, prosecution investigator, notary public, state arbiter and for persons serving as trainee judges, trainee prosecutors, trainee notaries public and arbitration trainees. It also determined the conditions of reliability to allow the operation of some licensed businesses (sec. 1).

A prerequisite for the positions mentioned above was that during the period from 25/2/1948 to 17/11/1989, the citizen was not a member or an officer of the Communist Party or government nomenclature, in the hierarchical order specifically of:

- a/ the Central Committee of the Communist Party of Czechoslovakia or the Central Committee of the Communist Party of Slovakia, the Bureau for the Management of Party Work in the Czech Lands (Committee for the Management of Party Work in the Czech Lands), a Secretary of a body of the Communist Party of Czechoslovakia or the Communist Party of Slovakia from the level of a District Committee or an equivalent committee upwards, a member of the presidium of these committees, except for those holding these posts only in the period from 1/ 1/ 1968 to 1/ 5/ 1969 (i.e. during the Prague Spring and after),
- b/ the National Front Action Committee after 25/ 2/ 1948, vetting commissions after 25/2/1948 or vetting and normalization commissions after 21/ 8/ 1968,
- c/ the People's Militias,

12 Pavel Žáček, "Sachergate": první lustrační aféra. Nesnáze postkomunistické elity (nejen) se svazky Státní bezpečnosti", in *Paměť a dějiny*, 2007, (1), 63–64.

13 Ibid., 76–77.

14 Lubomír Kopeček, *Éra nevinnosti. Česká politika 1989–1997*, Brno: Barrister & Principal, 2011, 55–57.

15 Comparison Ibid., p. 114–121.

16 In the Czechoslovak Army and in the department of the Federal Ministry of Defence, the act applied to positions with the highest achievable ranks of Colonel and General and the positions of military attachés (sec. 1 (2)).

- d/ the system of structures from the level of a District Committee to the Central Committee of the Communist Party of Czechoslovakia (or Communist Party of Slovakia) in a department in charge of the political running of the National Security Corps,
- e/ a student at Felix Edmundovic Dzerzinsky University of the Council of Ministers of the USSR for officers of the State Security Service, the University of the Ministry of the Interior of the USSR for officers of the Public Security Service, the Political College of the Ministry of the Interior of the USSR, or a postgraduate or a participant in courses lasting longer than 3 months at these schools.
- f/ an officer of the State Security Service,
- g/ registered in the State Security Service's files as a resident, agent, lent apartment holder, conspiracy apartment holder, informer or ideological collaborator of the State Security Service.¹⁷

At first, the Minister of Defence could have pardoned the membership of the State Security, if an application of the prerequisite "*disrupted an important security interest of the state*" and at the same time, "*objective of this Act was not endangered*" (sec. 2). The facts referred to in relevant sections of the act were proved by a certificate issued by the Ministry of the Interior or by an affidavit. (sec. 4)

In justified cases, the Minister of the Interior and the directors of the intelligence service and the chief of the police force could have pardoned the prerequisite to function, "*if its application disrupted an important security interest of the state*" and at the same time "*the objective of this Act was not endangered*" (sec. 3).

Before their election, designation or appointment to positions the prerequisites of which are determined in this act, the citizens submitted the certificate issued by the Ministry of the Interior and an affidavit (sec. 5).

If the citizen failed to satisfy the prerequisites for the position, his or her employment was to be terminated by a notice of dismissal served by the organization concerned within 15 days of the date when the organization learnt this fact, unless the citizen had been assigned to another position. The same procedure applied, "*if the citizen has refused to make an affidavit [...] or if the affidavit is not truthful*" (sec. 14). If a prosecutor or prosecution investigator fails to satisfy the prerequisites for his or her position, this fact was a reason for terminating the employment of the citizen (sec. 15). The competent body could even file a motion to remove the judge or lay judge from his or her position (sec. 16). Within two months of the delivery of the finding, the citizen could ask the competent regional court to review its content, as well as the invalidity of the termination of the employment (sec. 18).

The act stipulated that the publishers of press periodicals and licensed operators of radio and television broadcasting, news agencies and audio-visual programmes "*may for themselves or for their employee who is involved in forming the content production of the above media, upon his or her previous written consent,*" apply to the Federal Ministry of the Interior for issuing a certificate. Similarly, the presidents or equivalent representatives of political parties, political movements and associations "*may for themselves or for a member of the management of their political party, political movement or association, upon his or her previous written consent,*" apply for issuing a certificate or for issuing a finding (sec. 21). One of the last sections of the act forbid publishing any facts contained in the certificate or finding, or publishing the certificate or finding itself, as well as publishing

any of the documents supporting the issuance "*without previous consent from the citizen*" (sec. 19).

The time factor is a logical limitation of the effect of the act: the provisions shall not apply to citizens of the Czech Republic born after 1 December 1971, i.e. they apply only to citizens who are over 18 years of age on 1 December 1989 (sec. 20).

The Act No. 451/1991 Sb. became effective on the date of promulgation and it should become ineffective in 5 years, i.e. on 31 December 1996. In 1992, both parliamentary chambers of the republics adopted "small lustration laws" (No. 279/1992 Sb.) relating to officers of the Police of the republic and officers of the Penitentiary Service of the republic, that determine very similar prerequisites for officers of both security services on the same principle.¹⁸

To implement the lustration laws, the Ministry of the Interior carried out investigations in its archive (former Central Operative Register of the State Security, today's Security Service Archive), to confirm or exclude that the vetted person was a member or officer of the State Security or a secret associate of the State Security between 1948–1989. Data proved by the affidavit may be verified partly in the Security Service Archive (political bodies of the security service, students of security training in the Soviet Union), or in the National Archive (officers of the communist nomenclature in the former cadre registers of the Communist Party of Czechoslovakia) or in state regional archives (action committees, screening commissions).

CONSTITUTIONAL REVIEW

On 26 November 1992, the Federal Constitutional Court issued its decision in which it concluded its finding that "*it is not only a right, but an obligation of a democratic state to promote and protect the principles*" which it was based on, and therefore, it cannot remain inactive "*in a situation when leading positions at all levels of the state administration, economic management, etc., are staffed according to totalitarian system criteria that are nowadays unacceptable*" (nomenclature system). At the same time, the Court was supposed to seek to abolish the former unjustified preference of one group of privileged citizens based exclusively on the principle of a membership of the totalitarian political party over the rest of the other citizens for which the obviously unlawful preference undoubtedly represented oppression and discrimination.

The Constitutional Court ruled that in state and public bodies as well as in places of work linked with the security of the state democratic societies, it requires complying with certain state-citizen prerequisites characterised as "*loyalty with democratic principles which the state is based on.*" In comparison with the situation under the totalitarian regime when all leadership positions were staffed at all levels not only in contradiction with democratic principles and international standards but also in contradiction with the national law itself, the large lustration law covered only a very limited circle of workers, exclusively in power, administrative and economic apparatus, or in licensed

17 Pavel Žáček, "Lustrační zákon po dvaceti letech", in *Paměť a dějiny*, 2011, (4), 127.

18 Pavel Žáček: *Lustrační zákony v České republice. Aplikace zákonů č. 451/1991 Sb. a č. 279/1992 Sb.* See <http://www.ustrcr.cz/data/pdf/konference/20let-pote/twenty-years-after-zacek.pdf>

businesses, which could be a source of certain risks as far as the protection of a democratic system and its principles, state security or protection of state secrets are concerned, or it covered positions enabling their holders to openly or secretly influence the development of society and the desirable execution of functions of individual bodies or organisations.

In contrast with the totalitarian system which was based on an immediate objective and had never been bound by legal principles, let alone by constitutional ones, the democratic state is built on completely different values and criteria. Therefore, we cannot understand the large lustration law as *“a revenge on individual persons or groups of persons or as discrimination against persons who, contrary to generally recognized principles, violated the fundamental human rights and freedoms, either on their own or in cooperation with the repressive bodies or through them.”*

The Constitutional Court emphasised that *“each state, the more so a state that was forced to put up with fundamental rights and freedoms violations by the totalitarian power for more than forty years, has a right to establish a democratic system and to apply such legal provisions to avert the risk of subversion or a possible relapse of the totalitarian system, or at least to reduce them.”*

The Constitutional Court was persuaded that because of these reasons, among others, it was not possible to deny the state stipulating in its national law the conditions or prerequisites for the execution of management or other positions with decisive power, taking into account the criteria of its own security and citizens' security and ensuring its future democratic development.

After the fall of the communist regime, the state which was being built upon the rule of law based on the value discontinuity with the totalitarian regime naturally could not be rooted in a different system of values, not even in a situation where the formal normative continuity of the legal order allowed for it. *“In fact, respecting the continuity with the old-value system would not be a guarantee of legal certainty, but on the contrary, it would question the new values, endanger the legal certainty in society and shatter the citizens' trust in the credibility of the democratic system.”*

The Constitutional Court ruled that the determination of some further prerequisites for certain positions in state bodies stipulated in the large lustration law is essentially an admissible act, both on the basis of the constitutional standards and in compliance with international legal obligations. As a justification, the court referred to similar provisions adopted by other post-totalitarian European states that understood these *“as a legitimate tool, the purpose of which is not to endanger the democratic character of the constitutional establishment and the system of values of the constitutional state built upon the rule of law, or the fundamental rights and freedoms of the citizens, but their protection and reinforcement.”*

The Constitutional Court also looked at the argument of the possible retroactivity of the lustration law, and concluded that retroactivity had not been applied at all. The law did not declare the occupation of certain positions in the past as illegal or legally punishable facts or even points of facts of criminal offences and it did not link any legal consequence to it.

Similarly, it rejected the objection that it was a general punishment according to formal affiliation to certain categories, especially in cases that, in compliance with the politics of the totalitarian regime, it acted in line with the power apparatus and its repressive forces.

However, the Constitutional Court based its decision on the time limitation of the law *“to quite a short period in which it envisages the completion of the democratic process”* (by 31/12/ 1996).¹⁹ Yet, Czech legislators concluded that this period of *“completion of the democratic process”* is too short and they extended the effect and force of the law indefinitely. With regard to the active role of the anti-system Communist Party of Bohemia and Moravia in the Czech political system, its stuffing policy and relativisation of totalitarian mechanisms and crimes of the Communist regime before November 1989, the lustration law continues to fulfil its important role.

LESSONS LEARNT

Lustration laws in the Czech (Slovak) conditions became a constitutionally compliant solution for the system to overcome the consequences of the nomenclature apparatus, an essential solution to the discontinuity of staffing in the state governance positions, to the protection of high representatives in public administration and partly also in the economic or financial sphere, to the prevention of many affairs that occurred in other post-communist countries (Poland, Hungary, Slovakia), the determination of conditions to occupy certain positions and an important support for the continuous creation of the rule of law.²⁰

The preventive nature of the law consists in the fact that an essential part of the categories (nomenclature of the Communist Party of Czechoslovakia, membership in People's Militias, etc.) is verified exclusively by an affidavit. This is proved by the number of applications handled since 1991: out of the total number of applications 473,284 applications, pursuant to Act No. 451/1991 Sb., only 10,255 were positive ones, and pursuant to Act No. 279/1992 Sb., only 476 out of 24,619 applications were positive ones.²¹

One of the imperfections of this legislation is the fact that it does not apply to all of the power supports of the communist totalitarian regime, for example it leaves out the Military Counter-Intelligence members of the Czechoslovak People's Army, officers of the Border Guard or Intelligence Administration of the General Staff of the Czechoslovak People's Army. Similarly, it does not differentiate between the officers of the Public Security, ideologically transformed police departments some of which exceeded the acceptable level of collaboration while serving the totalitarian regime.²²

A fundamental change was brought about by the adoption of the Act No. 250/2014 Sb., on Amending Acts related to the adoption of the Act on State service on 1 January 2015: the act stipulated that the *“large lustration law”* does not apply to government Ministers and Minister Deputies. This political decision, enforced in addition because of one specific politician – the leader of

19 Comparison with the decision of the Constitutional Court of the Czechoslovak Federal Republic (full court) from 26/ 11/ 1992, file No. Pl. ÚS I/92, in <http://www.abscr.cz/data/pdf/normy/nalez-us-pl-1-1992.pdf>

20 Pavel Žáček, *Memory of Nations in Democratic Transition. The Czech Experience*, Praha: CEVRO-LKA, 2015, 25.

21 Comparison <http://www.mvcr.cz/clanek/lustrace-29644.aspx?q=Y2hudW09MTM%3d>; Roman David, *Lustration and Transitional Justice. Personnel Systems in the Czech Republic, Hungary, and Poland*, Philadelphia: University of Pennsylvania Press, 2011, 76.

22 Compare Pavel Žáček, *Boje o minulost. Deset let vyrovnávání se s komunistickou minulostí – pokus o předběžnou bilanci*, Brno: Barrister & Principal, 2000, 53–54.

a political movement – totally disrupted the existing requirements for the highest civil servants to have a clean record.

RECOMMENDATIONS

The Czechoslovak (Czech) experience confirms that the most convenient procedure of protecting a society (state) in transformation is to remove the information systems – as well as the file agenda linked to them – of the former secret police out of the competences of the power apparatus.

On the basis of a political consensus, expressed by the adoption of the law, it is necessary to create an independent institution managing the original data of the secret police. Then, on

the basis of their analysis, it is possible to assess the way of using them for vetting, or rather for the purification of the public administration. The status of classification of operational documents that are not absolutely necessary for the further activities of the new security apparatus and intelligence services will be gradually removed.

With regard to the legitimate interests of the public, very eager to uncover the classified practices of the totalitarian regime, it is appropriate to combine the non-public system of lustrations with opening the archives and making them accessible.

Moreover, the Czech and Slovak experience confirms that the 5-year period of validity of lustration laws is too short to ensure that people compromised by their participation in the totalitarian regime do not return back to their offices.

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INVESTIGATION AND PROSECUTION OF THE CRIMES OF THE REGIME

PAVEL ŽÁČEK

Just like any other totalitarian regime, the Communist regime in Czechoslovakia upheld its own existence via a power and ideology apparatus, through applying instruments of mass repression as well as terror and by inherently suppressing human rights and freedoms of the opponents of the regime.¹ The Communist authorities and national bodies governed by the communists committed hundreds of thousands of crimes from the time when they came to power on February 25th 1948, but until the fall of the Communist regime, it was impossible to reveal, investigate and punish these crimes.

During the 1948–1989 period, there were at least 257,864 people given unconditional sentences in Czechoslovakia as part of the so-called class-struggle.² Around 250 men (and one woman) were executed based on the political processes.³ The Communist border guards killed at least 280 people on the borders to Austria, the Federal Republic of Germany, or even on the border to the German Democratic Republic, 143 of these people were shot and 95 were killed by the electric fence.⁴

From 1948 until 1953, about 22,000–23,000 people were sent to forced labor camps, the Czechoslovak gulags without any court ruling.⁵ During the 1950–1954 period, the Communist regime assigned approximately 60,000 people to the special military labor units, the so-called technical support battalions (*Pomocné Technické Prapory*, hence the abbreviation *PTP*) and to the later *technical battalions* (*Technické Prapory*, hence the abbreviation *TP*), 22,000 of which were demonstrably assigned to these units due to political reasons (the so-called classification “E”).⁶

The political bodies within the Communist Party of Czechoslovakia, the People’s Militia, the national administration and self-administration bodies, especially the security services (State Security, Public Security), the Czechoslovak People’s Army, the Border Guard and the Guard of the Interior, the prosecution offices, state and people’s courts, national committees etc. participated in different forms of repression. With very few and rare exceptions, the Communist regime protected these bodies and didn’t allow for them to be prosecuted, frequently not even in cases when their members or employees broke valid legal standards.

LEGAL CONDITIONS OF INVESTIGATION OF POLITICALLY MOTIVATED CRIMES

It was already during the “Velvet Revolution” at the end of 1989 that the investigation authorities were overloaded with applications demanding the politically motivated crimes committed during the 1948–1989 period by the communist nomenclatura, the repressive forces and other state bodies to be investigated. In this way, the citizens tried to pave the way for justice, yet according to valid legislation, their only recourse were the hitherto existing institutions: the General or Military Prosecution office, investigation units within the National Security Corps, various

inspection bodies that in turn were more or less occupied by communist structures supporters. The disappointment caused by these police bodies, or rather by the justice not working and also by the fact that the judicial system was occupied by Communist Party members too, frustrated people and made them mistrust the post-totalitarian system. There was an objective factor complicating the investigation which consisted of the long period throughout which the totalitarian regime prevailed and frequently, a significant stretch of time had elapsed since the crimes had been committed, the perpetrators and victims were very old (and had sometimes even died), written evidence was systematically being destroyed. Furthermore, part of the society was unwilling to help as it had wanted the criminal system to remain operational.

On November 13th 1991, the Act No. 480/1991 on the Era of non-Freedom was adopted by the Federal Assembly as a sign of political compromise declaring: “*Between 1948 and 1989, the Communist regime breached human rights and even its own laws.*” This act stated simultaneously that the legal acts adopted during this era may only be annulled by special acts.

It was as late as on July 9th 1993 that people managed to put through the Act No. 198/1993 Sb. on Illegality of the Communist Regime and on Resistance to it. This was an expression that people knew it was necessary to reappraise the Communist regime. The Czech Parliament representatives said that the Communist Party of Czechoslovakia, its management and members are responsible for the type of government in our country in the 1948–1989 period, “*which especially refers to the organized destruction of traditional European civilization values, to the wittingly committed breaches of human rights and freedoms, to the moral and economic decay accompanied by judicial crimes and terror against people who have another opinion – all of this having been done by replacing a functional market economy by a centrally organized one, by destroying traditional approaches towards property rights, by misuse of education, science and*

1 Michal Reiman: *O komunistickém totalitarismu a o tom, co s ním souvisí*, Praha: Nakladatelství Karolinum, Praha, 2000, 62.

2 This refers to the number of convicted people who were rehabilitated later on according to Act No. 119/1990 Sb., but excluding the people convicted by military courts. František Gebauer, Karel Kaplan, František Koudelka, Rudolf Vyhnaněk, eds., *Soudní perzekuce politické povahy v Československu 1948–1989. Statistický přehled*, Praha: ÚSD AV ČR, 1993, 64.

3 Otakar Liška a kol., eds., *Tresty smrti vykonané v Československu v letech 1918–1989*, Sešity No. 2, Praha: ÚDV, 2006; Ivo Pejčoch, *Vojáci na popravišti*, Cheb: Svět křidel, 2011. There is a specific category of several thousands of people killed or tortured to death in custody, prisons, penitentiaries or forced labor camps.

4 Martin Pulec: *Organizace a činnost ozbrojených pohraničních složek. Seznamy osob usmrčených na státních hranicích 1945–1989*. Sešity 13, Praha: ÚDV, 2006, 173.

5 Karel Kaplan: *Tábory nucené práce v Československu v letech 1948–1954*, Praha: Nakladatelství R, 1992, 136.

6 Jiří Bílek: *Pomocné technické prapory 1950–1954*, Praha: Nakladatelství R, 1992, 53.

culture for political and ideological reasons and by recklessly destroying nature.”

The Parliament stated that the Communist regime including those who had been supporting it, had committed the following:

- “a/ deprived its citizens of any opportunity to freely express their political will, forced them to hide their opinion about the situation within the country and made them say they agreed even with things they actually regarded as a lie or a crime – all this being done under the threat of persecution of the people, their families or friends,*
- b/ abused human rights systematically and consistently, suppressing certain political, social or religious groups of people,*
- c/ breached the fundamental principles of a democratic constitutional state, international contracts and even its own laws, posing thus the Communist Party's and its representatives' will and interests above the level of law,*
- d/ ade use of any power instruments for the purposes of persecution, especially:*
 - executed, murdered, incarcerated people in prisons and forced labor camps, making use of brutal methods including physical and psychological torture and exposure to inhuman ordeals during investigations and during incarcerations,*
 - deprived people arbitrarily of property and breached their property rights,*
 - hindered people from doing their employment, occupation or function and prevented them from achieving a university or vocational degree,*
 - hindered them from travelling freely abroad or returning back freely,*
 - drafted people for army service in the Technical Support Battalions or in the Technical Battalions for an indefinite period of time,*
- e/ the regime didn't hesitate to commit crimes in order to achieve its targets, enabling crimes to be committed with impunity and offering unjustified benefits to those participating in those crimes and persecutions,*
- f/ formed an alliance with a foreign power upholding the above-mentioned state of affairs with this power's occupation army from 1968 onwards.”*

The law stated that the functionaries, organizers and instigators within the communist regime and its political as well as ideological sphere are entirely co-responsible for the crimes that had been committed as well as for other issues.

The regime based upon Communist ideology which had absolute power from February 25th 1948 until November 17th 1989 in respect of governing the country and the Czechoslovak people's fate, was declared to be criminal, illegal and despicable especially due to the above-mentioned acts. Furthermore, the Communist Party was declared to be a criminal and despicable organization, like other organizations based upon its ideology, i.e. organizations that strived for the suppression of human rights and the democratic system.⁷

Again, the act declared support for anybody who had been unjustly affected or persecuted by the regime, but who had not been supporting this regime stating that such a person deserved some kind of participation and moral satisfaction. Additionally, the Czech government was empowered to make up for some injustices committed towards Communist regime opponents or towards people affected by this regime's persecutions – be it in the social, health or financial sphere. What followed during

the next decade of government was social support for former political prisoners, for people sent to military forced labor camps or to technical support battalions, or for people who were arrested or exmatriculated etc.

CRIMINAL PROSECUTION OF THE CRIMES OF THE PREVIOUS POWER

This very important legal standard significantly influenced the subsequent criminal prosecution of Communist crimes. The period between February 25th 1948 and December 29th 1989 still didn't count as being part of the limitation period *“if a politically motivated final court conviction or acquittal had been proclaimed that would be incompatible with the fundamental principles of the constitutional order within a democratic state.”* This paragraph enabled the Office for the Documentation and the Investigation of the Crimes of Communism, the prosecuting offices and the courts to continue criminally prosecuting the Communist regime representatives.

Last but not least, this act significantly set the way towards establishing a legal standard regulating rebellion and resistance against the Communist regime which on the one hand provided for these movements to be put on the same level as resistance against the Nazi regime and furthermore led to these movements being acknowledged: *“The people's resistance against this regime which they expressed – be it individually or in a group – due to their politically, religiously or morally guided democratic conviction through rebelling against the regime or through another activity or which they expressed wittingly and in public, on national territory or abroad, even in an alliance with a foreign democratic power, was a legitimate, justified act which deserves to be acknowledged.”*

The fact that the Communist Party has not been banned, the fight for its electorate, the significant polarization of legislative acts addressing significant problems with the totalitarian past, or rather with the necessary transformation of the legal system, public administration and the whole society during the transition from the totalitarian regime towards a democracy caused the process of putting through the legislative as well as factual means for at least a partial remedy to these problems to last until now – and this is definitely to be regarded as a negative aspect.

STATUS OF INVESTIGATING AUTHORITIES

The first specialized institution to have been established was the **Department for Documentation and Investigation of State Security Activities under the Federal Ministry of the Interior** set up in the middle of September 1991, which was directly controlled by the minister who had the task of analyzing archive materials, dealing with proposals made by natural as well as legal persons in relation to the State Security, and who was to investigate crimes committed by members of the Communist secret police. Although the volume of staff under the guidance of Jiří Šetina didn't exceed twenty people, this department managed to process 56 proposals during 1991 and 245 in 1992.

⁷ For comparison, see Pavel Žáček, *Boje o minulost. Deset let vyrovnávání se komunistickou minulostí*, Brno: Barrister & Principal, 2000, 67–68.

Shortly before Czechoslovakia broke up into the Czech Republic and Slovakia, to be more precise – in November 1992 – the department was transformed into a new Office for Documentation and Investigation of State Security Activities, under the Investigation Office for the Czech Republic. The management of the Office for Documentation and Investigation presided over by the political prisoner Lubomír Blažek preferred to gradually educate its own investigators and documentarians (experts). Logically, the demands on the respective police officers and civil employees were very high as far as suitable character requirements were concerned – no one compromised by a burdening relationship towards the pre-revolutionary power could become an employee of this office.⁸

The **Coordination Centre for the Documentation and Investigation of Violence against the Czech Nation from 8. 5. 1945 until 31. 12. 1989**, i.e. an office that was part of the General Prosecuting Office of the Czech Republic and managed directly by the General Prosecutor, was founded in March 1993. The coordination centre's main task was solving crimes against peace and humanity, or possibly further extraordinarily severe crimes committed in relation to citizens, and deducing the legal responsibility for the revealed illegal acts. Solving these crimes was to refer both to illegally acting people, as well as to leading functionaries who had caused or ordered such an activity. Apart from solving, documenting and investigating, the coordination centre was to carry out an analysis and publish the specific results of its activities.

Yet the investigation files from the former Investigation Directorate at the State Security became the main information sources. The coordination centre employees tried to secure further information and evidence via questionnaires that were to serve for recording cases of persecution and to note down specific testimonies.

From May until November 1993, the coordination centre received 538 applications, solving 214 of these cases: 7 were passed on for criminal prosecution, 10 were postponed, 7 were referred to the Office for Documentation and the Investigation, 19 to another department within the General Prosecuting Office, 28 to the Regional Prosecuting Offices, 3 to the Central Military Prosecuting Office, 140 cases were terminated another way.

The transformation process from the prosecuting offices to the Prosecutor's Offices was accompanied by this office's new orientation and by the new title of the authority – **Centre for Documentation of the Unlawfulness of the Communist Regime of the Ministry of Justice of the Czech Republic**.⁹

It was as late as on the advent of the Act on the Illegality of the Communist regime and Resistance against it when it was stated that the period from February 25th 1948 until December 29th 1989 does not count as a limitation period *“if a politically motivated final court conviction or acquittal had been proclaimed that would be incompatible with the fundamental principles of the constitutional order within a democratic state.”* (§ 5). This paragraph de facto provided for the investigation and criminal prosecution of some of the most severe communist crimes.¹⁰

Until December 1993, the *Office* for documentation and investigation dealt with 1,135 suggestions directed at State security members concluding 616 cases. It mainly focused on files that had been handed over after the inspection of the Federal Ministry of the Interior had been abolished. Approximately 200 suggestions referred to people labelled as secret collaborators – agents

where the criminal prosecution of an unknown delinquent was demanded.¹¹

In spite of this, it had been demonstrated by the years of 1993/1994 that the Office for the Investigation and Prosecution which was de facto the only state institution responsible for re-appraising the past, had been founded too late and vested with too little powers. It appeared on the stage at a time when the deceitful opinion among most of its partners – the administrators of the secret archive materials – prevailed that they had already completed the reappraisal process with the past.

In March 1994, an agreement was concluded between the office and the centre in order to prevent the duplicity of new applications. In August 1994, the office's management stated that it was focusing on 1,400 cases, estimating that it would be possible to start criminal prosecution in about less than one percent of the cases.

By the end of the limitation period for a public official's abuse of power (which is by December 29th 1994), the Office for Documentation and the Investigation of Crimes of the State Security concluded 1,055 applications; in 44 cases, the investigators filed charges against the respective people.¹²

In January 1995, the office and the centre were united and the **Office for the Documentation and Investigation of the Crimes of Communism** was founded, chaired by the dissident and politician Václav Benda. Defining the new office's competence, the Minister of the Interior made use of § 5 of the above-mentioned act that defined the limitation periods in the Communist era. Apart from checking notifications and applications as well as investigating crimes committed by Communist functionaries, organizers and supporters in the period from February 25th 1945 until December 29th 1989, the office was to focus on reports, suggestions, investigations of crimes and on detecting the perpetrators. Last but not least, it was to collect, evaluate and document facts and activities connected to the illegality of the Communist regime and the support against it.

In November 1995, V. Benda said in one of the interviews he gave about the Office for the Documentation and Investigation that this office represents *“a unique investigation authority of this kind within the whole post-communist block, vested with the full powers of a police force, yet being confined to the 1948–1989 era and to crimes that can be characterized as having been committed under political pressure. In contrast to usual investigation units and taking into consideration the above-mentioned restrictions we are also obliged to document crimes that cannot be prosecuted due to the perpetrators having died or due to insufficient evidence.”* He described the Czech Republic's approach in reappraising the totalitarian past as *“hesitant, but in a way purposeful”* because *“we intend to gradually reappraise the past.”*¹³

Carrying out its activities, the investigation department paid due respect to the Constitution of the Czech Republic and

8 Žáček, *Boje o minulost*, 59–60.

9 Ibid. 60–65.

10 The Act No. 198/1993 Sb., on the illegality of the Communist Regime and the Resistance against it, § 5. For comparison, see Jiří Kozák, *Právo na pomezí diktatury a demokracie. Právní vyrovnání s totalitní minulostí v České republice po roce 1989*, Praha: Auditorium, 2014, 87–88.

11 Pavel Žáček: Překonávání totalitní minulosti na český způsob, in Petr Fiala, František Mikš, eds., *Česká konzervativní a liberální politika. Sborník k desátému výročí založení revue Proglas*, Brno: CDK 2000, 393–394.

12 Žáček, *Boje o minulost*, 69–71.

13 Ibid. 80–81.

the Charter of Fundamental Rights and Freedoms following the Criminal Code, the Criminal Act, the Act on the Police of the Czech Republic and other legal rules and internal standards applicable to the police and the Ministry of the Interior. It started its investigations based upon suggestions and criminal information handed in by natural and legal persons, or upon its own initiative which was mostly based upon archive materials having been researched by the documentation sector with a specific suspicion that a crime had been committed or possibly, based upon information that resulted from already ongoing investigations.¹⁴

IDENTIFICATION OF THE CRIMINALS OF THE TOTALITARIAN REGIME

The Office for the Documentation and Investigation focused on investigating more important cases related to high-ranking party and security nomenclature within the Communist Party of Czechoslovakia (high treason of 1968), or on cases related to medium- and higher-ranking security apparatus posts (e.g. the “Asanace” (*Sanitation*) campaign, i.e. the forced removal of unpleasant people to foreign countries), shooting on the border or the escapes from forced labor camps, or the torture methods applied by investigators during the fifties.¹⁵

At the end of 1996, the investigators pertaining to the Office for the Documentation and Investigation were in the process of criminally prosecuting 110 people. In 30 cases, the investigation was concluded and passed on to the prosecutor's office with the proposal to file charges. In approximately 8 cases, the action was brought before the court. The office was forced to stop several other criminal prosecutions or to postpone them – due to failure of evidence, the perpetrator having died or due to other reasons. At that time, director Benda declared: *“The harsh reality is that most of the crimes will remain unpunished. Let's not deceive ourselves that we could punish all the evil that has been committed during the 42 years of the Communist regime. Our work mainly serves the future, creating a constitutional state. We do want to reestablish the knowledge that any crime, be it a crime committed with the utmost support from above, can be punished once. We do want that anybody who committed such crimes lives in fear until the end of his days that he may have to reap the consequences of his behavior.”*

In April 1997, the overall number of accused people decreased to 100, yet altogether, 13 people were charged, and 4 people faced trials. One month later, V. Benda mentioned: *“Currently, more than 100 people are being prosecuted and we are counting with the option of prosecuting several other hundreds, yet within two or three years, this number shall be reduced to about one tenth. It's realistic to assume that a more complete documentation of the crimes of communism will consume another ten to fifteen years.”* He again stressed the international scope of the office's activity: *“We are the only regular police authority of this type within the countries of the former Eastern Block. Not even the Gauck-Authority in Germany, which has three thousand five hundred employees, is an institution with this purpose. At first, our concept had been doubted by people from abroad, but the situation has radically changed. We are now being admired by the West and the East, people are trying to establish similar institutions.”*

During 1997, the Office for the Documentation and Investigation of the Crimes of Communism was also entrusted with some cases falling into the time period prior to February 1948. This

was one of the reasons why the Minister of the Interior broadened the power of this authority to crimes committed in the time from 1939 to 1945 *“on citizens of Roma origin in connection to the Protectorate authorities that founded and managed punitive detention camps”*.

By the end of 1997, the office had processed 39 proposals for indictment, the state prosecutors accused 25 people, yet hitherto, only one had been sentenced – the former State Security officer Jaroslav Daniel. At that time, director Benda complained about some judges' “ideological” approach. *“I underline that this isn't a universally present phenomenon but it's the case of individual judges who are starting to interpret the cases in a purely ideological way. I would say that this is a large-scale offensive intended to stop the prosecution of communist crimes from the previous era...”*¹⁶

Following the elections of 1998 won by the Social Democratic Party which was the sole party to form the government, indifference about the office's activity prevailed and changes in its management were carried out with bureaucratization and subsequent ineffectiveness prevailing and almost wiping out the investigation of crimes and the documentation of power support during the communist regime era. The office's management basically switched to a rigid mode where quality was replaced by quantity. The fact that the leading functionaries from this office hardly appeared in the media and that the subordinates received hardly any support, furthermore meant that the office which had been initiating a qualified discourse in society and determining the topics of discussions turned into a toothless institution, some kind of alibi established by the state and the police for the political prisoners and for foreign countries.¹⁷

In spite of that, the Crime Act Amendment introduced by Act No. 327/1999 Sb. succeeded in prolonging the limitation period thanks to the provision of § 67 subs. 1 letter b) of the Crime Act from ten to twelve years stipulating at the same time the imprescriptibility of a limited scope of crimes (listed in § 67a letter d) of the Crime Act). The punishability of the crimes committed in the period from February 25th 1948 until December 29th 1989 didn't end after the limitation period of these crimes ran out *“where the maximum period of imprisonment is at least ten years, if a politically motivated final court conviction or acquittal had been proclaimed that would be incompatible with the fundamental principles of the constitutional order within a democratic state, and if these crimes were either committed by public officials or in connection to prosecuting individuals or groups due to political, racial or religious reasons.”*¹⁸

In spite of the crisis, investigating Communist crimes didn't stop. In 2005, the structure of the former Communist regime representatives criminally prosecuted by the Office for the Documentation and Investigation of the Crimes of Communism under the Criminal Police Administration was as follows: 114 National Security Corps members (there were 2 members of the Police with the other prosecuted people coming from the State Security – including chiefs of units within the political police), 30 border

14 Pavel Gregor, “Informace o činnosti odboru vyšetřování”, in *Securitas Imperii*, 2006, (14), 424.

15 For comparison, see Pavel Žáček, Proces demokratizace a vyrovnávání se s totalitou v oblasti práva, in *Auseinandersetzung mit der Totalitären Vergangenheit. Deutsche und Tschechische Wege nad 1989 – ein Vergleich*, Berlin: BWV, 2008, 185–186.

16 Žáček, *Boje o minulost*, 79–85.

17 Ibid, 95–107.

18 Gregor, “Informace o činnosti odboru vyšetřování”, 424.

guard members, 13 Communist Party nomenclatura cadre members (including people from the Federal and National Ministry of the Interior) seven judges, six prison guards, four prosecutors (one of them being an investigator), two military intelligence members, state administration functionaries and doctors, one General Staff of the Czechoslovak People's Army member and one intelligence member.¹⁹

By October 2006 the criminal prosecution of 188 people had started; and in 98 of these cases, the state prosecutor agreed with the investigation results, i.e. came to the conclusion that a crime had been committed and that it had been committed by the accused person. 29 people were finally convicted, 21 of these people received a suspended sentence with a probation period. Furthermore, the courts came to final conclusions in the cases of 48 people who were acquitted or where criminal prosecution was stopped due to amnesty, as a result of a limitation period having run out or due to death. As far as the other cases are concerned, no final decision was arrived at.

After the checking procedure, the investigation department decided to put aside 700 other cases and in 450 of these cases it came to the conclusion that it wasn't possible to prove that a crime had been committed (§ 159a subs. 1 Criminal Code); in 123 cases, the suspect had died or been granted amnesty which prevented the opening of criminal proceedings (§159a subs. 2 Criminal Code); and in 127 cases, the reason for putting the cases aside was that it wasn't possible to detect facts which would enable the opening of the respective person's criminal proceedings (§ 159a subs. 4 Criminal Code).²⁰

At the end of 2006, the Ministry of the Interior management decided to transfer 22 workplaces from the documentation department, i.e. people who were in no way linked to the course of the investigation itself, to the Department of Security Services of the Ministry of the Interior (which was carried out on February 1st and on July 15th 2007) – this was part of the preparations for adopting the act on establishing the National Memory Institute (respectively Institute for the Study of Totalitarian Regimes and Security Services Archive). The Office for the Documentation and Investigation furthermore had 36 system-internal police staff and 2 civil employees.

According to statistics provided by the Office for the Documentation and Investigation of the Crimes of Communism, this office prosecuted 212 people in 114 criminal cases during the period ranging from 1995 until 2013. This institution's police officers filed 113 proposals for action at the respective prosecuting offices (36 of these were placed repeatedly) related to 136 accused people. The prosecutors subsequently accused 112 people in 84 (21× repeatedly) cases. Until now, the courts have come to a final decision related to 54 people. According to available information, the lowest sentence was a 1 year suspended sentence with a probation period of 18 months and the highest sentence 6 years of unconditional detention. This statistic does not include data on people criminally prosecuted or sentenced prior to the Office for the Documentation and Investigation's establishment.

Furthermore, during the same period, there were 41 actions initiated at the Supreme Prosecuting Office in Brno for

extraordinary remedies to achieve the respective courts' final decision (this referred to a total of 106 people). This number consisted of:

- 16 applications for complaints initiated due to a breach of law resulting in a disadvantage to the accused,
- 11 applications for reviews of an appeal, again resulting in a disadvantage to the accused people,
- 12 applications for complaints initiated due to a breach of law resulting in an advantage for the accused – referring to the period prior to 1989 (the so-called remaining penalty),
- 2 applications for revision.

Hitherto, the Supreme Court of the Czech Republic has given its approval in 25 cases, whereas in 15 cases, the application was rejected.

The Office for the Documentation and Investigation also handed over information regarding crimes of aliens from the former USSR, Bulgaria, Hungary, the former GDR and Poland through the channels of international judicial assistance.²¹

LESSONS LEARNT AND RECOMMENDATIONS

Finally, it remains to be stated that also striving for the punishment of communist crimes was part of the transformation process – on the one hand, this was promoted as part of the process of introducing justice and on the other hand, it formed an indispensable condition for establishing a constitutional state. The process of criminal law reappraisal of the totalitarian past is to be commenced once the political conditions following the fall of the totalitarian regime enable this. If it is possible, a special police and judicial body shall be entrusted with investigating these specific crimes and this authority shall be composed of uncompromised people who are free of any connections to the former totalitarian regime (which also applies to judges who would lack any connections to the policy of the past). Above all, these investigation authorities' attention should be drawn to solving cases of murder, torture, politically motivated executions, judicial crimes and unclear deaths, manslaughter on the border and also corruption.

Punishing the most severe crimes committed by a totalitarian power is an important element of reestablishing the constitutional state and also represents an indispensable form of prevention against any other attempt which would lead to the usurpation of power. In this sense, it also needs to be stressed that restoring justice is a very difficult legal process where it's necessary to tackle retroactivity, presidential pardons etc., including a different approach towards the accused who are using all the conveniences available in a constitutional state to defend themselves. Prosecuting the judicial system's employees, especially the judges, remains another specific issue.

19 Pavel Žáček, "Úřad dokumentace a vyšetřování zločinů komunismu", in *Památ národa*, 2005, (2), 83.

20 Gregor, "Informace o činnosti odboru vyšetřování", 425.

21 Pavel Žáček, *Memory of Nations in Democratic Transition. The Czech Experience*, Praha: Zaostreno, CEVRO LKA, 2015, 38–39.

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REHABILITATION OF VICTIMS

MARKÉTA BÁRTOVÁ

INTRODUCTION

When the Communists took over power in February 1948, a period of a mass persecution of real or potential opponents of the new regime began in Czechoslovakia. In investigations and the following trials, there were illegalities consisting in counterfeiting of the evidence, provocations, fabricated accusations of “crimes against the state”, falsifications of expert opinions and using bestial methods of violence and psychological terror towards the imprisoned. Due to such methods of the police and judicial bodies, tens of thousands of Czechoslovak citizens were condemned to many years of imprisonment or to life sentences, more than two hundred people were executed for political reasons.

Efforts to re-open some trials or to open new trials of some cases were made by the convicts themselves already in the early 1950s. This actually happened to a very limited extent and the trials started to reopen approximately in 1954. For the re-examination of some show trials, the state gradually established several investigation commissions that looked at these cases, however, basically all of the show trials concerned the former members of the Communist Party of Czechoslovakia – the victims of purges in the party. These commissions entered into history either under the name of the communist officer who was at its head, or of the place where it held its sessions. They are the Barák's Commission (1955–1957), Kolder's Commission (1962–1963) and Barnabite Commission (1963). The last commission called Piller's Commission (1968–1971) also looked at other cases, not only at cases concerning the Communist Party.¹

In general, the state tried to deal with the prisoners' situation from the 1950s by declaring two extensive general pardons in 1960 and in 1962. However, these were not the general pardons of the President of the Republic in its proper sense as we know them from the period after the fall of communism in 1989. In fact, it was the leadership of the Communist Party of Czechoslovakia that decided authoritatively on their scope. By declaring these general pardons, the top apparatus of the Communist Party of Czechoslovakia intended to avoid revealing the truth about the course of the show trials from the beginning of its rule, to “come to terms” with its history, and, at the same time, if possible, to look like someone “who showed good will”. However, the objective to trigger positive reactions, if there were to be some, did not work. The former political prisoners released from prison both before and during these general pardons, did not feel that they got any moral or social satisfaction in this way. Moreover, even after their release from prison, the former prisoners had to face the consequences of their conviction, including permanent surveillance by the State Security or difficulties in getting a job, linked with the ban on re-entering their original profession. Persecution of the convicts' families was not an exception either. Their children were not allowed to study at high schools or universities because of the “inconvenient cadre profile” of their parents, and if they exceptionally could, they were not allowed to freely choose the field of study they were interested in.

Complaints about illegal investigations and judgements were increased over the years and information about the course and the background of the show trials were brought to light. The public was more and more interested in these issues and the call for rectification of former crimes in the changing political climate became one of the key moments that contributed to the change in society and to the formation of opposition forces leading to the Prague Spring in 1968.² During this period, the reformist wing of the Communist Party of Czechoslovakia got more and more support, promoting “socialism with a human face”, i.e. political loosening in general and at least a partial democratisation of the situation in the state. At that time, the debate about the possibility of anchoring the judicial rehabilitation in a separate act was stirred. A supporter of this idea was also the group of the “reformed” Communists formed mainly by the recently rehabilitated Communist Party members who were condemned in the 1950s.³ The rehabilitation of both communist and non-communist victims of past unlawfulness by means of a legal measure was included in the Action Programme of the Communist Party of Czechoslovakia⁴ in April 1968, and soon after preparations of the act was launched on request of the Presidium of the Central Committee of the Communist Party of Czechoslovakia.

K 231 – ASSOCIATION OF FORMER POLITICAL PRISONERS

In the relaxed social environment which even favoured various civic activities for a short period, the idea of creating an association of former political prisoners was revived. It was a very large group as, according to estimates of that time, the number of individuals condemned over the two decades, from 1948 to 1968, mainly on the basis of Act No. 50/1923 Sb., *on the Republic Protection*, and Act No. 231/1948 Sb., *on Protection of the Democratic People's Republic*,⁵ reached up to 128,000 people.⁶ At the end of March 1968, the constituent meeting of the preparatory committee of Klub 231 (also referred to as “K 231 – Association of former political prisoners”

1 About these commissions: Josef Halla, *Průběh a podmínky rehabilitací a odškodnění v českých zemích*, in Hynek Fajmon, ed., *Sovětská okupace Československa a její oběti*, Brno: CDK, 2005, 85–97.

2 Karel Kaplan, Pavel Paleček, *Komunistický režim a politické procesy v Československu*, Brno: Barrister & Principal, 2001, 212.

3 Petr Blažek, “Akty revoluční spravedlnosti”. Limity pražského jara, soudní rehabilitace a bývalí političtí vězni, in Pavel Žáček a kol., *Vyjádření úcty a vděčnosti. 2. sborník o protikomunistickém odboji*, Praha: MO ČR – VHÚ, 2015, 241.

4 Jitka Vondrová, Jaromír Navrátil, Jan Moravec, *Komunistická strana Československa. Pokus o reformu (říjen 1967 – květen 1968)*. Brno: Doplněk, 1999, 332–333.

5 Full text of the act available on-line: http://www.totalita.cz/txt/txt_zakon_1948-231.pdf (cited on 28/4/2017).

6 Hana Fuková: *Rehabilitace politických vězňů v Československu. Zákony o soudní rehabilitaci z let 1968 a 1990*, Praha: Diploma thesis FSV UK, 2012, 12. Available on-line: <https://is.cuni.cz/webapps/zzp/detail/105840> (cited on 13/4/2017).

or simply “K 231”) was summoned in Prague⁷ where several thousand people gathered. The name of the club symbolically referred to the number of the already mentioned Act No. 231/1948 Sb. During the following three months, the club established committees in all the regions and approximately 80,000 people were interested in membership.⁸ The main topic of the discussions of the club members, which was one of the fundamental reasons why political prisoners organised themselves in this way, was the judicial rehabilitation. The rehabilitation would result in a restoration of their societal and social status and bring them moral satisfaction.

At first, the K 231 truly could contribute, together with various institutions, to the preparation of the rehabilitation act. The most important thing the club leadership emphasised was the blanket rehabilitation, that is that the majority of persons would be rehabilitated directly by law. Only in cases when a person was judged, besides being judged for political acts, for a delict of criminal nature (battery, rape, murder, etc.), individual investigation was to be carried out. In May 1968, the legal commission of the K 231 even drafted its own bill called act on general reconciliation that was submitted for further negotiations.⁹ However, the individual assessment model for each demand was pushed through and the concepts of the association were not carried out. The main reason for the refusal of the proposal of general rehabilitation was that the rehabilitation would deny by law the Czechoslovak legislation itself and recognize it as being unlawful and that there would be a “risk” that even those who were “sentenced fairly” would be rehabilitated by court.¹⁰ Moreover, under pressure from Moscow, the whole Presidium of the Central Committee of the Communist Party of Czechoslovakia opposed the official authorisation for the K 231 to be a legally operating organisation, including the Czechoslovak “pro-reform” Communists. A campaign was launched aimed at dishonouring the club and damaging its reputation in the public eye and making any kind of its operation impossible.¹¹

On 25 June 1968, the National Assembly enacted Act No. 82/1968 Sb., *on Judicial Rehabilitation*.¹² Even though it was the first serious attempt to comprehensively rectify the persecutions from 1948 to the enactment of the cited act, its wording was disappointing for the former political prisoners.

ACT NO. 82/1968 SB., ON JUDICIAL REHABILITATION

According to the legislative body, the act was supposed to ensure a quick and effective rectification of injustices caused in the previous period to citizens by the unlawful use of criminal repression. However, in the preamble of the act, it was clearly stated that rehabilitation regards only those convicts who became the “victims” of the investigation and judicial system of the past period: “... In the first place, it is necessary that citizens who were convicted and punished as saboteurs of socialism, although they did not violate the interests of the socialist society by committing any criminal activity, be urgently and fully rehabilitated.”¹³ The explanatory memorandum of the act states that “deformations in the department of criminal justice affected many citizens. Judgements and heavy punishments especially because of crimes against the republic also concerned those citizens who were not enemies of the socialist establishment and did not develop any criminal activities against it: on the contrary, they were usually [...] active builders of socialism.”¹⁴ So, the act applied to the above mentioned citizens; on the other hand, the citizens

who actively opposed the communist regime, and were therefore, according to the legislative body, judged “rightfully”, were excluded from the act. “However, it is not possible to remove acts of revolutionary legality, weaken or even deny the socialist legal order. The rehabilitation cannot apply to enemies of building socialism who violated the valid laws by their crimes against the republic [...] and were rightfully punished by these laws.”¹⁵

The review of cases started on 24 October 1948, i.e. the enactment day of Act No. 231/1948 Sb., *on the Protection of the Democratic People’s Republic*. Pursuant to the act, the review concerned convictions in criminal cases which were ruled in the original proceedings in the first instance by

a/ the Supreme Court

b/ the former State Court, established by Act No. 231/1948 Sb.,¹⁶

c/ the Regional Court or Higher Military Tribunal¹⁷ from 1 January 1953 to 31 July 1965.

And it was in the trials before these institutions when the biggest violation of lawfulness occurred systematically from 1949 to 1956, and to a lesser extent, later in several waves until July 1965.¹⁸

7 About the topic in general, comparison Hana Grisová, *K 231. Sdružení bývalých politických vězňů. Příčiny jeho vzniku a zániku*, Olomouc: Diploma thesis FF UP, 2009. Available on-line: <http://theses.cz/id/ewfz13/72104-117133767.pdf> (cited on 13/4/2017). Filip Růžička, *Klub K 231 a jeho pobočky*. Diploma thesis, FF Univerzita Pardubice, Pardubice 2013. Available on-line: http://dspace.upce.cz/bitstream/handle/10195/49470/RuzickaF_KlubK231_VV_2013.pdf?sequence=3&isAllowed=y (cited on 13/4/2017).

8 Hana Fuková, *Rehabilitace politických vězňů v Československu*, 13.

9 For the full text of the bill see Petr Blažek: “*Akty revoluční spravedlnosti*”, 253–255.

10 Hana Fuková, *Rehabilitace politických vězňů v Československu*, 15.

11 Petr Blažek, “*Akty revoluční spravedlnosti*”, 251. The same rejecting stand was taken by the Communist Party of Czechoslovakia leadership towards the Club of Committed Non-Party Members, uniting people interested in political engagement who did not want to be members of the Communist Party of Czechoslovakia. The Club of Committed Non-Party Members adhered to the ideals of freedom and democracy and it restored its activity after November 1989. Comparison of The Club of Committed Non-Party Members, available on-line: <http://www.kan.cz/home> (cited on 20/4/2017).

12 Full text of the act available on-line: <https://www.zakonyprolid.cz/cs/1990-119> (cited on 20/4/2017).

13 Act No. 82/1968 Sb., *on Judicial Rehabilitation*, preamble.

14 Miloš Jestřáb, Vladimír Hladil, *Soudní rehabilitace. Komentář k zákonu č. 82/1968 Sb., o soudní rehabilitaci*. Praha 1969, 19.

15 Ibid.

16 The State Court, established by Act No. 232/1948 Sb., *on State Court*, was active from 24 October 1948 to 31 December 1952. It was mandatorily competent to rule on crimes, respectively after 1 August 1950 on criminal offences, for which a death sentence or imprisonment longer than 10 years were imposed by the act. According to the Act No. 231/1948 Sb., *on Protection of the Democratic People’s Republic*, these were mainly the following acts: high treason, spying, spying against an ally, sabotage, etc. The State Court also ruled on criminal offences committed by people subject to military jurisdiction, and used the military criminal law in such cases.

17 The Regional and Higher Military Tribunal ruled on criminal offences, if the Act No. 231/1948 Sb., *on Protection of the Democratic People’s Republic*, stipulated imprisonment of at least five years, and on criminal offences of terror, sabotage, subversion of the republic and damage to the states of the world socialist system.

18 On 31 July 1965, the amendment of the criminal code, Act No. 57/1965 Sb., entered into effect and it was seen as a certain turning point, as it extended the possibilities of the defence to intervene already in the pre-trial proceedings and to control the legal procedure executing the investigative actions. Thus, it was supposed that it ensured a crucial limitation of the possible lawless acts in investigations and the following trials. Miloš Jestřáb, Vladimír Hladil, *Soudní rehabilitace*, 30.

The review proceeding took place before special panels of the Regional and Higher Military Tribunals in the first instance, and in the second instance, i.e. after the appeal of the claimant against the judgement of the first instance, before the special panel of the Supreme Court. Such court panels, created especially for the needs of the Rehabilitation Act and formed by three professional judges for the first instance and by five professional judges in the second instance, were to ensure quick and correct court proceedings. The proceedings were initiated at the request of the convicts, and in the case of their death, of their relatives in the direct line (grandparents, parents, children, grand-children, great-grandchildren) or their siblings, adoptive parents, adoptees, spouses and partners. The proposal to initiate the review proceeding of a given case could have been submitted by the prosecutor himself, for example in the case that the formerly convicted person died and none of the entitled persons submitted a request for a review. Social organisations were denied the right to submit a proposal, on the grounds that “it could lead to reproaches and suspicions of using political influence and exerting a certain pressure.”¹⁹

It was possible to submit the proposal both in a written form and in the form of a testimony in the record at a competent court panel. At the same time, it was also possible to withdraw the proposal. After that, the court asked for all the necessary documents and the addressed national bodies concerned, as well as social and economic organisations, were obliged to provide all the documents regarding the case to the court, if they had them. Thus, they could not deny providing the documents due to the obligation of keeping state, service or economic secrets in the case of matters linked with the original criminal proceeding.

The act cancelled in a blanket manner only some less serious cases that were not originally created by a court decision. These were mainly decisions on placement into Forced Labour Camps which were made by a three-member commission subordinate to the competent Regional National Committees.²⁰ The act enumerated and stipulated the only reasons for which it was possible to cancel the original legally effective judgement of a conviction in the review procedure and to replace it with a new statement:

“If the panel rules that the reviewed decision is defective because:

- a/ it was made on the basis of wrong findings, especially that it was based on artificially falsified accusations, or fake or falsified evidence,
- b/ procedural rules were grossly violated, especially by enforcing a confession by violence or in other illegal ways,
- c/ the activity which the convicting decision was based on was provoked, organised or directed by security bodies,
- d/ the act was recognized as criminal in contradiction to the criminal law,
- e/ the act was qualified more strictly than it ensues from the act,
- f/ the type of penalty imposed was clearly in contradiction to its legal purpose, or the level of the penalty was in clear disproportion to the level of danger of the act to society, it will cancel the decision, either fully, or partially (the part which is defective), and it will decide on the case using its own judgement.”²¹

In the opposite case, the panel rejected the proposal by its ruling.

The act looked quite extensively at the material indemnity of the rehabilitated persons. The original estimates of expenses by the state amounted to approximately 2.5 billion Czechoslovak Crowns (Kčs).²² The granted indemnity was supposed to cover the compensation of lost wages calculated according to average

earnings that the rehabilitated persons earned before they were imprisoned and to the time of their imprisonment. There was a limit in the provision of this compensation – the amount of the compensation could not exceed 20,000 Czechoslovak Crowns a year.²³ Moreover, the indemnity was reduced by finances that the former prisoners earned during their service of the term of imprisonment.

Furthermore, the rehabilitated persons were entitled to an indemnity for health damage that they sustained during their custody and imprisonment and its maximum amount was 40,000 Czechoslovak Crowns. The financial indemnity was awarded to the rehabilitated persons even in cases where they lost earnings due to their inability to work or to their lower ability to work caused by the imprisonment. However, the exact limit was set in this case as well – the indemnity together with the wage and pension was not allowed to exceed the amount of 1,600 Czechoslovak Crowns.

If the rehabilitated person made a claim for an indemnity of the paid costs of the criminal procedure, custody and service of the term of imprisonment, costs of defence or financial penalty, i.e. issues that were usually an integral part of the original punishment, these issues could be dealt with within the rehabilitation procedure and financially refunded by the state, too. The act included the possibility of returning the confiscated property or the forfeited thing to the rehabilitated person after the former judgement. The act preferred “natural restitution”, however, if this was not possible or effective, it provided for the possibility to have the “lost” property reimbursed by the state via the Ministry of Justice.

However, the act did not affect the provisions of the then in force criminal code stipulating that the entitlement to indemnity did not appertain to the former prisoner under certain circumstances. The indemnity for the service of the term of imprisonment could not be awarded to a person who, according to the statement of the court, “caused” the custody by himself, e.g. by an attempt to escape. Furthermore, it could not be awarded to a defendant who was acquitted or if a decision not to proceed with the case was taken due to a general pardon.²⁴

A very important fact regarding regaining the standard of living of the former political prisoners is that the act provided the rehabilitated person the possibility to modify the height of the paid state pension. In fact, the calculated pension benefit of the majority of convicts was very low due to their imprisonment. The time of imprisonment was therefore added to the time of worked years of the rehabilitated persons, as if they had worked all this time in the job they had had before their conviction.

19 Ibid., 39.

20 The Forced Labour Camps were established by Act No. 247/1948 Sb., on Forced Labour Camps, with the effective date from 17 November 1948, for persons avoiding work, persons who “threatened the building of people’s democratic establishment or the economic life, especially the public supply”, and persons whose convictions were legally effective. Decisions about people whose convictions were not legally effective were made by the above mentioned commissions. It was possible to imprison people in the Camps of Forced Labour for the period of 3 months up to 2 years. Miloš Jestřáb, Vladimír Hladil, *Soudní rehabilitace* 89. General comparison of the Camps of Forced Labour: Mečislav Borák, Dušan Janák, *Tábory nucené práce v ČSR 1948–1954*, Šenov u Opavy: Tilia, 1996.

21 Act No. 82/1968 Sb., on Judicial Rehabilitation, section 15.

22 Petr Blažek, “Akty revoluční spravedlnosti”, 246.

23 Act No. 82/1968 Sb., on Judicial Rehabilitation, section 27.

24 Comparison Miloš Jestřáb, Vladimír Hladil, *Soudní rehabilitace*, 13.

If the convicted and then rehabilitated person did not live to see the act in force, their heirs by intestacy were allowed to make a claim for the indemnity. If a person who was executed or died while serving the term of imprisonment was rehabilitated, the person who was factually provided with support and maintenance by the convict during his life or whom the convict was obliged to provide support and maintenance on a legal ground had the right to claim the indemnity of the lost support and maintenance. The basis for calculation of the compensating financial amount was again the average earnings the convicted persons received before the launch of the criminal prosecution against them.

With regard to the amount of the claims, the act stipulated that the persons concerned were paid compensation of 20,000 Czechoslovak Crowns in cash, and if the amount was higher, the rest was paid in government interest-bearing bonds, payable within 10 years at the latest.

When the rehabilitation judgement was made, both the formerly convicted person and the survivors were able to ask for its publication and this fact was also perceived as a way of moral satisfaction. The financial costs for publication of the rehabilitation judgement, usually in the same media the former convicting verdict was published, were covered by the state.

The legal provision on making persons who participated in the illegalities of the investigation responsible was to become crucial. The criminality of such acts was not to be barred by the statute of limitations before 1 January 1973, unless these criminal offences were already time-barred on the date of the effective day of the rehabilitation act. Therefore, the concept of retroactive effectiveness, which would restore the criminality of acts that were already time-barred, was not accepted with the reasoning that it would be in contradiction with the basic principles of the criminal law.²⁵ The Rehabilitation Act introduced a provision stipulating that members of the security apparatus who repeatedly and provably acted illegally and occupied public positions in the effective period of the act had to resign from their positions. The level of their guilt was to be assessed by workers of special three-member commissions established at the Ministry of the Interior, Ministry of Defence, General Prosecutor's Office, or eventually in other state bodies as needed. The decision on removing them from their position or on dismissal from their job could still be changed by a high commission which was to be created by the decision of the National Assembly and which the concerned person could appeal to against the decision of the first instance. However, such punishments of former investigators were probably carried out rather sporadically; there is no research depicting this topic. As far as the representatives of the judicial apparatus, i.e. judges or prosecutors, are concerned, the Rehabilitation Act established a review commission – a “disciplinary panel” formed by judges elected by the parliament which was supposed to look at individual cases. Nevertheless, there is no factual information either about investigations of the given persons or about their consequent punishments.

In general, we can state that only a few people from the State Security and Counter-Intelligence Corps stood trial and were convicted for cruelties which the imprisoned had to face during their custody. The judicial representatives who participated in the show trials imposing and executing death penalties were never investigated, let alone prosecuted, for their actions. Unfortunately, with only one exception,²⁶ they were not prosecuted after the fall of the communist regime in Czechoslovakia either.

To conclude this chapter we can state that pursuant to the act, requests for review could be submitted until 1 August 1969 and 23,306 people did so.²⁷ Until the amendment of the act in July 1970, 2,898 individual requests were heard, out of which 1,950 (65.2 %) claimants were fully acquitted, 247 claimants (8.3 %) benefited from the decision not to proceed with the case, the sentence was commuted for 157 persons (5.3 %) and 635 requests (21.2 %) were denied as unjustified. Out of the rest, 455 requests were withdrawn by the claimants before the court made a decision and 721 were transmitted to other institutions to deal with them.²⁸ With regard to the total number of convicts in politically motivated trials estimated at hundreds of thousands between 1948–1965, the result of the Rehabilitation Act was quite poor.²⁹ It was caused, besides other things, by another important fact: until then, there were actually no staff changes in the judicial apparatus and the courts employed the same judges as in the 1950s.

AMENDMENT TO THE REHABILITATION ACT

As has already been mentioned, the existing studies state that about 24,000 requests were submitted pursuant to Act No. 82/1968 Sb., on Judicial Rehabilitation.³⁰ This number would have been higher if the political situation had not changed after the occupation of Czechoslovakia by the armies of five states of the Warsaw Pact on 21 August 1968. This tragic event launched a “normalisation process” of the situation in the country and it had the following impact on the topic in question – the 1968 Rehabilitation Act was amended. The amendment, signed by state representatives on 8 July 1970, entered into force on 17 July 1970,³¹ modified and, in fact, destroyed the meaning of the Rehabilitation Act.³² It significantly limited the scope of the reviewed issues which in practice meant it made the rehabilitation of former political prisoners more difficult. Due to the amendment, many of the former prisoners did not even submit their request.

The explanatory memorandum, drafted to the Act on Judicial Rehabilitation amendment on the occasion of the Presidium of the Central Committee of the Communist Party of Czechoslovakia meeting on 19 June 1970, states that “the findings collected by the General Prosecutor's Office of the Czechoslovak Socialist Republic and the Supreme Court of the Czechoslovak Socialist Republic during 1969 on the implementation of Act No. 82/1968 Sb., on Judicial Rehabilitation, indicated many

25 Ibid., 121.

26 The only exception is Ludmila Brožová-Polednová (1921–2015) who between 1950–1952 worked as a prosecutor of the State Court, Prague Department. Brožová-Polednová was sentenced to 6 years of unconditional imprisonment in 2008 for her contribution to the show trial with Milada Horáková (1901–1950) who was sentenced to death. Her sentence was commuted by the pardon of the President of the Republic in 2010. For more see Petr Zídek, *Příběh herečky: Ludmila Brožová a její svět*. Praha: Dokořán, 2010.

27 Václav Veber, “O rehabilitacích a o tom, co s nimi souvisí”, in *Securitas Imperii*, 2010, (16), 1, 26.

28 Ibid.

29 On this topic, see also Jiří Hoppe, *Opozice '68. Sociální demokracie, KAN a K 231 v období pražského jara*. Praha: Prostor, 2009.

30 Václav Veber, “O rehabilitacích a o tom, co s nimi souvisí”, 26.

31 Full text of the Act No. 170/1970 Sb., amending the Act No. 82/1968 Sb., on Judicial Rehabilitation, available on-line: <https://www.beck-online.cz/bo/chapterview-document.seam?documentId=onrf6mjzg4yf6nzq> (cited on 20/4/2017).

32 Comparison Petr Blažek, “Akty revoluční spravedlnosti”, 247.

serious deficiencies.”³³ Some of them, allegedly e.g. the insufficient activity of prosecutors before the special panels or the incomplete investigation of the facts by the court, were, according to the memorandum, removed by organisational measures; others were found to be caused by the wording of some provisions of the act itself, and therefore, it was necessary to amend it.³⁴ The amendment changed the limit date until which the judgements were examined, from the originally stipulated 31 July 1965 to 31 December 1956 (!), and also excluded the alleged “issues of a criminal nature” from the review proceeding.³⁵ It completely removed several sections from the act, including the section which obliged the witnesses, or more precisely all state bodies and social and economic organisations, to submit the required material on request, as well as to otherwise satisfy the demands of the special court panel. At the same time, it denied these bodies and organisations the possibility to refuse to do so due to their obligation to keep the state, service or economic secret. The reasoning for such a significant interference into the wording of the act was that in some cases, it is absolutely necessary for the state secret to be kept. Another important intervention and one of the main reasons why the amendment was according to the explanatory memorandum necessary, was a modification of section 15: “Decisions of the panel.” Newly, the amendment “excluded the possibility to cancel the original judgement only on the basis of serious procedural defects regardless of its factual accuracy.”³⁶ The amendment also changed the section which entitled the rehabilitated person to publish the new decision, on the grounds that the publication of decisions on rehabilitation was used to scandalise the investigative, prosecuting and adjudicating bodies.

The obligation to pay for the costs of the review proceeding was also dealt with differently than in the 1968 Rehabilitation Act. The costs of the review proceeding were to be paid by the complainant whose proposal to open the review procedure was refused. In practice, the provision caused a lot of people seeking rehabilitation to prefer to withdraw their request because they feared the obligation to pay such high financial amounts in case of failure.

Moreover, the amendment significantly altered the rules for financial indemnities of the rehabilitated persons, or possibly of their families, to their detriment. Another change was the adoption of a completely new provision which deprived persons “illegally sojourning abroad” of the possibility to request the review procedure, stating that “there is no reason that the law should provide advantages to people who do not respect the legislation of the Republic and harm its interests.”³⁷

AFTER 1989

The fundamental rights of the Czechoslovak citizens were suppressed by repression until November 1989 when mass protests against the communist regime culminated and led to its fall. Very soon after, the question of judicial rehabilitations was raised again. The result of the efforts to abolish the convicting judgements for acts that, in contradiction to democratic society principles defined the communist acts as criminal, and to allow for the full rehabilitation of persons who were sentenced for these acts, was the Act No. 119/1990 Sb., on Judicial Rehabilitation, enacted on 23 April 1990. The act followed up on the legislation of 1968; however, it surpassed it in many respects. It was

created in free conditions and it reacted to ideological and power changes in the governing structures. Not only did it allow for legality in the field of criminal law implementation, i.e. it did not rehabilitate only those convictions that were illegal for the illegal procedure in the interpretation and implementation of criminal laws (that is in judicial decisions), but as far as certain crimes, enumerated in the act, are concerned, it was based directly on the illegality of the legislation, i.e. on the illegality of acts in force at that time.³⁸

The act directly stipulated, i.e. without the review proceeding, cancelling the effective judicial decisions made from 25 February 1948 to 1 January 1990 inclusive that the act exhaustively specified and enumerated in sec. 2 (1) (a–f). This provision concerned all the declared convicting judicial decisions, even if they were in the meantime modified by a legal procedure, e.g. by a general pardon or by a pardon awarded by the President, previous rehabilitation, decision on the complaint in violation of the law, in a new trial, etc. Pursuant to Act No. 119/1990 Sb., on Judicial Rehabilitation, approximately 260,000 persons were rehabilitated in a blanket manner.³⁹

The review proceeding applied to decisions on crimes, criminal offences, misdemeanours and less serious crimes that were different from those that were enumerated in the exhaustive list mentioned above. The procedure was initiated in the same way as in the 1968 Rehabilitation Act. Similarly to the previous act, the court had a notification duty, that is if the court learned from its official agenda about a circumstance that could justify the proposal to open a procedure, it had to notify the entitled person who was concerned. The trial took place before the court which made the former, convicting judgement. If the given court did not exist any more, the case was assigned to the court of the subject-matter and local jurisdiction. Some of the provisions, such as the possibility to publish the decision on rehabilitation in the media, but also other, above mentioned provisions, were practically identical to the provisions of the 1968 act. The situation was similar regarding the financial indemnity and evening up the height of the pension, only the amounts calculated as limit amounts differed a little. This act, too, looks at the criminality of persons who participated in illegalities at trials that the Rehabilitation act rectified. Pursuant to this act, the limitation period for such a crime (if it had not already been a statute-barred crime or offence before the Act No. 119/1990 Sb., on Judicial Rehabilitation, entered into force) did not end before 1 January 1995. However, only a few such persons were actually prosecuted.

A problematic issue regarding the rehabilitations according to the mentioned act were the “residual sentences” imposed in connection with some earlier convictions. These were, for example, acts qualified as damaging the socialist property, sabotage, possession of weapons, etc., which concerned about 25,000 cases (!). It can be considered as totally absurd that in several cases, residual sentences were imposed on persons who were executed during the regime for political reasons. It was only on the basis of a complaint of the Confederation of political prisoners, an actual

33 Hana Fuková, *Rehabilitace politických vězňů v Československu*, 25.

34 Ibid.

35 Ibid.

36 Ibid., 26.

37 Hana Fuková, *Rehabilitace politických vězňů v Československu*, 28.

38 Kol. autorů: *Soudní rehabilitace. Komentář k zákonu č. 119/1990 Sb., o soudní rehabilitaci*, Praha 1990, 1.

39 Petr Blažek, “*Akty revoluční spravedlnosti*”, 250.

successor of K 231, that the 1990 act was amended several times in the following *two* years thanks to which some other cases were solved and the residual sentences abolished. However, the question of the legitimacy of the resistance against the communist regime being a criminal regime remained unnoticed by the legislature for a long time. The rehabilitation of certain resistance fighters, especially those who went in for armed resistance, was still out of sight.

The enactment of Act No. 198/1993 Sb., on Unlawfulness of the Communist Regime and Resistance against It⁴⁰ finally opened the way to the rehabilitation of other persons which the previous rehabilitation acts did not apply to. Actually, the above mentioned legal act clearly stated that “the Communist Party of Czechoslovakia, its leadership and its members are responsible for the way of governing [...] the country between 1948–1989, especially for the programmed destruction of the traditional values of the European civilisation, for the deliberate violation of human rights and freedoms, for moral and economic decline accompanied by judicial crimes and terror against people with different opinions, by replacing a functioning market economy with direct governance, destroying the traditional principles of property rights, abusing education, science and culture for political and ideological purposes, the ruthless destruction of nature.”⁴¹ The perception of qualification of some criminal offences, considered as criminal even after the enactment of the 1990 Rehabilitation Act, changed and in the new court trials, the already mentioned residual sentences were imposed for these offences.

Nevertheless, as far as the assessment of the acts committed by citizens in their resistance and opposition to the communist totalitarian regime is concerned, the most important act is Act No. 262/2011 Sb., on Participants in Anti-Communist Opposition and Resistance⁴² enacted by the Parliament of the Czech Republic on 20 July 2011. It entered into effect symbolically on the day of the anniversary of the fall of communism in Czechoslovakia, but unfortunately, not earlier than more than 20 years later, on 17 November 2011.

By enacting this act, the legislature expressed “respect and gratitude to all the women and men who during the communist totalitarian regime actively defended the values of freedom and democracy while risking their lives, personal freedom and property” and repeatedly expressed its “deep regret over the innocent victims of the communist regime terror.”⁴³ First of all, this legal act fully legitimized the opposition and resistance against the communist regime defined as the time of oppression from 25 February 1948 to 17 November 1989 and defined its individual forms, including, for example, the cooperation with the foreign intelligence service of a democratic state, people smuggling or trespassing over state borders in order to take part in the resistance against communism, weapons gathering, writing and spreading anti-communist papers, public speaking against the communist regime, etc. It stipulated the conditions for issuing a certificate for the participant in anti-communist opposition and resistance and enabled the former political prisoners to request the status of a participant in anti-communist opposition and resistance. The act also altered the way the former political prisoners were perceived – they were almost without exception considered both by the law and the public to be the “victims” of the totalitarian regime, not its legitimate opponents.

The legislator charged the Ministry of Defence of the Czech Republic to be the first instance body to lead the process of granting the status of a participant in anti-communist opposition and

resistance. On the basis of the request submitted by the applicant, the Ministry is obliged to gather archive or other material that can prove the active participation of the applicant in resistance activities against the communist regime. At the same time, the existence of any obstacles to granting the status of a resistance fighter must be excluded during the process as well; these obstacles are exhaustively enumerated in the act, for example cooperation with the State Security or other armed forces of the former communist Czechoslovakia, membership of the Communist Party of Czechoslovakia, studying at universities, etc. If the applicant is recognised as an opposition and resistance participant, the person is pursuant to the act honoured with a certificate and a commemorative badge and is granted, besides the moral appreciation in the first place, a one-off financial contribution of CZK 100,000. According to the existing below average calculation of pensions, the resistance fighter is granted a pension amounting to the height of the average national financial pension.

Besides other provisions, section 11 of the act also introduced the provision on rehabilitation, stipulating that the court has to cancel the sentence imposed for a criminal offence that the rehabilitation did not apply to pursuant to the existing rehabilitation acts, if it was found out that the act which the person was convicted for was committed with the intention of weakening, disrupting or otherwise harming the communist totalitarian power in Czechoslovakia. The given provision does not apply to criminal offences that prove to be committed for low or dishonest reasons. In the case of rehabilitation pursuant to the above mentioned section of the act, which has to be requested within 5 years from the date the act entered into force at the latest, the claimant is entitled to a financial indemnity of the suffered losses. For settlement purposes, the provisions of Act No. 119/1990 Sb., on Judicial Rehabilitation, shall apply.

LESSONS LEARNT

If we wanted to evaluate the rehabilitation process of persons convicted in show trials during the communist regime in Czechoslovakia, i.e. between 1948–1989, we have to refer to the period following its fall only. It was only in the free and democratic society, even though it was developing slowly, that the conditions were created to be able to declare the former totalitarian regime as illegitimate and criminal from its base, and only after having identified with such a position, it was possible to achieve the full rehabilitation of all persons, be it “victims” of the regime, or those who truly stood up against it. As we can observe from the Czechoslovak, or Czech experience, this process was not easy at all and from the point of view of the citizens most concerned by the rehabilitation acts, it was more than a lengthy process.

From 1989, the state governments attempted several times to deal with the tragic heritage of the past, but it was only in 2011

40 The full text of the act available on-line: <https://www.zakonyprolidi.cz/cs/1993-198> (cited on 29/3/2017).

41 Act No. 198/1993 Sb., on the Unlawfulness of the Communist Regime and Resistance against It, preamble.

42 The full text of the act available on-line: <https://www.vlada.cz/assets/ppov/eticka-komise-cr/dokumenty/sb262-2011.pdf> (cited on 29/3/2017).

43 Act No. 262/2011 Sb., on Participants in Anti-Communist Opposition and Resistance, preamble.

when they succeeded in enforcing the act on anti-communist resistance, however, not without difficulties. Thus, this act can only be perceived as an act completing the process that lasted for decades, leading, at least from the legal point of view, to an undeniable distancing from the former communist regime and efforts to rectify the damage it caused. Unfortunately, with regard to the disproportionately long period this process had required in the Czech Republic, many former political prisoners did not live to see this moral satisfaction in the first place.

RECOMMENDATIONS

When evaluating the Czechoslovak experience with the rehabilitation of persons oppressed and persecuted by the former non-democratic regime, it can be emphasised in the first place that it is absolutely necessary that the new, democratically elected

government openly rejects such a regime by adopting an act on the illegitimacy of the past regime and declares its will to mitigate its consequences. At the same time, it should factually, not only formally, strive to punish the culprits of the persecutions, both in the security forces and in judiciary bodies.

The persons persecuted in the past should be fully rehabilitated, granted a financial indemnity and offered an opportunity of social involvement corresponding to their degrees and former employment. Moreover, the state should particularly appreciate the true opponents of the former non-democratic regime who participated in the restoration of democracy and freedom in their country while risking not only their position and property, but also their lives and the lives of their close ones. And what is really important is that the government considers these issues to be so important that they are dealt with in a satisfactory manner as soon as possible. In this way, a situation that the majority of persons concerned die first could be avoided.

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EDUCATION AND PRESERVATION OF SITES OF CONSCIENCE

MARKÉTA BARTOVÁ

INTRODUCTION

The ways the society reconciles with its past, *remembers* it, what it leaves out or *forgets*, have always been a subject of constant political pressure on the shaping of the content of the *collective conscience*.¹ These days as well, the collective conscience becomes a subject of pressure and manipulation of power and not even today's democratic societies are protected against the dangers of a gradual forgetting of the period of non-freedom.

SITUATION IN THE CZECH REPUBLIC

After the fall of communism in Czechoslovakia in November 1989, the idea to create a conscience institution in the new democratic state was not born in the minds of its political representatives, but came out of a private initiative. Over the years, several conscience institutions have been created this way, some of which have built up a very strong and irreplaceable position in the given area. An institution directly governed and financially funded by the state was created only in 2007 after long debates and disputes at the political and expert level, almost twenty years after the fall of the communist regime in the country.

The following overview introduces the institutions focusing on the period of the communist regime in the former Czechoslovakia between 1948 and 1989, specialised web sites – projects of non-profit organisations concentrating mainly on the collection of and making accessible the memories of witnesses, and educational programmes, as well as planned projects and in the end, purely commercial projects.

I. INSTITUTIONS

LIBRI PROHIBITI,² PRAGUE

After several months of preparations consisting especially in searching for suitable premises and getting the necessary financial support, it was finally possible to open for the public a completely unique library Libri prohibiti in October 1990. The aim of the whole project was to concentrate and make accessible the production of samizdat and exile publishers, i.e. books and various printed materials in general, the production and dissemination of which was banned by the communist regime for ideological and political reasons and judicially punished. The collection originally consisted of 2,000 books, magazines and other documents written by authors who were the leading Czechoslovak dissidents, including the founder of the library. Today, it accounts for more than 100,000 items kept in several collections. These are the Czechoslovak samizdat of 1960–1989, the Czechoslovak exile literature of 1948–2008, the Polish samizdat literature of 1979–1989 and foreign literature linked to

the former Czechoslovakia. Besides these, the library provides access to literature of the Czechoslovak war exile of 1939–1945 and literature of Russian and Ukrainian exile of 1920–1990.

In 1993, an audio-visual department of the Libri prohibiti was created, collecting and making accessible music records of groups banned under the communist regime (more than 3,000 music supports), audio records of lectures and seminars organised by political opponents of communism at that time (approximately 570 records), video documents and amateur film production (over 1,260 records). Moreover, the library is gradually converting all the records into a digital form, thus conserving them for the public, as the quality of records on audio-cassettes and tapes deteriorates over time and they could be lost forever.

Besides this, the library has a wide archive collection including written documents created mainly by the activity of independent initiatives – Charter 77, Committee for the Defense of the Unjustly Prosecuted (VONS), East-European Intelligence Agency (VIA) and others which informed about the violation of human and civil rights at that time not only in the former Czechoslovakia, but also in the whole Soviet Bloc. Petitions with the signatures of signatories, various letters, non-published manuscripts, posters and fliers of the Polish and Czechoslovak opposition, photographs and other unique documents from the period of persecution belong to other unique documents of the period of persecution. The library also managed to gain several private collections of the Czechoslovak dissidents to add to its collections.

The library of the “banned books” has been and still is in private hands, which gives it freedom and independence mainly as regards the projects it focuses on. Besides the above mentioned activities, it cooperates in various educational and cultural programmes, organises many author's readings and exhibitions of works of art by artists who could not officially publish or exhibit before November 1989.

The absolute uniqueness of the documents conserved in Libri prohibiti is proved by the placement of its collection of Czech and Slovak samizdat periodicals of 1948–1989 into the UNESCO register Memory of the World in 2013.³

THE CZECHOSLOVAK DOCUMENTATION CENTRE,⁴ PRAGUE

It is a non-profit organization following up on the activity of the exile Czechoslovak documentation centre of independent literature which was founded in March 1986 in Hannover by

1 Hana HAVLŮJOVÁ, Jaroslav Najbert a kol., *Paměť a projektové vyučování v dějepise*, Praha: Ústav pro studium totalitních režimů, 2014, 5.

2 For more, see <http://www.libpro.cz/en/index/contact> (cited on 29/05/2017).

3 See <http://www.unesco.org/new/en/communication-and-information/flagship-project-activities/memory-of-the-world/register/full-list-of-registered-heritage/registered-heritage-page-5/libri-prohibiti-collection-of-periodicals-of-czech-and-slovak-samizdat-in-the-years-1948-1989/> (cited on 23/05/2017).

4 For more see <http://csds.cz/en/csds.html> (cited on 23/05/2017).

a group of Czech exiles. The institution cooperates very closely with the National Museum⁵ and the centre of its activity is to support the scientific research, promote the historical research and shape the historical conscience of the society in general. The aim of its efforts is to contribute to the knowledge of the national and exile anti-totalitarian resistance in the period of communist Czechoslovakia between 1948 and 1989. The centre has a wide archive collection, consisting among others of the personal estate of the prominent Czechoslovak dissidents who were politicians and artists. It owns and makes accessible to the public a huge amount of samizdat national and exile literature, contributes to publishing its own publications and co-organises technical conferences and exhibitions. The centre is also a co-founder of the International Samizdat [Research] Association (IS[R]A) based in Budapest.⁶

THE MUSEUM OF THE THIRD RESISTANCE,⁷ PŘÍBRAM

The Museum of the Third Resistance ranks among the conscience institutions in the CR and its origins go back to 1990 when it was being created within the initiative of the former political prisoners. In various negotiations, they strived for the museum to be created directly in the capital; however, the capital did not react to these efforts. That is why the museum was finally built in 1992 in Příbram, i.e. in the home town of the local branch of the Confederation of Political Prisoners with the financial support of the government of that time.⁸ The declared objective of the museum is to document the anti-communist resistance of 1948–1989. During that time, approximately 250,000 Czechoslovak citizens were sentenced in politically motivated trials and the majority of them were used as cheap workforce in uranium mines or in production during the service of their term of imprisonment. The exposition called *Political prisoners in uranium mines of 1948–1968* shows, via more than 400 documents and collection objects including objects of the every-day use of the prisoners, mining tools, personal objects of a reminder nature and others, the atrocious living conditions in prisons the convicts had to face. The exhibition includes aerial photos of labour camps that operated at the beginning of the 1950s, mainly in the Jáchymov, Slavkov and Příbram regions, as well as models of the main camp buildings. Other specialised exhibitions can be found in the museum: *Women in the Third Resistance behind the Bars of the Prisons 1948–1968* and *From Bohemia into the Gulags of Siberia* documenting the imprisonment of Czechoslovakia citizens in the USSR between 1944 and 1969.

However, the uniqueness of the exposed objects, but also the phenomena of the anti-communist resistance ignored by the Czech society until recently would deserve bigger support of the state, mainly from the financial point of view. Rather modest expositions consisting more or less of glass show-cases and glazed notice-boards are, as regards today's requirements and possibilities of presentation of historical material and precious artefacts, very old-fashioned and unfortunately rather unattractive for the young generation living hand in hand with technological progress. The existing situation of the museum which has virtually not been changed from the beginning of the 1990s shows the lack of interest of the state in such projects.

THE VOJNA MEMORIAL,⁹ PŘÍBRAM

The former political prisoners have sought a reconstruction of the only, authentically preserved prison site and the making of it

accessible to the public already from the beginning of the 1990s. It was at their instigation that in 1998, the government adopted a resolution which transformed the camp owned by the army into a memorial area.¹⁰ Originally a camp for German war prisoners situated between the former uranium shafts served in 1949–1951 as a forced labour camp and until 1961 as a prison facility for the opponents of the governing regime.

Two years after the Czech government adopted the resolution to preserve the premises and build a memorial there, designed as a memorial area commemorating the suffering of citizens imprisoned by the communist regime, the memorial was pronounced a cultural monument and a very demanding reconstruction began. The best preserved buildings were reconstructed, some buildings were built again as replicas of the original ones. A barbed wire fence was built around the whole area and watchtowers were erected to evoke, or rather to preserve the mood of that time. In the buildings, we can find exhibitions documenting the everyday life of prisoners. The Corrective Labour Camp Vojna, as the facility was called from 1951, was opened up to the public in 2005.

INSTITUTE OF CONTEMPORARY HISTORY, THE CZECH ACADEMY OF SCIENCES (ÚSD AV ČR),¹¹ PRAGUE, BRNO

The Institute was created at the beginning of 1990 and since then, it has been focusing on the research of the most recent Czechoslovak history in the period 1938–1989. The research of the only recently finished communist era which was systematically accompanied by the ideological surveillance, cadreship and censorship, appeared to be an actual and urgent need of the society after November 1989. The liberated society perceived the knowledge of the communist past as one of the conditions of its inclusion into the European democratic community.

A specialised library opened to the wide public was created in the Institute. From the beginning of its creation, the Institute focused on its own publication activities, it founded the editorial series *Sešity ÚSD* (*Notebooks of the ÚSD*), *Prameny k dějinám čs. krize v letech 1967 až 1970* (*Sources to the history of the Czechoslovak crisis in 1967–1970*) and *Svědectví o době a lidech* (*Testimony about the era and the people*). It has its own magazine called *Soudobé dějiny* published since 2013 with its English mutation called *Czech Journal of Contemporary History*.

Today, the Institute is divided into three departments according to their chronological focus, covering the periods from 1938 until today: the department of the history of the occupation and

5 For more see <http://www.nm.cz/index.php?xSET=lang&xLANG=2> (cited on 24/05/2017).

6 For more, see http://w3.osaarchivum.org/index.php?option=com_content&view=article&id=70&Itemid=61&lang=en (cited on 24/05/2017).

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8 Jakub Jareš, "Český 'komunismus' v muzeu. Mapování muzejní krajiny a konstitutivní faktory pro její formování", in Radka Šustrová, Luba Hédlová, eds., *Česká paměť. Národ, dějiny a místa paměti*. Praha: Památník Lidice, 2014, 361.

9 For more, see <http://www.muzeum-pribram.cz/en/vojna-memorial-lesetice/from-history/> (cited on 29/05/2017).

10 Jareš, *Český "komunismus" v muzeu*, 364.

11 For more, see <http://www.usd.cas.cz/en/> (cited on 29/05/2017).

capitalism creation, the department of real socialism and the department of late socialism and post-socialism. In parallel with this structure, there are smaller and flexible working teams and centres that sometimes exist only for a given period of time. It is the Centre of Oral History, the Centre for the Study of the Cold War and its Impacts, the Centre for the History of Minorities, the History of the Communist Party working group, the Czech Society 1938–1948 working group, Society and the Regime working group and others.

After its creation, the Institute has built the position of a well-respected academic institution, which is proved by the prestigious international Hannah Arendt Prize in 1999 received from the Institute für die Wissenschaften vom Menschen and Koerber-Stiftung. The Institute develops international contact, its cooperation institutions are the National Security Archive in Washington, D.C., the Forschungsstelle Osteuropa an der Universität Bremen, the Instytut Studiów Politycznych Polskiej Akademii Nauk and the Instytut Pamięci Narodowej in Warsaw or the Hannah-Arendt-Institut für Totalitarismusforschung an der Technischen Universität Dresden and others. In cooperation with these organisations, the Institute organises international conferences, specialised symposiums, workshops and exhibitions.

INSTITUTE FOR THE STUDY OF TOTALITARIAN REGIMES¹² AND SECURITY SERVICES ARCHIVE,¹³ PRAGUE

The proposal to create a conscience institution which was supposed to provide the institutional framework for the reconciliation of the Czechoslovak society with its own totalitarian past was first discussed in the Parliament of the CR only in 1999. Its working name was “the Memorial of the Non-Freedom Era” and its aim was, following the example of similar institutions in the world (National Holocaust Museum, Yad Vashem), to document, educate, scientifically research, collect and provide information about the non-freedom era mainly of 1939–1989. The memorial should have been given powers that would enable it to gather evidence and documents from national bodies, public administration bodies and eventually from citizens needed to fully and impartially evaluate the era of the Nazi and communist totality.¹⁴ Its main goal was to analyse the reasons for the loss of freedom and the way it was carried out, manifestations of totalitarian regimes and ideologies, to systematically collect and expertly process all kinds of information. The memorial assumed broad cooperation with all the interested national and foreign institutions, especially with scientific institutions, resistance memorials, libraries and museums. The most important role of the planned institution was to publish and provide access to information about the non-freedom era and the promotion of ideas of freedom and defence of democracy against totalitarian regimes.

However, the necessary political consensus was not reached at that time and it was not until 2005 that the idea of creating the state memory institution in the Czech Republic was revived. The “Nation’s Memory Institute”, which was the newly considered name of the institution, was to be created on the basis of a newly enacted act that stipulated the rights and obligations of the given institution and which stipulated such conditions allowing for a qualitative new approach to documents of the repressive forces of the Czechoslovak state. Documents of the given origin were to be set aside into a special archive which would be an impartial, but to a certain extent independent institution of the Institute.

The Czech Republic drew the inspiration from the already created institutions of a similar character in the neighbouring post-communist countries – Germany, Poland and Slovakia. According to its legislative intention, it was to be awarded the competences of an administration office for processing information about both the Nazi and communist totalitarian power and their application for the protection of the democratic rule of law and the base of a democratic political system.¹⁵

After complex negotiations and discussions, the Act No. 181/2007 Sb., *on the Institute for the Study of Totalitarian Regimes and the Security Services Archive*,¹⁶ was enacted and came into effect in August 2007. On 1 February 2008, the Institute for the Study of Totalitarian Regimes (ÚSTR) and its subordinate Security Services Archive began their operation.

The supreme authority of the ÚSTR was the Council of the Institute, consisting of seven members named by the Senate of the Czech Republic on the basis of proposals of the President of the Republic and the Chamber of Deputies of the CR. The Council of the Institute has, among others, powers to appoint and revoke the head of the institution. The ÚSTR gained the position of an individual organisational unit of the state, the activity of which can be intervened with and modified only on the basis of the enacted act. The activity of the Institute is controlled by the Chamber of Deputies or by the Senate by discussing its annual reports on its activity.

Besides other obligations, the Act No. 181/2007 Sb., *on the Institute for the Study of Totalitarian Regimes and the Security Services Archive*, imposes on the Institute the following:

- to examine and impartially assess the non-freedom era and the period of communist totalitarian power, examine the non-democratic and criminal activity of the state bodies, especially of its security forces, and the criminal activity of the Communist Party of Czechoslovakia, as well as other organisations based on its ideology;
- to analyse the causes and the way of elimination of the democratic regime during the communist totalitarian power era, to document the participation of national and foreign persons in supporting the communist regime and resistance to it;
- to gather documents testifying about the non-freedom era and period of the communist totalitarian power, especially about the activity of the security forces and forms of persecution and resistance and opening up these documents to the public,
- to convert the collected documents into an electronic form without undue delay,
- to provide the results of its activities to the public, especially to publish information about the non-freedom era, the period of the communist totalitarian power, acts and fates of individuals, publish and spread publications, organise exhibitions, seminars, specialised conferences and discussions,
- cooperate with scientific, cultural, educational and other institutions in order to exchange information and experience regarding technical issues,

12 For more, see <https://www.ustrcr.cz/>, <http://old.ustrcr.cz/en> (cited on 29/05/2017). See also *Ústav pro studium totalitních režimů a archiv bezpečnostních složek*. Praha: Ústav pro studium totalitních režimů, 2009.

13 For more, see <http://www.abscr.cz/en> (cited on 29/05/2017).

14 See Pavel Žáček, *Memory of Nations in Democratic Transition. The Czech Experience*. Praha: CEVRO, 2015, 40.

15 Žáček, *Memory of Nations in Democratic Transition. The Czech Experience*, 41.

16 The full text of the act available on-line: <https://portal.gov.cz/app/zakony/zakonPar.jsp?idBiblio=64947&nr=181-2F2007&rpp=15#local-content>.

- to cooperate with foreign institutions or persons with a similar focus of activity.

To sum up, the basic tasks of the Institute are research activities regarding the non-freedom era (1938–1945) and the period of the communist totalitarian power (1948–1989). Besides the scientific and editorial activities, the employees of the Institute participate in a social discourse about totalitarian regimes by organising conferences, movie zones and conference cycles for experts and the lay public including schools. The Institute also regularly publishes two expert review periodicals – the revue *Paměť a dějiny* and the almanac *Securitas Imperii*. Both of them present the results of the research of the historians working at the Institute or of their external colleagues. Once a year, the Institute publishes the *Almanac of the Security Forces Archive*, presenting other research findings from the cycle of topics that the act imposed on the Institute to process. The ÚSTR administers its own huge library named after Ján Langoš, the important Czechoslovak and Slovak politician and founder of the Nation's Memory Institute in Bratislava.

One of the most important tasks of the Institute is to convert the documents from the archive collections and ABS collections into an electronic form, enabling the necessary protection of archive documents, as well as creating a digital archive the aim of which is to provide quick and quality access to archive documents to the researching public.

MEMORIAL TO THE VICTIMS OF COMMUNISM, PRAGUE

Even though they are not institutions as such, memorials, too, can be ranked among the *sites of conscience*, and therefore, we shall mention at least one memorial representing all the memorials (and there are not many of them) that are built in the Czech Republic today to commemorate the victims of the communist regime: it is the Memorial to the Victims of Communism in Prague. The Memorial is situated at the foot of the Petřín hill in the centre of the capital and it was unveiled in 2002, that is more than 10 years after the fall of the regime (!). Its sculpture part was created by the Czech academic sculptor Olbram Zoubek, the architectural design was made by the architects Zdeněk Hölzl and Jan Kerel. The memorial is made of a massive tapering staircase with seven more or less torso-like human figures made of metal alloy and situated in its upper part. The first of the walking figures is almost complete, the others are gradually more and more crippled, but still standing. The figures symbolise the everyday torture of political prisoners, as well as their bravery and resilience. It represents men and women, liquidated by the state power, but still standing and resisting.

At the bottom part of the memorial, there is a signature imprinted in metal plaques reading “*Victims of Communism 1948–1989: 205,486 sentenced – 248 executed – 4,500 died in prisons – 327 died on the borders – 170,938 citizens emigrated.*”

II. WEB PROJECTS OF NON-PROFIT ORGANISATIONS

The organisations listed below, presenting themselves mainly, but not only, via their web projects, work with the concept that the *sites of conscience* can contribute to disrupt the “master narratives”, i.e. official, linearly narrated history, as it is traditionally taught at schools. They strive to affect and disrupt the classical

approach to history education which was determined by a selection of historical reality and learning about heroic political acts, rather than by a critical analysis of the history.¹⁷ They emphasise the concept of discovering the life of an ordinary person, which represents a new approach in history education: “*instead of famous heroes and battles, the cultural conscience promotes the perspective of ‘ordinary’ people who found themselves in unprecedented situations exposed to incomprehensible suffering which at least some of them have been more or less lucky to be able to survive. Thus, the memories of the witnesses become on the one hand the source of sadness, and on the other hand both a warning and a lecture for the future.*”¹⁸

Besides collecting, making accessible and evaluating historical documents witnessing the persecution of opinion opponents and their persistent efforts to resist the Communists, the above mentioned institutions try to capture the testimony itself of these people by the method of oral history.

POLITIČTÍ VĚZNI.CZ¹⁹

The non-governmental and non-profit project called *Politíční vězňi.cz* (*Politicalprisoners.eu*) is an example of such efforts. Its objective is to ethically record and preserve the memory and life experience of the former political prisoners and prisoners in the territory of the former Czechoslovakia and abroad. The aim of the project with the motto “*Each interview with a victim of Stalin's repression recorded in a methodologically correct way represents a living memory of the European past*” is mainly to document the life stories of the former political prisoners and to present them to the wide public in an accessible way. Besides the database of interviews with political prisoners accessible online, the association also publishes freely available publications thematically connected with the period of the communist regime in the Czechoslovak Republic. Moreover, it organises visits to former uranium mines in Jáchymov and to criminal labour camps with a trained guide, or accompanied by one of the witnesses who were imprisoned in the Jáchymov region.

DCERY.CZ²⁰

A unique project which was founded in 1999 is the *Spolek Dcery 50. let* (*Daughters of the Enemy Association*) associating the daughters of political prisoners of the 1950s. These daughters, bound by similar life experiences, decided to get their personal testimonies over especially to the young generation, to give lectures about the impact of the communist era on the environment and life of families where usually one of the parents did not agree with such a communist ideology and opposed the ideology via various forms of protest and fight. These persons were punished for their opinions not only by a long-term imprisonment, but their whole family was punished, too. The aim of this association is to lecture future generations so that a terror of this kind

17 Milan Hlavačka, Místa paměti a jejich postavení v historickém a společenském “provozu”, in *Místa paměti česko-německého soužití. Sborník příspěvků z konference pracovní skupiny Česko-německého diskusního fóra Místa paměti v Chebu 5. 6 2010*, Praha: Antikomplex pro Collegium Bohemicum, 2011, 17.

18 Hana Havlůjová, Jaroslav Najbert a kol., *Paměť a projektové vyučování v dějepise*, 6.

19 For more, see <http://www.politicalprisoners.eu/> (cited on 23/05/2017).

20 For more, see <http://www.enemysdaughters.com/> (cited on 24/05/2017).

would never take place in our country again, which is expressed in the motto of the association: “Who can map their past, can control and govern their future as well.” They cooperate with various national and foreign non-profit organisations, participate in the creation of film and radio documentaries, give lectures at schools, participate in miscellaneous meetings and discussions with the public and publish.

POST BELLUM,²¹ PRAGUE

The non-profit organisation with a fitting name was founded in 2001 by several activists, mainly journalists. The fundamental goal of this organisation which is still operational and the activities of which are known to the wide public, is to record the memories of the witnesses and to make them accessible on the internet website *Paměť národa*.²² Today, there are more than 6,000 memories of the war veterans, holocaust victims, prisoners and opponents of Nazism and communism, victims of collectivisation, victims of brutal physical and psychological terror by the former security forces of communist Czechoslovakia. The recorded memories of the participants of the historical events are supposed to enable the recognition of the essence of totalitarian regimes of the 20th century, but also to examine the motivations and decisions of individuals who found themselves in a limit situation. It is the widest publicly accessible database of memories in the whole of Europe. Gradually, the base and number of collaborators of the Post Bellum organisation widened and it organises various conferences, exhibitions and discussions, participates in document creation, publishes thematic publications and is pedagogically active. Within its sectional project *Stories of Our Neighbours* (*Příběhy našich sousedů*),²³ it instructs the pupils of higher classes of secondary and high schools to find a witness, record his or her life-time memories, digitalise their photographs, explore the archives and finally create a radio, TV or written report or document.²⁴ It also organises the biggest documentary competition in the country called *Stories of the 20th century*.²⁵ The Post Bellum organisation aims to simplify and at the same time to diversify the ways of mediation of historical events via its own application for mobile phones with a fitting name *Memory of Nations Sites*.²⁶

ONE WORLD IN SCHOOLS²⁷ – STORIES OF INJUSTICE PROJECT²⁸

One World in Schools is one of the educational projects by the People in Need organisation and it was launched in 2001. Its aim is to contribute to the education of young people so that they are able to orient themselves well in the contemporary world and to take an open and critical approach to information. The educational materials are provided to students and teachers in more than 3,300 secondary and high schools that are involved in the programme. Films, discussions and educational activities within this project mainly bring the topic of human rights and civic engagement to schools.

One of the important projects of this programme is the Stories of Injustice project. It was created in 2005 when a need to react to the contemporary situation in the Czech Republic was felt, as, despite their experience of living in dictatorships for decades, people seemed to forget that freedom cannot be taken for granted and it is necessary to protect it. Thus, the Stories of Injustice project gives students an idea of the time of

non-freedom, via documentary and feature films, lectures and discussions with the witnesses and historians, publications and exhibitions. Since 2009, students have been awarding the Stories of Injustice Award for brave positions and acts during the communist regime era.

PANT²⁹

The civic association PANT, founded in 2007, focuses on similar activities as the above mentioned project with the objective to be active in the field of the development and promotion of public awareness about human rights issues and their violation by totalitarian regimes of the 20th century. Its activity focuses above all on education, film documentary and journalist production, support of activities that are mapping and developing the cultural heritage in the Czech, Central-European and European regions. The flagship of the association is the educational website *Moderní dějiny.cz* (*Modern History.eu*) providing high quality content to the public with increasing web traffic.³⁰ The association cooperates intensively with primary, secondary and high schools and universities, historical and political science institutions, archives, associations of witnesses and other non-governmental organisations with a similar orientation. In the international field, it develops a rich cooperation with educational institutions, schools and historical departments in Poland, Hungary and Slovakia.

III. UNREALISED PROJECTS

Over the last two decades, there have been many museums and memorials being discussed and not created or built until today, let's mention at least two of them.

PRISON IN UHERSKÉ HRADIŠTĚ³¹

The site of the former prison has a troubled history: during the occupation of the Czechoslovak Republic by the German army, Czech patriots and anti-fascism fighters were imprisoned here, during the communist regime, its opinion opponents were imprisoned and brutally tortured here. In 1960, the prison was closed and the site, now owned by the Ministry of Justice, has been deteriorating ever since. The state has not been able to decide yet what to do with the former prison and the building is in quite a dilapidated state today.

21 For more, see <https://www.postbellum.cz/english/> (cited on 29/05/2017).

22 For more, see <https://www.memoryofnations.eu> (cited on 29/05/2017). See also Kol. autorů: *Memory of Nation*. Post Bellum, Praha 2015. Available on-line: http://www.pametnaroda.cz/data/page/File/PN_promo9.3_CZn.pdf (cited on 29/05/2017).

23 For more, see <https://www.pribehynasichsousedu.cz/> (cited on 29/05/2017).

24 For more, see <https://www.pribehynasichsousedu.cz/> (cited on 23/05/2017).

25 For more, see <https://www.pribehynasichsousedu.cz/> (cited on 23/05/2017).

26 For more, see <http://www.mistapametnaroda.cz/?lc=en> (cited on 23/05/2017).

27 For more, see <https://www.jsns.cz/en/home> (cited on 23/05/2017).

28 For more, see <https://www.jsns.cz/projekty/pribehy-bezpravi> (cited on 23/05/2017). See also Adam Drda, *Příběhy bezpráví – příběhy vzdoru. Člověk v tísni*, Praha 2009.

29 For more, see <http://www.pant.cz/english.html> (cited on 23/05/2017).

30 For more, see <http://www.modern-history.eu/> (cited on 23/05/2017).

31 For more, see <http://www.veznicehradiste.cz/> (cited on 24/05/2017).

In 2009, the civic association called *Initiative for a dignified use of the prison in Uherské Hradiště* (*Iniciativa za důstojné využití věznic v Uherském Hradišti*) was created. Its aim has been to support the solution of the in-the-long-term unacceptable situation of the object which the association considers to be an important monument commemorating the years of terror of the two totalitarian regimes of the last century. The goal of the association is to preserve the prison and to rebuild it, with an appropriate reverence, into a memorial to the victims of the totalitarian regimes and a museum of the power persecution. However, this has not happened yet and it remains a question whether the expensive reconstruction of the prison in order to build the monument instead will ever be carried out by the state.

RED TOWER OF DEATH, OSTROV NAD OHŘÍ

The tower for sorting the uranium ore situated near the uranium mines in Jáchymov where many political prisoners worked as slaves under atrocious conditions is one of their most significant symbols now. Thanks to long-term efforts, this site was pronounced a national cultural monument in 2008 and handed over from private ownership into the hands, or administration of the Confederation of Political Prisoners (KPV). The organisation was thinking about creating an “International Museum of Slave Labour”, as was the working title there, however, this objective was not carried out because of a lack of financial resources and staff capacities. Recently, the confederation has been striving for the state to take the monument directly into its ownership and administration, whereas the costs of the overall reconstruction of the site and creation of expositions are estimated at CZK 60,000,000. After the completion of the reconstruction, the exposition on communist camps together with the necessary facilities for visitors should be created here on the basis of the consultation of the former political prisoners and experts.

IV. COMMERCIAL INSTITUTIONS

In 2001, a private *Museum of Communism* was opened right in the centre of Prague. At the time of its creation, it aroused many reactions, mainly due to the fact that it was the first (and unfortunately, the only) museum of communism in the capital city, on top of this it was created on a commercial basis and without consulting the experts on history.³² Its owner focuses mainly on tourists and the turnout of 60,000 visitors a year proves that people show interest in the museum.

A similar project is the *KGB Museum in Prague* created in 2010, with a smaller range of exhibited objects, and the Iron Curtain Museum in Valtice in South Moravia. The second listed museum focuses on the border surveillance in the former Czechoslovakia and attempts at its illegal crossing.

CURRENT STATUS AND LESSONS LEARNT

After the fall of communism, we can observe a steady and in some periods even increasing tendency to feel nostalgic about the life “during communism”, despite the criminality of the communist regime and the constant efforts of the memory institutions that have been created in the Czech Republic so far. However, this fact, for some even incomprehensible, is in various degrees of

intensity observable in most of the post-communist countries. This is reflected in different surveys and opinion polls, as well as in the political sphere. Public opinion polls confirm such a prevailing phenomenon, especially for persons of the lower social class of the older and middle generations; the majority of this category of respondents emphasises the material and social securities that the former regime in their opinion ensured.³³ Today, they do not consider the predominant “mainstream problems” of communism, such as the ban on crossing the borders of your own country, the ban on presenting opinions of one’s self, or even on having them, the ubiquitous censorship and a lack of consumer goods, to be that important. Usually, on the grounds that today, they can travel and buy things, but they do not have enough financial funds for it. It seems that the creation or demonstration of their own opinion is not that important to them. They approve of, condone or ignore the crimes of communism. Unfortunately.

As far as the current political situation in the Czech Republic is concerned, the successor party of the Communist Party of Czechoslovakia (KSČ) entitled the Communist Party of Bohemia and Moravia (KSČM) is a kind of a permanent element of the Czech political scene at the national, as well as local level. The long-term research continues to attribute to the party important electoral preferences that are, moreover, rather increasing (today, up to 13 % of legitimate voters would vote for the party).

Also due to these warning results, it is important for the state to fight for the establishing or innovating of the sites of conscience that are related to the long-term period of the non-democratic regime rule in Czechoslovakia. These sites of conscience are meaningful not only for preserving the nation’s memory, but for the future of the nation as well – for the viewpoint it will take. All the projects mentioned above draw attention to recognize the injustice and violence not only as the attributes of the past communist regime, but of any authoritarian system that suppresses the fundamental freedoms and rights of a person, and teach the new generations to do so. Remembering the past events and victims of the fight for democracy and freedom in our country can be perceived as one of the key factors of preventing their repetition. Unfortunately, democracy is still not a state programme in the Czech Republic, the successor state of the former Czechoslovakia, and the priority of its citizens is still not an unshakeable certainty there.

RECOMMENDATIONS

Each democratic state, or its political representatives should consider the maintenance and reinforcement of democracy and freedom in their country as a priority. This approach must be reflected in the financial and staff support of memory institutions and projects alike, as these can significantly influence the opinion orientation and political direction of the whole nation in the future.

32 See Jakub Jareš, *Český “komunismus” v muzeu*, 365.

33 See for example Stanislav Hampl, Jaroslav Huk, Sametová revoluce po dvaceti letech, in Jiří Šubrt, ed., *Historické vědomí jako předmět badatelského zájmu: teorie a výzkum*. Kolín: Historická sociologie, Nezávislé centrum pro studium politiky, ARC – Vysoká škola politických a společenských věd, 2010, 107–122.

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TIMELINE OF THE MAJOR EVENTS

November 17, 1989	Suppression of student demonstration in the centre of the capital city of Prague by communist security forces
November 20, 1989	Creation of opposition political movement named “Civic forum”
November 29, 1989	Federal Parliament removes parts of the Constitution about the leadership of the Communist Party of Czechoslovakia and about Marxism-Leninism being the national ideology
December 1–8, 1989	Members of the communist secret police State Security (StB) destroy tens of thousands of operative files with evidence of their illegal activity
December 10, 1989	Appointment of the Government of National Understanding
December 29, 1989	Election of the opposition leader Václav Havel as the President of the Czechoslovak Socialist Republic
January 23, 1990	Federal Parliament adopts the Constitutional Act on the Removal of Deputies from Representative Bodies and on the Co-option of New Deputies and the Act on Political Parties legalising the existence of the Communist Party of Czechoslovakia
February 15, 1990	Federal Minister of the Interior Richard Sacher dismisses central and regional departments of State Security
February 26, 1990	Signature of the intergovernmental agreement between Czechoslovakia and the SSSR about the withdrawal of soviet troops from Czechoslovakia by 30 June 1991
April 23, 1990	Federal Parliament adopts Act No. 119/1990 Sb., on Judicial Rehabilitation
May 21, 1990	Federal Government issues a regulation on the removal of the immovable property in permanent use by the Communist Party of Czechoslovakia
June 8–9, 1990	The first free parliamentary elections take place in the Czech and Slovak Federative Republic after the fall of the communist regime
October 2, 1990	Federal Parliament adopts the Act No. 403/1990 Sb., on Mitigating the Consequences of Certain Property Injustices
November 16, 1990	Federal Parliament adopts the Constitutional Act on Property Restitution of the Communist Party of Czechoslovakia to the people of the Czech and Slovak Federative Republic
January 30, 1991	Federal Parliament adopts Act No. 47/1991 Sb., amending and supplementing the Act No. 119/1990 Sb., on Judicial Rehabilitation
February 21, 1991	Federal Parliament adopts Act No. 87/1991 Sb., on Extra-Judicial Rehabilitations
June 30, 1991	Departure of the last units of the soviet occupation troops
September 2, 1991	Creation of the Department for Documentation and Investigation of State Security Activities under the Federal Ministry of the Interior
October 4, 1991	Federal Parliament adopts Act No. 451/1991 Sb., on Determining Some Further Prerequisites for Certain Positions in State Bodies and Organizations of the Czech and Slovak Federative Republic, the Czech Republic and the Slovak Republic (“large lustration law”)
November 13, 1991	Federal Parliament adopts Act No. 480/1991 Sb., on the Era of Non-Freedom
April 28, 1992	Czech Parliament adopts Act No. 279/1992 Sb., on Some Further Prerequisites for Certain Positions Filled by Appointment or Designation of Officers of the Police of the Czech Republic and Officers of the Penitentiary Service of the Czech Republic (“small lustration law”)
November 1, 1992	Creation of the Office for the Documentation and Investigation of the State Security Activities under the Investigation Office for the Czech Republic
January 1, 1993	Division of the Czech and Slovak Federative Republic into the Czech Republic and Slovak Republic
February 10, 1993	Creation of the Coordination Centre for the Documentation and Investigation of Violence against the Czech Nation from 8 May 1975 to 31 December 1989, integrated in the organisational structure of the General Prosecutor's Office of the Czech Republic

July 9, 1993	Czech Parliament adopts Act No. 198/1993 Sb., on the Unlawfulness of the Communist Regime and Resistance against It
January 1, 1994	Creation of the Centre for Documentation of the Unlawfulness of the Communist Regime of the Ministry of Justice of the Czech Republic
January 1, 1995	Creation of the Office for the Documentation and Investigation of the Crimes of Communism under the Investigation Office for the Czech Republic
April 26, 1996	Czech Parliament adopts Act No. 140/1996 Sb., on Making Publicly Accessible Files Resulting from Activities of the Former State Security Police
June 25, 1997	Czech government issues a regulation on the payment of One-off Compensation to Alleviate some Wrongs Committed by the Communist Regime
March 8, 2002	Czech Parliament adopts Act No. 107/2002 Sb., amending the Act No. 140/1996 Sb., on Making Publicly Accessible Files Resulting from Activities of the Former State Security Police, and some other Acts
June 8, 2007	Czech Parliament adopts Act No. 181/2007 Sb., on the Institute for the Study of Totalitarian Regimes and the Security Services Archive, and on amending certain Acts
February 1, 2008	Creation of the Institute for the Study of Totalitarian Regimes and the Security Services Archive
April 27, 2009	Czech government issues regulation No. 135/2009 Sb., on One-off Contribution to Alleviate Some Wrongs Committed by the Communist Regime
July 20, 2011	Czech Parliament adopts Act No. 262/2011 Sb., on the Participants in Anti-Communist Opposition and Resistance
November 17, 2011	Creation of the Ethics Committee of the Czech Republic for the Appreciation of the Participants in Anticommunist Opposition and Resistance
February 20, 2013	Czech government issues regulation No. 51/2013 Sb., amending the government regulation No. 135/2009 Sb., on One-off Contribution to Alleviate Some Wrongs Committed by the Communist Regime
January 1, 2015	Adoption of Act No. 250/2014 Sb., on Amending Acts related to adoption of Act on State service stipulating that the “large lustration law” does not apply to government Ministers and Minister Deputies

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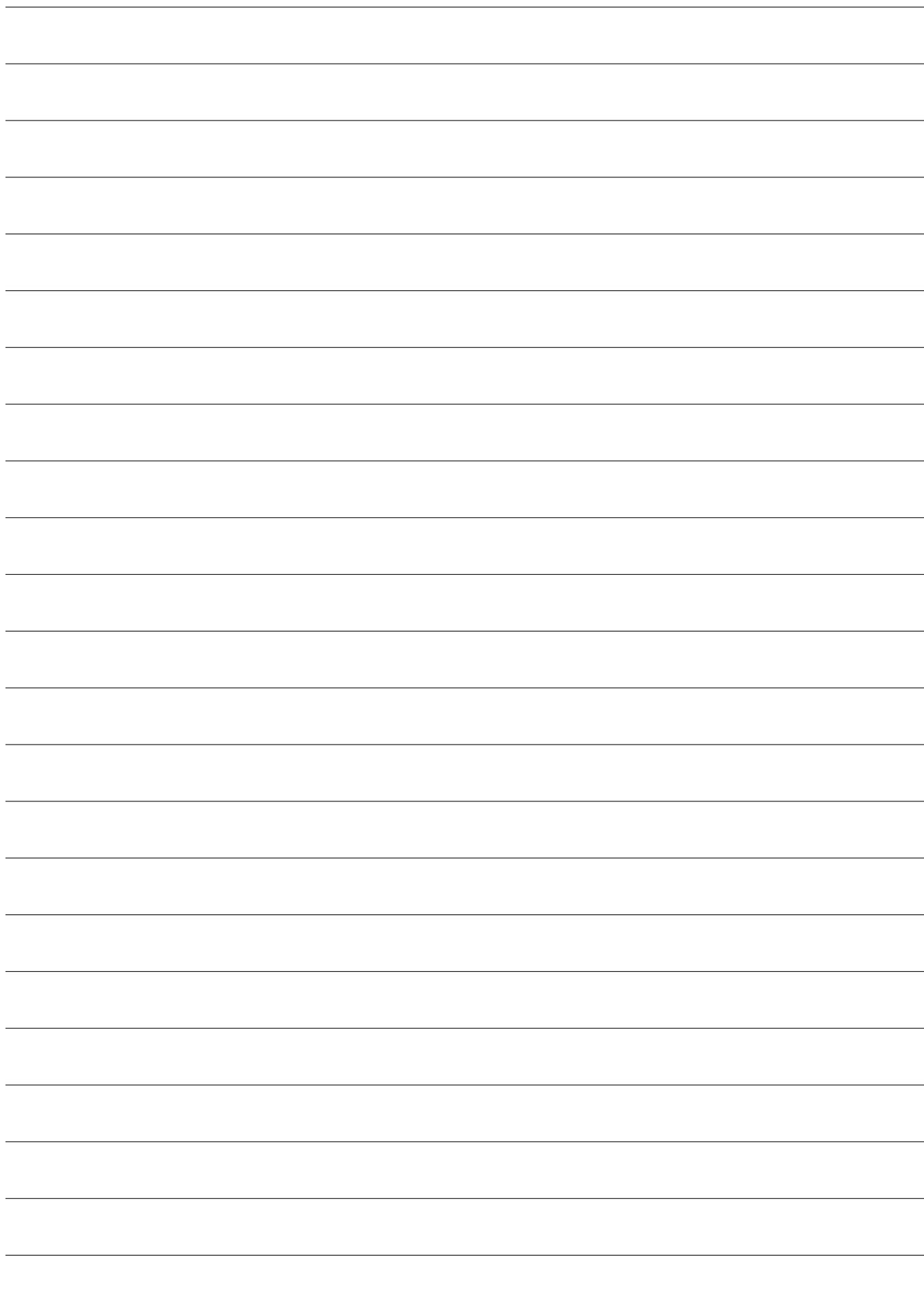
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AUTHOR

ASHRAF AL-SABAGH
Political Researcher focusing on public policy studies and democratic transitions in the Arab world. Author of many expert articles concerning the political and social developments in Egypt.

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MISSED OPPORTUNITY: HOW POST-JANUARY REVOLUTION REFORM OF SECURITY SECTOR IN EGYPT FALTERED?

ASHRAF AL-SABAGH

INTRODUCTION

The 25 January revolution provided a good opportunity to create a new horizon for radical change in Egypt. This is not only through toppling the Mubarak regime, but by also dismantling the authoritarian regime and rehabilitating the notion of radical change by involving numerous sectors in managing authority on various levels and creating room for the establishment of democratic organizations and diverse intermediary institutions. These would enable citizens to have oversight of authority, take part in formulating and implementing policies and legislation, and defend their political, economic and social rights. Indeed, the period that immediately followed the overthrow of Mubarak witnessed great momentum, manifested in the emergence of a large number of new parties and movements, a flurry of activity by civil society and student action at universities, and the emergence of a number of new media channels and platforms, both private and independent, and research and study centers. Additionally, there was large room for newcomers who are interested in political and community work. It appeared as though Mubarak had been a great barrier to a living domain that was only waiting for the opportunity of the death of the deity that had a tight grip on power.

At the time, many headings and initiatives were proposed concerning the form of society and state within their new framework, key of which were: Reforming security agencies and civil-military relations as main headings to dismantle authoritarianism that had dominated Egyptian society for decades. The aim was to reestablish the security system to operate in a manner that is more consistent with the standards of democracy and good governance. Also, this system should be qualified and subject to accountability before a democratically elected civil political authority.

In the first months of the revolution, reform of the police overshadowed reform of the military establishment, perhaps because the context of the scene was linked to the revolution against the practices of the security agencies under Mubarak and because the army had been absent from the political scene before the revolution. Of course, the army dominated the scene when the revolution broke out as it was the establishment that sided by the key demands of the revolutionaries; namely, toppling Mubarak and the symbols of his ruling regime. It later transpired that this was done in form only and that it actually allowed the military establishment to reposition itself within the components of the state. This started with partial administration of the state and ended in full control in the wake of the changes that followed 3 July 2013.

The opportunity created in January for taking serious steps vis-à-vis the file of “security reform” after the revolution was

greatly reduced because of the growing political polarization and the lack of political-community consensus to push for reforming the security system as an important step toward democratization. This was reinforced by the weakness of the opposition and its failure to build a popular democratic political alternative. The opportunity was then completely eliminated when the military establishment imposed its control on the administration of the entire political process after ousting President Mohammed Morsi and removing the Muslim Brotherhood-backed government from power on 3 July 2013.

Political and community polarization increased dramatically and pro-regime government and private media alike were mobilized against any political or civil activity. In addition, security policies and measures – not witnessed by Egypt even under the Nasserite state – were introduced. Thus, the movement of the opposition in the street was completely restricted and the Interior Ministry was again used as a heavy stick to restrict the space that was largely opened to return it to its pre-revolution situation. The police establishment took advantage of this counterrevolutionary wave to try to restore its lost prestige. Consequently, it stepped up its repressive practices. Also, tight control was imposed on any political and social activity. This trend was reinforced by the practices of the judicial establishment, which was politicized in a crude manner. It handed down tough sentences across the board against thousands of political opponents and lost its status and position as a neutral authority to a large extent in the eyes of the opposition and the street. As time went by, the grip of the regime – with the military establishment at its core – has become tighter on the political and economic tracks. It has become clear, due to repressive practices that went hand in hand with legal and constitutional amendments that toppled freedoms in Egypt, that the post-3 July 2013 situation is much worse than what the situation was, even under Mubarak.

The weak positive aspect in this extremely bleak picture is that most of those who were involved in revolutionary struggle, which has extended throughout the post-revolution era, came to the conclusion that reviving the political situation in Egypt once again was dependent on a broad political reform agenda, the key part of which is clearly linked to radical structuring of the police establishment and a review of the status of the army and its role in the political and social sphere based on a clear perception of civil-military relations.

It has clearly emerged that issues linked to the achievement of a transitional justice system and the fulfillment of some of its measures, such as the creation of a fact-finding committee to examine crimes committed by the regime and hold those responsible accountable, the revolution establishing institutions that ensure serious care for the victims and their families, reviewing the documents of the various security agencies and subjecting

them to an oversight committee formed by popular authorities, and others have actually not been realized. This is in light of the absence of the conditions that are linked to completing the process of democratization, most important of which are a broad civil coalition and the existence of revolutionary momentum to push for achieving the goals of the revolution. This has not been achieved due to the growing polarization and the lack of a civil democratic alternative that has the necessary conditions to compete and exercise pressure.

This paper analyzes the reasons that led to the failure of the reform of the security agencies in Egypt after the revolution. It also tries to analyze the structure of the political regime on which the revolution was based and the reactions of its various institutions and agencies, particularly security apparatuses, to the revolution. Moreover, the paper seeks to explore the reasons that have “relatively” led to the failure of the idea of documenting the events of the revolution and the failure of the “fact-finding” committees that were formed after the revolution to achieve their main aims. This has been one of many reasons for the lack of actual investigation of the crimes of the Mubarak regime and the lack of purging and taking action against the members of the security agencies who caused human rights crimes before and during the revolution.

PART ONE: THEORETICAL FRAMEWORK OF STUDY

There is no single path for achieving democratic transition. Successful political experiences in South and East Europe, Southeast Asia, Latin America, and Africa over the past few decades suggest that there are numerous ways for this transition. Besides, relevant academic studies have offered a long list of reasons that explain the shift toward democracy in these experiences.¹

Achieving democracy here means, in its simplest definition, establishing a system whereby there is a great measure of equality, law enforcement, expanding public participation, subjecting state officials and representatives to oversight and accountability, and creating justice that guarantees the equality of all citizens in rights and duties, regardless of differences in race, religion, and gender.

In general, the period of democratic transition goes through three main phases. In the first phase, there is social and political action against an authoritarian regime. In this period, the experience of this activity accumulates and there is ebb and flow. There are successes in achieving different (political or social) demands. This action could also suffer failure and perhaps wane, giving way to another alternative movement in the street after some period of interruption, and so on and so forth.

When different reasons come together, including internal reasons related to the old age of the regime or its extreme faltering in managing the state, and external reasons related to the rising action in the street, and perhaps others, such as loss in wars, foreign pressure, and new alliances, the time becomes ripe for the dismantlement and collapse of the regime. The pace increases when there is revolutionary action that seeks to remove or dismantle the regime and its institutions as a whole (when there is a large-scale radical revolution) or partial (if there is a short popular uprising) to bring pressure to bear on the regime to make large concessions. This is the second phase. The third phase is the one that follows the fall of the authoritarian regime or its leaders making major concessions. Here, political and social

forces agree to the structure of “supra-constitutional” principles that lay the groundwork for the form of the new regime, the assignment of authorities between the institutions, the role of each institution in it, the form of administration of authority, and others. The situation will end up with a democratic regime (it is important to note that there is disagreement over the very term of democracy and the idea of the democratic system as will be explained later).

According to Gary A. Stradiotto and Sujian Guo, the concept of “democratic transition” refers, in its broadest sense, to processes and interactions associated with transition or shift from an undemocratic ruling regime to a democratic ruling regime. It is known that there are several modes or patterns for the undemocratic regimes. They could be totalitarian, closed authoritarian, civil or military, autocracy or rule by a few individuals, etc. Also, there are several states and levels of the democratic regime to which there is transition. A closed authoritarian regime might shift to a semi-democratic regime that assumes the form of electoral democracy; a semi-democratic regime could turn into a liberal democratic regime or be close to it. Besides, the transition to a democratic regime could be top-down, which means that it is based on an initiative by the ruling elite in a nondemocratic regime or the reform wing in it; or bottom-up by the opposition forces, which have broad popular support; or through bargaining and negotiation between the ruling elite and the opposition forces; or through foreign military intervention.²

Burhan Ghalioun says that what is meant by democratic transition is “seeking to absorb major and violent contradictions and reduce the high tension that cannot be tolerated and that threatens the democratic process before it begins.”³ Schmitter defines it as “the process of applying the democratic rules, whether at institutions in which they were not applied before or extending these rules to include individuals or subjects that they did not include them before.” Based on this, the process of democratic transition refers to integrating or reintegrating competitive and institutional multi-party practices into the political body. This includes constitutional, organizational, value, and intellectual amendments. It also includes redistributing power and influence and expanding the circle of participation in it and the emergence of different centers.⁴

Samuel Huntington identifies three patterns and mechanisms for the transformation, summed up as follows:

A. TRANSFORMATION FROM ABOVE

This process takes place when the regime leaders allow for the greatest measure of popular participation and provide an opportunity to political parties and civil society institutions to be present and largely reduce censorship of newspapers and media. The leaders of authoritarian regimes often resort to this track in view of the growing social demands or even external pressures for bringing about democratic reforms. The regime often tolerates

1 Abdel Fattah Madi, *Post-Revolution Violence and Democratic Transformation*, Cairo: Al Bashir House for Culture and Science, 2015, 17.

2 Sodfa Mohamed Mahmoud, Concept of Democratic Transition and Concepts Closely Related To It, in *Academia website* (researcher's page), date of visiting link 11 June 2017: <https://goo.gl/KvmhxE>

3 Eman Ahmad, *Theoretical Readings: Democracy and Democratic Transition*, Egyptian Institute for Political and Strategic Studies, 28 February 2016: <https://goo.gl/hHE3dP>

4 Ibid.

these demands so that it can continue. This response is usually parallel with the arrival of new elite from within the regime itself that supports transition toward more political and economic liberalism.⁵

Also, there is often something similar to a conflict of interests all the time between the new forces and the old forces over influence within the regime. The new group that came to power shows its smartness by taking advantage of the card of political reforms to enhance its influence and get closer to the street or to establish coalitions with internal forces (for example businessmen) or external forces (friendly countries). The last formula was somewhat closer to the set of “limited” reforms that occurred in Egypt after 2004 after the pressure put on the Mubarak regime by the U.S. Administration to open the political sphere more. It is the same period that witnessed the greater rise of businessmen to power and partial marginalization of the men of the old guard, and then holding presidential election (even if it was formal and rigged) and parliamentary elections in which the Muslim Brotherhood won a large number of seats in parliament. However, the political sphere soon witnessed a great decline, especially during the period that followed the revolution, which is the period that witnessed the return of Mohamed ElBaradei and the establishment of the National Association for Change and then the outbreak of the revolution in 2011.

B. DEMOCRATIC TRANSFORMATION THROUGH NEGOTIATION

Huntington means by this the initiative that arises through negotiation between the ruling regime and the opposition. This negotiation ends in offering concessions by the authoritarian leaders. It often happens when political and economic conditions deteriorate, along with the legitimacy of the political regime. However, the opposition might be too weak to create a political alternative to allow it to be in power. Thus, the process ends in flexible negotiation that allows for partial amendments and reforms in phases, and so on.⁶

C. DEMOCRATIC TRANSFORMATION OR CHANGE FROM BELOW

Democratic transformation from below happens as a result of huge popular action and accumulation of a large movement of organized public protests and strikes by different popular organizations. Then, the leaders of the authoritarian regime yield to public demands in order to contain the crisis by introducing political reforms to the structure of the regime. Alternatively, public action could develop and become very violent and take the form of large-scale “radical revolution.” Consequently, the leaders of the regime will give up power voluntarily or be forced to give it up.⁷

The situation develops after the revolution based on the power of the opposition and its organizations, the size of its presence, and its closeness to the street. This also depends on the flexibility of some wings within the regime itself (for example the army) in dealing with the revolution or not. There are other factors that affect the form and structure of the new regime, such as foreign intervention. A revolution might be very close to toppling a certain regime, but some major foreign powers might intervene to abort the revolution and cause its failure. Or these powers could intervene to side with one opposition party at the expense

of another; or they might support the army, which is reluctant to deal with the revolution, to turn against the revolution and curb it.

Other scholars speak about other points of entry that contribute to the process of change and transformation, such as foreign intervention, which has many forms, including diplomatic and various intelligence forms, as well as conditional economic instruments and direct military intervention to change the ruling regime. The use of direct military intervention often causes a lot of acts of violence, as happened in the examples of Iraq and Afghanistan. The U.S. occupation led to the outbreak of civil war in the two countries and the fall of hundreds of thousands of people. The wounded are almost double the number of the dead. The Japanese and German cases are exceptions as other factors played a role in their success, chief of which is the generous Western support.⁸

When talking about the idea of transition from an authoritarian or despotic regime to a democratic regime, there are differences over the question of “democracy” itself and its definition and form, according to different academic and political schools. A democratic system in liberalism means something different for Marxism and so on. Marxists, for example, criticize liberal democracy and believe that the idea of democracy that is confined to changing elected governments and electing limited elite representative groups is a fragile idea that only expresses “procedural democracy.” They also believe that “representative democracy” only leads to limited elite groups getting to elected parliaments, which later control leading political positions in view of their ability to coordinate with a huge network that owns capital and media or that has tribal and factional links (as is the case in local communities that are primarily tribal). All of these are instruments that represent strong levers for being present at oversight, legislative, and executive institutions in the state. Therefore, decision-making, even with the existence of representative democracy, remains in the hand of particular elite groups. Meanwhile, large sectors of the masses remain incapable of participating in political decision-making or controlling decisions linked to their economic, social, or cultural interests in light of the existence of laws, institutions, or frameworks that hamper their participation or restrict their presence in or near decision-making institutions. Consequently, talking about a radical democratic issue, from their point of view, can only happen when there are decentralized representations, coming from below, of the masses and their interests.

The methodology of the study will focus on the vision of democratic transition and transformation stage. A part of this vision focuses on analyzing the positions of key players, explaining their positions and choices. It also examines the impact of selecting these positions on the process of democratization.

Here, the study focuses on the security establishments of the regime (military and police). The researcher will speak about an important player, which is the Muslim Brotherhood group, in view of its pivotal role, which is connected to it being in power for a short period and before that as a political actor that influenced the whole scene with a number of coalitions that it established with the Military Council and other political groups.

5 Sodfa Mohamed Mahmoud, Ibid (paraphrased).

6 Ibid.

7 Ibid.

8 Abdel Fattah Madi, Ibid.

PART TWO: PRE-REVOLUTION POLITICAL REGIME IN EGYPT

FIRST: ARMY OFFICERS AND THE CREATION OF THE JULY STATE

The regime that managed the Egyptian state before the January revolution had a complex structure, at the helm of which was a president who came from the military establishment as a key element representing a part of the legacy of the July state whose foundations were laid down by military persons who staged a coup on 23 July 1952. They changed the structure of the political system of the state completely and put in place political and social rules that are completely different from the situation of the liberal monarchical period that followed 1952. Therefore, it is important here to speak about the features of the political regime of the July state whose architect was Gamal Abdel Nasser and the form of the regime that Sadat created later before discussing the form of the political regime under Mubarak.

In March 1945, after the defeat of the democratic and popular forces and the parties (Al Wafd, the communists, unions, and student movement), besides the Muslim Brotherhood group, Gamal Abdel Nasser and the officers who sided by him against the return of the army to the barracks monopolized power. The stage of clearing out the public and political sphere started with a number of decisions that completely eliminated the public and political sphere in Egypt. The national sphere was completely nationalized by eliminating parties, unions, and student and labor movements. An authoritarian regime was created based on Gamal Abdel Nasser's monopoly over power, helped by executive agencies and a sole formal political agency (National Union which later was renamed as Socialist Union) whose sole job was to mobilize the street behind the various decisions of the leader.

The specific mission of the July state was to establish a unified power that works for central objectives linked to the building of a new state. The project was present only in the mind of Abdel Nasser. It was a project to be built by the person at the helm of the state, from top to bottom, and not the other way around. It was a project that centered on his own vision and his person.

Consequently, Abdel Nasser and the group of army officers that rallied around him rejected the idea of self-organization by the forces of the people. His hatred toward political parties was visible. He also sought to have flexibility and absolute freedom of movement for his authority. This is why he refused to restrict his movement by committing to a specific ideology and a genuine political party that leads a project for comprehensive social change from below. Therefore, Abdel Nasser preferred to rely on personal leadership and the class of army officers, which mostly had the inclinations of petty bourgeoisie, lack of competence, security mindset, and hostility to politics. He also relied on bureaucracy, which became very large under his regime. At the center, there was a network of security establishments (specifically belonging to the army and intelligence), which controlled these relations.⁹

The movement of the 23 July officers did not have a political organization that can contribute directly to implementing the decisions of the revolution. Therefore, it had to dominate the existing apparatus of the state through its military officers who came from the heart of the army, in order to move this apparatus and to move through it. To tighten this domination, it had to purge this apparatus and ensure its loyalty, with a shadow of legitimacy

from this apparatus [...]. On the other hand, the conflict between the organized political forces and the path chosen by the nascent authority, in using the tools of the state in this conflict, dictated that it pay attention to the security agencies [...]. Because the new authority emanated from the army, the army became its major pillar in the conflict of that new authority.¹⁰

The security agencies were re-formed through control by the security agencies affiliated directly with the army, such as the military police, which carried out different operations against the various components of the opposition that opposed the expansion of the officers' movement, such as the arrest of the officers of the Cavalry, the Brotherhood, the communists, and others.

To control the state and society, it was not enough to dominate the state administration apparatus and to own the security agencies and strike the party movement. It was also necessary to close windows and make things harder for the emergence of opposition, whether to the revolution (23 July coup) in terms of the aims and objectives, or to the new authority. This meant tightening control over the establishments that were known to have produced certain shades of opposition or resistance; namely, universities, unions, and old parties, especially the majority Al Wafd Party, newspapers, civil organizations, and others.¹¹

The Nasserite regime faced several upheavals, key of which was the failure of the unity with Syria. Economic conditions became difficult in the 1960s, and then there was the harsh defeat it sustained on 5 June 1967, which slightly affected its centers of power. However, the internal components of the regime remained intact, along with its political and economic perceptions. Abdel Nasser tried to curb the army, which was under the control of Abdel Hakim Amer and his group, and the General Intelligence after the defeat, to be under his full control.

SECOND: SADAT, ARMY, AND OPENNESS

After the death of Gamal Abdel Nasser in September 1970, Anwar Sadat, the vice president, assumed the presidency of the Republic. He was a man with rightist leanings in the Nasserite regime. Sadat removed Abdel Nasser's men within a short period. The man completed the building of the army to confront Israel. After the October War and in the middle of the 1970s, major changes happened in the July state in its political and economic line.

Sadat turned his back on the Soviet Union. Before that, he had expelled Soviet experts from the army. Sadat also relatively liberalized the economy. The policy of economic openness, which he adopted, sought to give free rein to the activities of private and foreign capital in various economic domains. The "age of openness" was reflected in several pieces of legislation passed during that period, including a major law, which is Law No. 43 of 1973, known as Investment of Arab and Foreign Capital and Free Zones. This law allowed foreign capital to operate in large areas. There was also Law No. 93 of 1974, which approved the right of individuals to represent foreign companies and open dealerships to import from them. Law No. 118 of 1975 opened the door for exports and imports to the private sector. Law No. 97 of 1976 on

9 Ashraf Al Sharif, *Kamal Al Din Hussein and the Faces of the Conservative July State*, 1 October 2015: <https://goo.gl/0aARQd>

10 Tareq Al Bishri, *Democracy and the 23 July Regime (1952–1970)*, Beirut: Arab Research Foundation, 1987, 92, 93.

11 Ibid, page 95.

Foreign Currency allowed individuals to possess foreign currencies from any source.¹²

However, Sadat's open policy was not controlled at all. It distributed import licenses and foreign exporter dealerships to people who were loyal to the authority. A parasitical class emerged, which became abnormally rich, taking advantage of a random economic climate. It soon merged into authority.

The role of the intelligence and the military police in subduing the opposition ended after the death of Abdel Nasser. Sadat relied on the police establishment as an instrument to subdue domestic opposition and control any social movement in the street. This trend gained strength under Mubarak later.

Sadat moved the army two steps back and the status of the military as the sole ruling elite that monopolized power declined a little. The military had to agree to share power with a rising class of parasitical businessmen who were close to Sadat and his family and who benefited from the new economic policies.¹³ But fortunately, the peace agreement with Israel came to save the military elite from this situation and restore to it a lot of what it had lost. After the war ended and Sadat signed the Camp David agreement, it was not possible to demobilize the huge number of army officers and soldiers who were highly trained on combat. Therefore, an agency was established called National Service Project Organization. It set up different projects and appointed army major generals and colonels as directors of it. Armed Forces projects were given privileges above the legal and accounting powers of the government since they were exempt from taxes and not subject to laws and regulations that everybody in the public and private sectors were subject to.¹⁴

THIRD: MUBARAK REGIME

The Mubarak regime inherited the Sadat regime with its manifold contradictions. The regime was despotic and contained pluralism that was lacking, represented in some parties described as "cardboard parties." Mubarak also inherited from Sadat his political line and economic vision of capitalist economy whose resources are essentially founded on rentier sources, fragile system of production, and budget that is permanently in trouble. The deteriorating situation of this budget was not improved by donations and financing from abroad or domestic debt. Mubarak had sought to curb the openness policy versus a somewhat larger role of the state to reduce the losses to the economy.

Under Mubarak, the role of the army receded and took two steps back. Mubarak tightened his grip on the army in a stronger way after he removed Abdel Halim Abu Ghazala in the wake of accusations that referred to the latter's involvement in a project to develop and produce missiles for the army, in cooperation with Argentina and Iraq, at the end of the 1980s. Before that, the budget of the Ministry of Defense had been reduced gradually in favor of other establishments, such as the Ministry of Interior. At the same time, the army kept hold of a share in executive positions in the state and managed entire economic sectors affiliated with it, as was mentioned before.

Field Marshal Abdel Halim Abu Ghazala, who occupied the post of defense minister toward the end of Sadat's term and the beginning of Mubarak's term for several years until 1989, used the National Service Project Organization, which was established as soon as the peace treaty between Egypt and Israel was signed, as his base of operations. One year after his appointment as defense minister, Abu Ghazala issued a ministerial decision to

amend the bylaw of the organization to give him the right to establish any kind of companies and expand his activities inside and outside Egypt, in cooperation with the capitalists of openness, Egyptians and foreigners alike.

The decision of the field marshal stated that "the organization will carry out all economic, industrial, agricultural, administrative, trade, and financial services and activities inside and outside... To achieve its aims, the organization may establish all kinds of companies, whether unilaterally or with the participation of national or foreign capital." Moreover, Abu Ghazala issued a decision making the activities of the organization "secret" and exempt from the control and inspection of the Accountability State Authority.¹⁵

In his important book "Strong Regime and Weak State," scholar Samer Suleiman says that the Egyptian state under Mubarak had proceeded according to specific mechanisms that defined the form of the composition of authority and the weight of the forces within it. This equation could be analyzed accurately when studying the paths of state spending and distribution of resources. Suleiman says that the financial resources of the Egyptian state had increased in favor of some sectors at the expense of other sectors. Public spending increased in certain paths for a major aim, which is basically to strengthen the ruling regime. In this context, Suleiman refers to two main paths in state spending. These are: Security agencies (specifically the police and its hard core, the State Security Service), and the ideological agencies that morally control the minds of citizens in support of the physical control that is carried out by the security agencies. These ideological agencies are represented in the Ministry of Culture and Ministry of Awqaf. The latter oversees the appointment and monitoring of mosque preachers throughout the Republic.¹⁶

The resources allocated to the Ministry of Interior were also raised, starting in the 1990s. Meanwhile, the resources of the Ministry of Defense had previously declined in the 1980s, especially with the growing confrontation between the state and jihadist groups at the time. However, the army was given a free hand to establish its own economic sectors after the reduction of the resources it received from the state. The idea was closer to an unwritten deal between the head of the regime and the army whereby the latter would not be present directly in authority provided that it is given space to move through quality appointments in the administrative apparatus of the state, such as municipalities and public and holding companies, and to establish its own companies.¹⁷

With the beginning of the new millennium, and the arrival of businessmen, the Mubarak regime turned relatively from a traditional capitalist system (market system with state intervention and the existence of public sector, free education and health sector and subsidy umbrella, even if these were worn-out sectors) into a free market economy in a larger manner, even if it had kept some of the features of the old system just to avoid angering

12 Ibrahim Hajjaj, Economic Changes in Egyptian Society in Openness Period, in *Al-Hewar Al-Mutamaddin*, 12 November 2010: <http://www.ahewar.org/debat/show.art.asp?aid=236568>

13 Zainab Abu al Majd, Army and Economy in Egypt, in *Jadaliyya*, 21 December 2011: <https://goo.gl/gxkceG>

14 Ibid.

15 Zainab Abu al Majd, Beautiful Time of the 80s... Days of Abu Ghazala (2-3), in *Al Manassa*, 12 January 2016. <https://almanassa.com/ar/story/675>

16 For more, see: Samer Suleiman, *Strong Regime and Weak State*, Cairo: General Organization of Culture Palaces, 2013, Third Edition.

17 Ibid.

the street and to maintain social grassroots that it feared losing. Also, reliance on the Ministry of Interior increased. This organ had the upper hand in drawing up many features of political life up until the revolution.

Mubarak headed the National Party, which had the majority all the time in parliament. It is the old party, which was dissolved immediately after the revolution. However, most of its grassroots became active again after 3 July 2013. The party represented a large gathering of the interests of businessmen and families whose interests were linked to the interests of the regime.

As for the government, it represented the executive organ of the regime. It mostly comprised technocrats coming from the administrative organ of the state or who had organizational ties with the National Party. In the last years of the Mubarak rule, a group of new businessmen controlled the government. Most of them came from the National Party or had ties with it. They were part of the wing of Gamal Mubarak, who led the Policies Committee in the National Democratic Party, which ruled at the time. It was helped in this context by businessman Ahmad Ezz, who had occupied the post of secretary of the organization of the party itself. In the recent years of the Mubarak rule, the influence of Ezz grew larger to the extent that he had controlled those who represented the party in the legislative elections.

Ahmad Ezz represented a very important segment whose influence increased with the emergence of Gamal Mubarak, the younger son of Mubarak, who was groomed to succeed his father. The presence of this group became larger with the major economic transformations in the mid 1990s. Their influence grew with the beginning of the millennium and the emergence of Gamal Mubarak, who set up a large Policies Committee within the National Party, which mostly comprised businessmen who controlled the government in the last decade of the Mubarak regime. They clearly supported Gamal Mubarak to make him get to the presidency. The military establishment objected to this. However, the outbreak of the revolution disrupted the inheritance of power and greatly minimized the domination and power of the group.

Strengthening the pillars of power as a part of the strategy of the Mubarak regime was done through a large network of close associates. The calculations were clear and enjoyed the sanctity of continuation: The more jobs the leader granted, the greater loyalty to him. While the state was being modernized and new laws were activated, the administrative divisions and ministries on the level of the old state were expanding and new entities were created, while only a small part was canceled. As a result of this expansion, the wages of civil servants accounted for 90 % of the current expenditures of local administration, compared with 60–70 %, which is the prevailing standard worldwide. Also, the ratio of workers in the local administration to the number of citizens totaled 1:21, while the ratio in Western Europe, which has decentralization, is between 1:70 and 1:80.¹⁸

There were two main groups controlling the local administration apparatus. They were the members of the old National Party, who controlled junior and middle executive positions and part of senior positions, but most senior positions in municipalities were controlled by men who originally came from the army, especially the governors and their aides.

In his important study “Above the State: Republic of Officers in Egypt,” Yazid Sayigh says that the military had almost total control over local administration. He says: “Retired army personnel occupy all government echelons and operate as an executive and security arm, which is affiliated with the president of the Republic

through the local governors, who are also appointed by the president. They make huge gains from these honorary posts, besides the end of service compensation that they receive as officers as bonuses for their early retirement. For example, in the mid 1990s, 50–80 % of the governors of the regions were retired officers, while 20 % came from the police or the security services. Retired officers also occupied other jobs that assist the governor on the level of the governorate. This pattern was also reflected on the lower levels of administration.”¹⁹

This system, which was made up of army officers, businessmen, members of the old National Party, and the security agencies, existed within a social coalition that changed slightly depending on certain political fluctuations. Thus, one group would advance at the expense of another or one segment would disappear from a certain group due to exceptional circumstances. In the revolution, for example, the group of businessmen in authority retreated, along with a large segment of the National Party, in favor of greater presence of the military establishment.

The current pattern of coalitions, according to some people, is very narrow (limited segment of businessmen and a limited number of civil and military bureaucracy). This coalition relies on a rentier economy that spread cultural patterns that give higher value to consumption and make the standard of social status the wealth that one has, while the value of productive work is wasted.²⁰

All in all, the Mubarak regime, and Sadat before him, consisted of a loose coalition that included the military and civil bureaucracy, along with a class or segment of businessmen that overlapped with senior figures of the existing political organization (National Party or Socialist Union), and a segment of cultural and media elites. These coalitions were supported by marriage relations and broad trade partnerships.

This composition in the Mubarak regime (the same composition now) relies on a structural base of large families that have roots in the governorates, villages, and rural areas. These families have strong community presence, economic weight, and links with major state organizations through their members, whether in the army, police, or administrative apparatus of the state. They also have political representation through the old party of the authority (the dissolved National Party) or parties and groups that are close to the state and its organizations after the revolution, some of which were formed by former officers of the military establishment and the intelligence.

PART THREE: POSITION OF STATE AND ITS INSTITUTIONS VIS-À-VIS JANUARY REVOLUTION

FIRST: WHY DID THE ARMY REFRAIN FROM CRACKING DOWN ON 25 JANUARY DEMONSTRATIONS?

Tackling the demonstrations in the first days of the revolution was based on the same security mentality of crude handling of

18 Tadamun, Why Did the Revolution Stop at the Municipal Level?, in *Tadamun website*, 25 June 2013, see link: <https://goo.gl/bC3VNL>

19 Yazid Sayigh, *Above the State: Republic of Officers in Egypt*, Carnegie Middle East Center, 1 August 2012: <http://carnegie-mec.org/2012/08/01/ar-pub-48996>

20 Abdel Mouti Dhaki, *Deep State in Egypt: Characteristics and Pillars*, Egyptian Institute for Political and Strategic Studies, 11 June 2016: <https://goo.gl/hETJZY>

any protest that appeared in the Egyptian street, especially in the latter years of Mubarak's rule. At the beginning, the Ministry of Interior adopted systematic tactics to eliminate demonstration before it occurs and to dry up its sources by arresting the symbols of revolutionary and political movements before and during the first days of the revolution. Then, the regime, through its security apparatus, put pressure on telecommunication companies to cut off Internet and disrupt mobile phone connections. In the early days of the demonstrations, the main metro stations that lead to Tahrir Square were closed and a militia of thugs was mobilized to deter demonstrators. The Ministry of Interior had used these groups before during the parliamentary elections.

The situation not only involved cracking down on demonstrators, but more than 1,000 people died in the first 18 days of the revolution, let alone tens of thousands of injured.

Some revolutionaries had fears that the military establishment would play a role in cracking down on demonstrators, who took to the streets in the millions. However, in view of the composition of the Egyptian army, which is basically set up through compulsory military service, it would be very difficult for soldiers to open fire on demonstrators. This not only concerned rank and file, but also officers of junior and middle ranks, and even some senior ranks. Perhaps, the situation would have developed into a rebellion and splits within the army itself on a class basis. This would have strengthened the revolution more.²¹

On 28 September 2013, an edition of *Al Watan* newspaper was confiscated. It is a private newspaper known for being close to el-Sisi's regime. The edition contained the first part of the memoirs of General Sami Anan, who was the army's chief of staff when the revolution broke out. He also occupied the position of deputy chairman of the Military Council, which led the country after Hosni Mubarak stepped down. The memoirs reveal how the military establishment handled the revolution and how the reaction of the army command was at the time.²²

The memoirs of Sami Anan clearly reveal the muted hostility between the military establishment on the one hand and the group of businessmen leading the dissolved National Party and the government on the other in the wake of the rejection of the former of policies linked to the file of bequeathing power and the reservations of the senior commanders of the military establishment over the manner in which the government ran the parliamentary elections in 2010. The elections were marred by great fraud and were a reason for increasing tension in the street and between the regime and opposition, which boycotted the parliamentary elections at the time.

Anan also talks about a conversation he had with the former minister of defense, Field Marshal Hussein Tantawi, in the wake of the outbreak of the Tunisian revolution about the reaction they are supposed to have if a similar revolution erupts in Egypt. The former told the field marshal that it would be difficult for him to take a decision to strike Egyptian demonstrators, justifying this by saying that the army commanders themselves had previously turned down a request by the political leadership to use a heavy hand when the Palestinians invaded Rafah while Israel was striking Gaza, let alone firing army bullets on Egyptian demonstrators.²³

Anan says that the Egyptian revolution broke out while he was in the United States. Anan was asked, according to his memoirs, by Alexander Vershbow, a U.S. official on a committee that supervised military and security cooperation and coordination between Egypt and the United States, about the reaction of the army

to the demonstrations that broke out in Egypt and what would happen if the army went down to the street. Anan answered that the army would go down only to secure vital installations and that if the political leadership gave orders to strike the demonstrators, military commanders would reject them.²⁴

Sami Anan expressed reservations about the first speech by Mubarak after the revolution, in which Mubarak used the words "I have asked the government to submit its resignation today." Anan was of the opinion that a stronger expression should have been used, suggesting that he would respond to the demands of the revolutionaries in the street and that he should talk about dismissing the government due to its failure to run the affairs of the state.²⁵

It is noticed here that Anan – the military establishment had the same view – did not hold Mubarak directly responsible for the failure to run domestic affairs. Instead, he blamed groups from the regime, chief of which, of course, were the groups run by Gamal Mubarak and Ahmad Ezz, secretary of the former organization of the dissolved National Party, as well as the group of businessmen who had controlled the party and government. Anan says: "The aides and advisers to the president are to blame. It is either that they did not have sufficient information, which is a disaster, or that they had it, but could not analyze it well in a mature scientific manner, which would be a bigger disaster."²⁶

The viewpoint raised by Anan carries a superficial military view that links political, economic, and social failure to administration and overlooks other things, such as corruption and the absence of democracy.

The interesting thing about the "memoirs" is Anan's praise of his former commander, Hosni Mubarak, and his talk about his emotional speech after 28 January, which appealed to the masses had it not been for the plotting by known domestic and foreign powers, which did not wish for stability for their own interests, according to Anan.

Anan also spoke in a tone that reflects the "conspiracy theory," which military commanders and the security agencies are known for. It states that Hamas and Hezbollah were the ones who raided the prisons of the Ministry of Interior and freed the prisoners. He also leveled implausible accusations against the Muslim Brotherhood group, saying that it prevented demonstrators from leaving the square. He further accused the United States of leaking news to the Qatari Al Jazeera TV to the effect that he had cut short his visit to the United States and returned to Egypt to stir up tension, by which it would maintain its interests. He used the Egyptian expression "a person who uses a cover provided by the Americans is naked."

The strange thing is that the tone of military and government officials had changed all the time. They used dual rhetoric when talking about the United States. The rhetoric addressed to the domestic audience demonized America and accused it of meddling and financing civil society groups and institutions. The rhetoric addressed to the United States during official visits

21 Ibrahim Al Sahari, Military Council Leads Counterrevolution, in *Socialist Papers*, Summer 2011, Number 22, 13.

22 Salah al Din Hussein, *Al Watan Publishes Memoirs of General Sami Anan About Secrets of 25 January Revolution*: <http://www.elwatannews.com/news/details/331085> (link accessed on 7 May 2017)

23 Ibid.

24 Ibid.

25 Ibid.

26 Ibid.

considered it a strategic ally and permanent military and political supporter of Egypt.

On 29 January 2011, the day that followed the “Friday of Anger” and the army going down to the street, Sami Anan, former chief of staff, proposed to Field Marshal Tantawi, the former minister of defense, that the army stage a “soft coup” against Mubarak – one that achieves stability without the fall of victims or bloodshed. The coup would heed the people’s demands on the one hand and preserve the status of the presidential position through free and fair elections on the other. Tactically, this would take place by asking groups from the commando forces, paratroopers, and military police to pass by the troops at Tahrir Square and Maspero. From there, the decisions adopted by the Supreme Council of the Armed Forces would be announced to maintain the unity of the country and avoid conflicts and problems. Anan thought that this soft coup would be welcomed by the people, especially in view of the popularity gained by the army after going out to the street and the demonstrators shouting then “the army and people are one hand.” Field Marshal Tantawi rejected this and waited to see how the situation would unfold and what the reaction of the presidency would be. Some resignations and changes in the National Party and the government occurred to absorb part of the popular anger.²⁷

On 29 January 2011, and amid the protests that demanded, among other things, removing Ahmad Ezz, he resigned from the National Party to absorb some of the anger in the street, which rose up against a regime that Ahmad Ezz represented par excellence.²⁸

Prior to that, the ousted president, Hosni Mubarak, had issued a republican decision, appointing Omar Suleiman as vice president of the Republic. He had also issued a decision, designating Ahmad Shafiq as prime minister.²⁹

All these concessions that were made through the change of the government and resignation of Ahmad Ezz, who was responsible for the disaster of parliamentary elections, were not enough for the street. The army remained in place, waiting for escalation by the revolutionaries and the reaction by Mubarak and his group in power.

On 31 January, Major General Ismail Othman, spokesman for the Armed Forces, announced that the Armed Forces would not use force against the protesters and that freedom of expression was guaranteed for all citizens who use peaceful means.³⁰ This step fueled the enthusiasm of the revolutionaries, who saw the announcement as one of two things: First, that they should rest assured that they can continue with the demonstrations without fear that the army would intervene and suppress them. Second, that the statement implies that the army had a different opinion of the moves in the street, away from the presidential palace. Indeed, the army gained popularity in the streets and squares at the time because of this statement.

Meanwhile, the army had thought, as Anan explained, that the step of dismissing the Ahmad Nadhif government and appointing Ahmad Shafiq and Omar Suleiman was good, but late. Mubarak summoned Anan and Tantawi to a private meeting, which was not announced in the media. The two army commanders went to the meeting, which was attended by Mubarak; Omar Suleiman; Ahmad Shafiq, the new prime minister; Interior Minister Mahmoud Wajdi; Major General Najib Rashwan, commander of the Republican Guard; and Major General Hasan Abdel Rahman, chief of the State Security Investigations. According to Anan, Mubarak was assured that the first statement

by the army was not meant to incite against him; it was simply to assure the street that the army would not shed the blood of demonstrators. Mubarak told Tantawi and Anan at the time that “the army is responsible for safeguarding legitimacy.”³¹

It appeared from Anan’s statement about Mubarak’s second speech, which he delivered on 1 February 2011 and in which appealed to the sentiments of the street, and even some demonstrators, that the army commanders welcomed the fact that things would proceed calmly when Mubarak announced that he would not run in the elections and that the army was interested in maintaining calm and stability in the street.

Army commanders thought that the concessions that Mubarak made in his speech on 1 February 2011 were more than enough. This included his announcement that he would not run again and ridding the army of bequeathal of power by toppling Gamal Mubarak and before that Ahmad Ezz, secretary of the organization, the government of businessmen, and Interior Minister Habib Adili. However, things went out of control when the infamous “Camel Battle” took place. Huge groups of thugs stormed Tahrir Square and the situation took another turn in favor of the revolutionaries after the Mubarak speech was about to pull the rug from under the feet of the revolutionaries.

The important and last point in Sami Anan’s memoirs – this is the first part only because the edition was confiscated and the other episodes of the memoirs were not completed – is that Anan responded to the accusations made against the military establishment after Mubarak stepped down. He first refuted the accusation that the army handed power over to the Brotherhood, noting that there was tension and hostility between the army and the Brotherhood and that the army removes people who have political inclinations from its ranks before joining military colleges. He said that when the Supreme Council ran the country after Mubarak stepped down, it was an unexpected and surprising development and without precedents or constitutional provisions that gave the military establishment this right. He said that the military establishment wanted to hand over power to civilians immediately. This is why it pushed for elections. It did not want a constitution to be drafted during that period because it did not want people to say that the constitution was drafted under a military administration. He added that civil opposition and youth of the revolution were the cause of the crisis because they were so weak and failed to establish parties that would enable them to compete with the Muslim Brotherhood. The historic responsibility assumed by the army made them speed up the constitutional track to hand over power to an elected administration. The elections that were held under their supervision were fair, as both opponents and supporters of the army have testified. According to Anan, the army was very keen on not getting involved in politics; its main task was to safeguard the state against any foreign aggression.³²

27 Ibid.

28 Mahmoud Musallam, Sharif Announces Ezz Resignation from National Party, in *Al Masry Al Youm*, 30 January 2011. <http://today.almasryalyoum.com/article2.aspx?ArticleID=286979>

29 Chronology of Most Important Developments in Egypt Since 25 January Revolution, in *Reuters*, 24 January 2012. <http://ara.reuters.com/article/topNews/idARACAE80N07N20120124?sp=true>

30 Chronology of Most Important Developments... 25 January 2011–2014, in *Aswat Masriya*, 23 January 2014. <http://www.aswatmasriya.com/news/details/48779>

31 Salah al Din Hussein, Ibid (paraphrased).

32 Ibid (paraphrased).

SECOND: POST-REVOLUTION CRISIS OF POLARIZATION

The March 2011 referendum on the constitutional amendments was the beginning of the unfolding of real polarization between political and revolutionary groups on the political scene. It was followed by several other developments, which completely did away with any consensus between the political forces.

The Muslim Brotherhood group, along with its allies from other Islamic movements and parties, participated in the first referendum that immediately followed the revolution on the constitutional amendments proposed by the Military Council at the time. Despite the wide rejection by the other political forces, the Brotherhood and the Islamic parties and groups mobilized support for the constitutional amendments because the implicit meaning of passing these amendments was the early entry into elections and winning them before the other forces get ready to build their parties. The referendum itself was the first real station for striking national consensus. It also served as a warning to the revolutionary and civil forces that clearly stated that the group intends to almost fully monopolize the administration of the transitional stage, based on partnership with the Military Council, as a prelude to a stage in which it will almost completely run the Egyptian state after the transitional stage.

Meanwhile, the Military Council wanted indeed to reduce the pace of the revolution by creating a legitimate cover for other reform forces with whom there can be negotiations and common ground to put pressure on it through them. The Military Council achieved what it wanted. That was the first and biggest mistake of the Brotherhood.

The Brotherhood group succeeded in mobilizing people for the first referendum. It then succeeded in the parliamentary elections and did not find a suitable candidate for the presidency of the state with whom it can establish an alliance. It hastened to nominate its candidate to compete for the most important executive position in the state, which is the position of president. The group initially controlled the People's Assembly – before dissolving it – and then the Shura Council and the Presidency. It finally controlled the composition of the last Brotherhood government that was led by Hisham Qandeel.

In the wake of the short experience in governance, be it the “almost total” control, along with the rest of the Islamic factions, of the two chambers of parliament (People's Assembly and Shura Council) or the Presidency or controlling the administration of the government, it can be said that the Brotherhood group, just as it was pushed by force toward revolutionary participation, seemed as if it was pushed by force to accept democracy in its procedural form, and not democracy as values and practice. Therefore, the governing framework with which the group dealt with its allies was exclusion and total control. It failed to adopt a consensual national discourse or take the initiative in accommodating all other revolutionary and political parties to take part in bearing the burden of running a state. This is because it would be difficult for a group with no experience in administration and governance to run this state on its own.

Moreover, the Brotherhood adopted a non-pragmatic political discourse, which is even more radical than that of some groups and parties that belong to the Salafi trend. Its crude media rhetoric was literally exploited by its opponents to discredit it with the public through media outlets, most of which were owned by businessmen loyal to the Mubarak regime. All of this made

the Brotherhood lose the chance of creating new coalitions after getting to power.

The crisis of the 2012 constitution was an example of this situation. The Brotherhood, along with their Islamist allies, drafted the constitution on their own after the resignation of most liberal, leftist, and independent political groups from the committee. Consequently, the composition of the constitutional committee received wide criticism as it did not seriously reflect any political or community consensus. On the other hand, the new revolutionary and political groups failed to build organizations that express broad grassroots or organize interest groups to take them to parliament or to power. Almost all the battles they fought were without the public or any real popularity.

PART FOUR: LACK OF PRESSURE FOR REFORMING THE SECURITY SECTOR

Based on the Huntington classification of the paths of democratic transition, the model of the Egyptian revolution follows the third case specifically, which is transformation through change from below. However, it was an incomplete state of democratization. The experience in Egypt faced failure in view of a large number of reasons, most significant of which is that the largest security establishment in the country (the military establishment) took control of the state after Mubarak stepped down and led the counterrevolution all the time and worked to exhaust different groups, one after the other.

The active factor in the political crisis that faced the democratic transformation in Egypt – which was aborted at an early stage – is that the military establishment managed sovereign files. There were no opposition institutions or parties that benefited from the revolutionary momentum in the street to get organized and assume and manage these files.

Contrary to many radical revolutions and democratic transformations that have occurred in some countries that were ruled by dictatorial regimes where reforms involved all branches of security establishments (police-army-intelligence), this did not happen in Egypt after the January revolution. We can exclude the police service, which witnessed simple partial reforms and changes in its key commanders. These changes soon witnessed a setback after 3 July 2013.

Of course, there was no rhetoric that spoke about the importance of rehabilitating the military establishment to be consistent with democratic practice and the new national goals for the stage that will follow 25 January 2011. The reason for this is simple, which is that the military establishment itself was the one that was actually in control of the administration of the transitional stage. Most political groups considered it a partner, and not a party that is the subject of reform, except for some very few voices, such as the group of Revolutionary Socialists.

The second point is that immediately after the revolution and despite the fact that the key demands raised by the masses in the streets included holding Interior Ministry officials accountable for their crimes in connection with torture and other violations and fabrication of cases, no path was adopted to reform the security establishment on a political and popular level in a manner that would allow for a real process of change at the heart of the police service. There were some very minor changes. Also, some views were raised by different entities, mostly think tanks and public political studies centers, and some of which by parties.

But all these papers were ignored because political groups were busy later with the elections, drafting of the constitution, and other issues. There was enough time, and the conditions allowed for pushing for some reform as the revolutionary momentum was still alive in the street, but this momentum was directed toward the elections, which were held early.

The strong state of polarization between political groups, which started appearing more visibly after the march 2011 referendum, increased the fragmentation of secular and Islamic political groups alike. Most parties with a reform inclination had clear reservations over any proposals that spoke about reshaping civil-military relations under the new political regime or demanding radical reform of the security agencies.

There was no consensus at all on the question of reforming security sectors. In fact, some sectors of the political groups did not have any clear vision of the question of structuring itself or dealing with the Interior Ministry. There was almost total absence of a specific view of civil-military relations on the part of most political groups that dominated the scene after the revolution, let alone a blurred and conservative vision associated with was called “the importance and centrality of the patriotic and historical role of the military establishment in the Egyptian state.” This vision was adopted by some political groups in a bid to curb the rhetoric that had demanded completely keeping the military establishment away from political life. The issue was only raised by small political or academic elite groups. Although these groups struggled to convey their voice to the larger political groups, they failed for different reasons, including the fact that political and revolutionary groups were busy with different procedures of the transitional process and faced attrition due to their involvement with these procedures and the internecine conflict they had.

In view of the situation of the revolution, there was room for the democratic forces and civil society to dominate and to have the upper hand vis-à-vis the old state and its institutions by creating a constitutional and legal status that would allow for public oversight of executive agencies and stripping them of their authoritarian situation. However, this did not happen. There was a reversal with regard to the status of the military establishment in the two constitutions of 2012 and 2014, which were drafted directly after the revolution. Thus, the military establishment assumed greater powers compared with the pre-January revolution constitutions.

For example, a new article was introduced into the 2012 constitution, which is Article 195. It stipulated that “the defense minister is the commander in chief of the Armed Forces and he shall be appointed from its officers.” Also, the constitution, which was drafted under a consensual government appointed by the Military Council and based on agreement with the Brotherhood and some civil forces, set a condition that the approval of the National Defense Council must be obtained in the case of declaring war or dispatching the Armed Forces to war outside the Egyptian state. This was previously tied to the approval of parliament.³³ This article was kept in the 2014 constitution, drafted under interim President Adly Mansour, who took power after the ouster of President Mohammed Morsi. This was the period in which the military establishment completely dominated the political scene.

The revolution did not address the space of civil-military relations, which discusses, among other things, the presence of military persons in the administrative sectors of the state and

the effect of this on military domination of the political realm and the obstacles to the democratic transition. The matter aggravated with the increase in the members of the military in civil jobs and sectors immediately after the revolution. It then exacerbated after 3 July 2013. The year in which the Supreme Council of the Armed Forces took power after the departure of Mubarak witnessed a noticeable increase in the number of officers appointed to civil posts. The Military Council, chaired by former Defense Minister Hussein Tantawi, took advantage of its presidential power to appoint a growing number of retired officers to many civil posts. The two post-revolution prime ministers, who were stripped of power, happily signed the letters of appointment of those officers.

The law on civil servants in the Egyptian state allowed this situation to develop. The president was given sole authority to appoint and dismiss holders of senior positions, including governors and directors general. Sadat issued Law No. 47 of 1978 in a bid to end the Nasser legacy and minimize the presence of the army in the government. Mubarak used the same law to reinstate them. Article 16 of that law stipulates that “appointment to senior jobs shall be by a decision by the president of the Republic.” Although the law stipulates that the employee must have a medical checkup to determine his fitness to assume the position, Article 20 exempts those appointed by the president from this checkup. This fits retired and old army officers.³⁴

In late 2015, Abdel Fattah el-Sisi issued a decision, allowing the army to establish companies with national capital or through partnership with foreign capital. This decision was deemed the cornerstone in the domination of the military establishment and interference in investment in all sectors. In February 2015, el-Sisi had allocated land south of the Cairo-Suez road for the Armed Forces Land Agency to establish the new administrative capital. In July 2015, el-Sisi issued a decision allowing the Egyptian army and police to establish private security companies, let alone the approval of establishing the first language school in Suez, which is Badr International School, affiliated with the military establishment, in 2013. A decision was issued by the Higher Council of Universities to stop all public bids and tenders for medicines and medical supplies to buy them from the medical services administration of the Armed Forces. The Egyptian army largely expanded its sales of food products through cars in the streets within the context of an announcement by el-Sisi about the intervention of the Armed Forces to control prices, although this is not its responsibility.³⁵

It became abundantly clear that civil-military relations had tilted in favor of the military establishment. This is much worse than the pre-revolution situation.

On the level of reforming the police service, all that happened was simply canceling some internal divisions, such as the administration that was involved in religious and political activity, which is affiliated with State Security. However, this division, which followed religious and political activity, was reinstated in 2014. Also, the Ministry of Interior changed the name of the “State

33 Sharif Muhyi al Din, *Development of the Military Establishment in Constitutional Pacts-Prospects for Democratic Oversight of Armed Forces in Egypt*, Arab Reform Initiative, January 2016.

34 Zainab Abu al Majd, Republic of Retired Generals, in *Al Wafd*, 13 May 2012: <https://goo.gl/N7jMvm>

35 Studies and Research Unit, *Successive Crises of Egyptian Economy... Will They lead to Collapse of el-Sisi Regime?* Fiker Center for Studies, 18 November 2016: <https://goo.gl/tpuc6v>

Security Investigations Service” and called it “National Security Service.” The Ministry of Interior further issued a code of conduct and ethics for police work, in which it highlighted the mission, goals, rights, and duties of the Egyptian police. The aim was to change the police doctrine and make them respect human rights and rule of law. There were some amendments to the provisions of Law No. 109 of 1971 concerning regulating the police service, which was approved by the People’s Assembly in June 2012, key of which were curtailing the powers of the Higher Police Council with regard to disciplining officers and giving this right to the interior minister while considering the opinion of the council to be “advisory.”³⁶

Following the overthrow of President Mohammed Morsi on 3 July, the security establishment and its personnel returned to the same old ways. The crimes of torture, detention without judicial warrant, expanding the scope of suspicion, and the lack of a dividing line between political and nonpolitical conduct were repeated. Thus, police violence and violations again became systematic.

PART FIVE: HOW DID NATIONAL SECURITY ARCHIVE DISAPPEAR?

FIRST: IMPORTANCE OF REVOLUTION ACCESSING ARCHIVE OF SECURITY REGIME

The content of the classified documents of the security agencies – these are seized after revolutionary uprisings or received from the government of the former regime under public pressure during the process of democratic transition to be used by transitional justice and fact-finding committees – is of paramount importance as it shows the magnitude of violations that were committed against the victims who fell at the hands of the regime before and during uprisings or revolutions. These documents also help in knowing the real culprits who took part in these violations either personally or through issuing orders, and tracking down corrupt officers and officials who are involved in cases of financial, criminal, or legal corruption; persons accused of taking part in torturing ordinary citizens or politicians; or security personnel or political officials who had a hand in putting pressure on judicial or local institutions to rig elections. Furthermore, the importance of these documents is that they represent an archive for preserving the popular and historical memory of the people to show the atrocities committed by the authoritarian regime that had ruled before the revolution.

All of this did not take place in the Egyptian revolution due to the lack of the necessary objective conditions to bring about the process of radical democratic change and transformation. These conditions included the following:

First: The political power imbalance between the forces of the revolution and the establishments that represented the counterrevolution or the old regime. There was some balance at the outset of the revolution, but it later disappeared and the military establishment managed to take control quickly.

Second: The revolutionary and political groups did not possess the conditions of systematic political change (the ability to put pressure on the regime, developing visions for managing the transitional stage, how to handle civil-military relations, developing supra-constitutional principles for managing the transitional stage and the stage that comes after it, etc.)³⁷

All of this did not happen in Egypt due to the collapse of the civil alliance between the revolutionary and political forces opposed to the Mubarak regime. In addition, the power of the protests and revolutionary momentum in the street waned before reaching the limit that would allow for continuing pressure on the establishment that ran the transitional stage (military establishment) to carry out a revolutionary program with clear features.

Of course, the failure of the party experience or any other alternative civil experience is a main reason for the lack of a political base to be relied on to bring about the stage of transformation. Then, the stage of transformation itself became under the rule of the Brotherhood, who are known for their extreme weakness when it comes to how they envision the necessary standards and goals to bring about a full-fledged process of democratic transformation. This has led to their downfall because of mistakes in their rhetoric and strategy and other mistakes in the political process and on the part of its different parties. This paved the way for summoning the military establishment, which found great room for intervention and halting the entire process of democratization.

SECOND: STORMING HEADQUARTERS OF NATIONAL SECURITY

In the January revolution, the masses managed to have access to some documents of the “State Security” Service. It is the agency that had controlled political and religious activity in Egypt. It represented the heavy stick through which the regime controlled the political and social scene. Its power reached the extent of rejecting the nomination of persons to specific ministries; rejecting the appointments of some names to sensitive ministries, such as the Foreign Ministry, and the state-owned TV; reviewing the lists of appointments of mosque preachers, university professors, and employees in government administrations; and handling political parties and movements. The State Security Service, which became “National Security” Service after the revolution, was a terrifying entity, given the wide influence it was granted by the head of the regime.

The revolutionaries managed to have access to a part of its files, while the larger part was burned and destroyed by the officers of the service, as will be detailed later. The revolutionary groups that stormed the State Security buildings or the political groups to whom the documents were leaked failed to handle the files that were seized as most of them were handed over to the army. Some individuals managed to get hold of some of these documents and leaked a small number to the media, but they were quickly suppressed after the army and government demanded not publishing any of their contents. As for the documents in the possession of other security agencies affiliated with the army and intelligence, of course they remained intact because the protests in the 25 January revolution only affected the institutions affiliated with the Ministry of Interior, specifically State Security branches in the different governorates.

The first headquarters of National Security – the military establishment known for its terrifying influence – to be burned

36 Karam Saeed, Security System in Egypt: Opportunities and Problems of Reform, in *Masr Alarabia*, 2 January 2016: <https://goo.gl/O4ZYql>

37 Mohamed Boraik, lecture on public policy and strategic administration, Mohamed Boraik channel on Youtube, 4 February 2013: <https://www.youtube.com/watch?v=faBSh-2XqyM>

was its branch in Buheirah on the “Friday of Anger” on 28 January 2011. Other incidents occurred on 4 March 2011, less than a month after former President Hosni Mubarak was toppled, and on the day that followed the dismissal of Prime Minister Ahmad Shafiq.³⁸

Hassan Mustafa, an Egyptian activist from Alexandria, had observed that large vehicles were transporting huge quantities of documents from the State Security (currently National Security) building in the Governorate of Alexandria. Activists and revolutionary citizens headed to the headquarters and besieged it, fearing that National Security officers would destroy the classified documents of these agencies, which might contain information about the involvement of some officials of the service or of the Ministry of Interior or other state officials in criminal or other acts.³⁹

The State Security headquarters in Alexandria was besieged and some of its officers were detained. On the next day, 5 March 2011, similar incidents took place. The National Security headquarters in Cairo, Giza, Faiyum, and other governorates were stormed.⁴⁰

THIRD: LEAKS OF STATE SECURITY DOCUMENTS

In an interview on 5 March 2011, conducted by Mona el-Shazly, a famous Egyptian TV host, on the “10 PM” talk show, Belal Fadl, a well-known Egyptian screenplay writer, revealed that he had received a large quantity of documents taken from “State Security” headquarters that were stormed. The documents showed that the service had committed several grave crimes under Mubarak as follows:

- Reports that include the names of journalists collaborating with state services; some of it includes reports submitted by those journalists themselves to these services about the progress of work at their establishments and the activities of fellow journalists and subordinates.
- The documents also contained the names of State Security officers who communicate with the journalists. Revolutionary young people deleted the names of journalists collaborating with these agencies in the leaked reports “so as to give them a lifeline,” as Fadl put it.
- Letters from the State Security Service to the Central Agency for Public Mobilization and Statistics asking it to issue cards for officers and informers allowing them to collect information about certain citizens. Letter No. 259 of 2005, which has the serial number 3, speaks, according to Belal Fadl, about recruiting some judges and members of the prosecution to seek their help in rigging some of the procedures of the electoral process that was held in 2005.⁴¹
- Documents and files that prove the attempt to hack the email of some political activists through some technical arrangements.
- Documents showing that the State Security Service put pressure on the Tax Authority to examine the tax status of some political activists who own some businesses.
- Papers showing letters sent by the State Security Service to some ministries to obstruct some services offered by members of the Muslim Brotherhood and opposition deputies (Parliament of 2005) to influence their popularity in their districts.
- Belal Fadl also spoke about obtaining a document, in which the director of State Security in Beheira asks Engineer Ahmad Ezz, secretary of the organization in the former National Party, to intervene to cause the father of Emad Jildah (political activist

imprisoned during Mubarak’s term), who ran in the elections then for Shubrakhit, to lose the election in favor of the candidate of the National Party.⁴²

- Other documents spoke about the involvement of State Security officers in the fire at the Accountability State Authority. The latter was supposed to deliver papers to the judiciary, proving the involvement of some officers of the security service in corruption relations and bribes, some of it related to their intervention in the appointment of employees in oil companies. Of course, Belal Fadl said that most of these very important and sensitive documents were shredded and destroyed and that what he had read and analyzed is only what the revolutionaries managed to obtain after a great deal of effort and that most of these documents were later handed over to the army.⁴³

On 6 March 2011, the Supreme Council of the Armed Forces asked all citizens to hand over the documents in their possession pertaining to the State Security Investigations Service to the Armed Forces immediately to adopt the necessary measures toward them and not to circulate them in the media. The council noted that, first, this stems from national responsibility, and, second, it is meant to avoid legal liability. It confirmed that these documents could contain issues that compromise the security of the country and its citizens.⁴⁴

Newspapers entered a race with each other to publish the leaked documents. Some analysts, most of whom were close to the military establishment and the security services, claimed that the documents were forged. Those include, for example, former Intelligence Major General Sameh Seif el-Yazal. These newspapers did not even wait for their print copies and started immediately posting photos of the leaked papers on their websites. At the same time, some pages were established specifically for these documents on Facebook.

On 6 March 2011, the day when the military establishment and the Egyptian Cabinet⁴⁵ asked Egyptian citizens not to publish the documents found at the State Security headquarters that were stormed two days before, *Al Masry Al Youm* newspaper published what it said were the minutes of a meeting at State Security to draw up a plan to destroy the secret documents before the storming of the headquarters.⁴⁶

38 Al Ahrām Gate, Resignation of Shafiq and Designation of Essam Sharaf to Form Government, in *Al Ahrām*, 3 March 2011: <http://gate.ahram.org.eg/News/45423.aspx>

39 Egypt in a Week: Telephone Call with Belal Fadl—Collapse of State Security 1/3, in ON Channel website, *Youtube*, 5 March 2011: https://www.youtube.com/watch?v=IIWC_wGsKyE

40 BBC, Egypt: Saving Documents of State Security Service, in *BBC website*, 5 March 2011: http://www.bbc.com/arabic/multimedia/2011/03/110305_cairo_doc.shtml

41 Telephone call of Belal Fadl with host Mona el-Shazly on the following two links on *Youtube*: <https://www.youtube.com/watch?v=Xfs9Hj6DfEQ> and <https://www.youtube.com/watch?v=Un38Ho5H21A>

42 Ibid.

43 Ibid.

44 Dalia Othman, Military Council Asks Citizens To Hand Over State Security Documents to Army, in *Al Masry Al Youm*, 6 March 2011: <http://www.almasryalyoum.com/news/details/117537> (link visited on 7 May 2017)

45 Reported by Middle East News Agency, Cabinet Appeals to People Who Obtained Documents From State Security Headquarters To Hand Them Over to Army, in *Al Masry Al Youm*, 6 March 2011: <http://www.almasryalyoum.com/news/details/117514>

46 Ahmad Abdel Fattah, *Al Masry Al Youm Publishes Minutes of Meeting of State Security To Draw Up Plan To Destroy Secret Documents*, 6 March 2011: <http://www.almasryalyoum.com/news/details/117506>

The newspaper noted that the minutes were in two documents, which it published along with an archival photo that explained their content. The first document includes instructions to the branches of the service to shred, rather than burn, all the archives of the offices of the administrations and geographic branches, while transferring information that was not available at the administration or branch to the archive of the administration or branch, in addition to:

- Doing business at the offices in the case of requesting names by contacting the administration or branch, with the knowledge of one of the officers, to meet the request.
- Removing the “Top Secret” archive at the administrations and geographic branches and shredding its content, and coordinating with the “Top Secret” archive at the State Security Service in the event of requesting information.
- Not keeping copies of “Top Secret” correspondence in the future and using the original only for that purpose.⁴⁷

The second document contained the minutes of a meeting given to Al Masry Al Youm by a young man called Asem Emam after finding it inside one of the offices at the State Security headquarters in Nasr City. It explained the measures that the service decided to take to destroy its entire archive of documents that bears the classification “Top Secret.”⁴⁸

According to the minutes of the meeting held on 21 February 2011 in the wake of the eruption of the 25 January revolution and the former president stepping down, the meeting was attended by a group of key commanders of the service to study securing the archive of the administrations and branches in light of the recent demonstrations witnessed in the country. The participants in the meeting decided to ask all the branches to provide archive rooms with concrete walls, armored doors, and internal steel locks. It also obliged each branch to develop an emergency evacuation plan that includes getting rid of the archive by shredding, rather than burning, in the event of a breach and once the branch chief ascertains that the archive cannot be salvaged. The participants in the meeting also studied seeking the help of one of the technical experts to study the possibility of destroying files with a chemical substance (in the case of danger) instead of a fire.

The participants in the meeting further stressed the need for transferring all the “Top Secret” correspondence to the electronic archive, which will take a year. The period can be cut to four months in the case of increasing the number of personnel working on data entry from 40 to 120. The minutes of the meeting revealed that the number of personal files at the regular archive of the service amounted to 354,000, while thematic files amounted to 500,000. The service also established an electronic archive on which it uploaded data from 1998 to 2011. Uploading the data before 1998 had been work in progress.⁴⁹

On its personal account on Twitter, the website WikiLeaks asked Egyptians not to throw away the papers and documents that the officers at the headquarters of the various agencies throughout the republic shredded when they feared that Egyptian revolutionaries could storm the headquarters and seize them. The WikiLeaks message said that the website had devices that could identify the documents anew. However, the call was greatly deplored by Facebook youth who called for handing over the papers to the army and not handing them over to any foreign parties or Arab or international media.

Some pages on Facebook called for ignoring foreign calls for handing over the documents and papers to foreign parties under the guise of reconstructing them.⁵⁰

Inspired by WikiLeaks, a website specialized in publishing secret documents, many Egyptians sought to publish photocopies of documents and papers of the State Security Service by creating several pages and groups on Facebook. The creators of these pages assumed the personality of Julian Assange, founder of WikiLeaks. Their aim was to have all these documents in one place to make it easy to access them and to expose the tasks of the service in the years that followed the 25 January revolution. These pages and groups had different names, such as “Scandals and Leaks of State Security Page,” “State Security Documents for History,” “Publish State Security Documents,” “State Security Files,” “State Security Investigations Documents-Top Injustice,” “Together To Expose State Security,” “As of Today, There Is No State Security; We Are security and We Are State,” “State Security WikiLeaks,” and “Amn Dawla Leaks.”⁵¹

The interesting thing is that these groups and pages attracted members estimated at thousands then although they had been created only two days after storming the National Security headquarters. Curiosity prompted people to learn about the secrets of the State Security Service, which virtually controlled the country under the former Mubarak regime, and to watch photos and videos of rooms where papers were shredded at State Security headquarters in Cairo and the governorates.⁵²

FOURTH: HANDING OVER DOCUMENTS TO PROSECUTION

On 10 March 2011, activists and rights advocates submitted a statement to the Egyptian attorney general to investigate cases related to the corruption of State Security officers in the country, based on the documents that they obtained after citizens stormed the headquarters of the State Security Service in a number of Egyptian governorates. They considered these documents to constitute material evidence of crimes committed by State Security officers against citizens. Lawyers and activists headed to East Cairo Public Prosecution where Statement No. 4098 was written and the documents were given to the public prosecutor of East Cairo, who formed a team comprising five members of the prosecution to receive and secure the documents by placing them under heavy security.⁵³

The committee succeeded in collecting 83,000 documents of State Security, which were placed in more than 40 boxes and handed over to the attorney general. The documents included files of spying on public figures and documents confirming the involvement of the commanders of the service in arms trade; smuggling antiquities, alcohol, and prostitution; selling state land; and interfering with the boards of companies. Sayid Ibrahim, head of the popular committee for protecting documents and files, said that the attorney general asked the committee to submit the documents to secondary prosecution offices.

47 Ibid.

48 Ibid.

49 Ibid.

50 Farraj Isma'il, State Security Documents About Media and Journalism Celebrities on Cairo Sidewalks for Two Pounds, in *Al Arabiya Net*, 6 March 2011: <https://www.alarabiya.net/articles/2011/03/06/140418.html>

51 Mohammed Ajam and Shaaban Abdel Sattar, Marathon Between Egyptian Newspapers and Facebook To Publish State Security Documents, in London-based *Al Sharq Al Awsat newspaper*, 7 March 2011: <http://archive.aawsat.com/details.asp?section=4&article=611312&issue=11787#.WQ9QMfEmM8>

52 Ibid.

53 Mahmoud Jum'ah, State Security Documents Before Prosecution of Egypt, in *Al Jazeera Net*, 10 March 2011: <http://cutt.us/bbb4i>

The committee thought that this was “very dangerous as it would be difficult to transport the documents for long distances in light of the absence of security.”⁵⁴

The attorney general, according to the statements of the members of the committee, then assigned a room for these documents with heavy security around the clock. He also assigned Counselor Hatem Zayyat and his assistants at the public prosecution the task of conducting investigations. After delivering the documents, the committee held the public prosecution responsible for protecting them. The committee warned it of the fires that destroy many documents and evidence of corruption. After delivering the documents, the public prosecution interrogated activists who were present when the National Security headquarters were stormed and asked them how the documents were obtained and about the persons who had access to them. The committee included some lawyers as members. Those lawyers had visited the National Security headquarters at the request of citizens after storming the State Security Service headquarters in Nasr City and the refusal to hand over the documents to legal and rights figures.

The notion of secrecy persisted. It involved obtaining any documents or statements, or even the memoirs of some commanders who witnessed some events. This even happened with the key commanders of the Military Council, which ran the country in the immediate aftermath of Mubarak's fall. The same military establishment confiscated *Al Watan* newspaper when it published the memoirs of Sami Anan, the former chief of staff. He occupied this post in the recent years before the revolution and afterward until he was dismissed by President Mohammed Morsi. He was a deputy to Field Marshal Tantawi in the Supreme Council of the Armed Forces, which ran the country immediately after the revolution.

Anan's memoirs spoke about the decisions that were taken concerning the revolution, the position of the Military Council on the overthrow of Mubarak, and the circumstances surrounding the visit of Sami Anan to the United States around the time of the revolution. They also spoke about the position of Anan and the military command toward the question of handling the demonstrators and other details related to backstage developments in the rooms of the highest leadership entity in the Egyptian army at the time of the revolution. The first part of these memoirs was published in *Al Watan* newspaper, which is not known for opposing the regime.⁵⁵ However, the edition in which the memoirs were published was immediately confiscated.

Afterward, an army spokesman made a statement to the effect that “the information and statements circulated by some media outlets during this period as memoirs of some former military officials create a state of confusion and sensationalism in a manner that affects the security and safety of the Armed Forces and that affects the national security of the country under extremely delicate and sensitive circumstances.” The official Egyptian Middle East News Agency carried statements by War Staff Colonel Ahmad Mohammed Ali, former official military spokesman, in which he stressed that “it is extremely important to be careful and to beware of handling this information without adopting the necessary legal measures, in coordination with the relevant agencies in the Armed Forces, given the risks that this could pose, especially since all countries ban the publication of issues that could affect their national security and set appropriate periods and laws to regulate this subject to legal accountability.”⁵⁶

At a later stage, after the domination of the “counterrevolution” that followed 3 July 2013, and in a wave of “settling scores” with political figures who belong to various political groups that

took part in the revolution, some activists who stormed State Security headquarters were pursued. A famous pro-regime lawyer filed lawsuits against some activists who witnessed these developments, accusing them of endangering state security.⁵⁷ The reputation of others was tarnished by leaking some of their personal calls to satellite channels affiliated with businessmen loyal to the regime, as happened with Mustafa Najjar, former MP who represented the Adl (Justice) Party. The same thing happened to activists from the April 6 Movement, such as Asmaa Mahfouz, Ahmad Maher, Mohammed Adil, and others.

The researcher tried to speak to a former activist who witnessed the storming of the main headquarters of the State Security Service in Nasr City in Cairo, but she declined, saying that this could make her criminally liable or cause security action against her, as happened to some revolutionaries previously.

PART SIXTH: LUSTRATION, INVESTIGATION, AND PROSECUTION INVOLVING REGIME CRIMES

FIRST: LACK OF SPECIAL COURTS

Contrary to the tradition in the experiences of revolutions and democratic transformation, which allow for quick special courts to hold corrupt officials of former regimes accountable for economic corruption, political crimes, or rights violations, the cases related to the crimes of the key figures of the Mubarak regime were referred to the ordinary judiciary, which is known for its extreme bureaucracy. Besides, some of its measures, which are full of loopholes, allow suspects to easily beat the cases against them. This is indeed what happened as Mubarak and the symbols of his authority were acquitted in all the major cases they were accused of a few months after the revolution. The complete opposite happened to political and community activists who received harsh prison sentences between 3 and 10 years after they were charged in connection with violating the Protest Law, passed under interim President Adly Mansour. The same applies to activists and members of the Muslim Brotherhood group and other Islamists, who received severe prison sentences, ranging from 5–7 years to long sentences and even death sentences under extremely exceptional judicial and political circumstances. This has led to accusations that the judicial system in Egypt has been politicized and totally controlled by the executive authority.

Therefore, it was important to set up “special judiciary” in the transitional phase of the revolution. It is special judiciary, and not extraordinary judiciary or outside the domain of law and constitution. This would allow for fair trials. The lack of such judicial entities allowed Mubarak and the symbols of his regime, as well as police officers accused of committing crimes against demonstrators and before that against victims in the pre-25 January phase, to escape justice. What helped in this is the lack of

54 Ibid.

55 Salah al Din Hussein, Ibid.

56 Abdel Sattar Jalilah, Egyptian Army Warns Against Publishing Information by Former Military Persons “Harming National Security”, in *Al Sharq Al Awsat* international edition, 29 September 2013, See link: http://archive.aawsat.com/details.asp?section=4&article=744981&issue_no=12724#.WQ9PnflEmM8

57 Asmaa Abu Bakr, Statement Accuses Former MP Mustafa Najjar of Leaking State Security Documents, in *Masr Alarabia*, 5 February 2017: <http://cutt.us/wcJP0>

a legislative framework that allows for such trials and that lays the foundations of a stable system of transitional justice.

A report issued by the Arabic Network for Human Rights Information, an Egyptian rights organization chaired by rights activist Jamal Eid – a recent ruling was issued to confiscate his funds and those of the organization he heads – about transitional justice stated that political will in the countries of the Arab Spring had seen a general trend of impunity and the lack of a systematic approach of transitional justice. This has led to the faltering of reform and democratization and the lack of restructuring of state institutions that are accused of corruption and holding officials accountable for the crimes committed against peoples.⁵⁸

SECOND: FACT-FINDING COMMITTEES

There are two main parties when it comes to knowing the violations against citizens, whether in times of peace or war or civil conflicts or revolutions. The first party is the person against whom violations are committed, and his parents and relatives. This is based on the updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, which stated the following: “Irrespective of any legal proceedings, victims, their families and relatives have the imprescriptible right to know the truth about the circumstances in which violations took place, and, in the event of death or disappearance, the victim’s fate.” The right of victims and their parents to know the truth is linked to their right to reparation and fair judicial satisfaction and bringing the perpetrators of violations to account.⁵⁹

Of course, the second party that has the right to know is society, which makes up the nation and state, because it is a public party to the conflict as a whole and because it represents the popular sum of a nation whereby the right of a group of its individuals have been violated. The violations that occurred are a small part within a system of conflict that represents a part of the context of the history of this society and its collective memory, which must be preserved for different reasons, most important of which is: Bringing the perpetrators of these crimes to trial, no matter how long the conflict lasts and regardless of the length of litigation and bringing the violators to justice. Also, this is meant to let new generations know about how much older generations suffered during conflict, war, or revolution, and to prevent the repeat of the same crimes and violations. Bringing violators or criminals to a fair trial or popular hearing committees is part of the punishment, which serves as a lesson for others.

The fact-finding committees formed after the revolution have failed for different reasons. The only thing that has changed in the regime is the fall of one of its wings. The state was run with a stronger wing, which is the military establishment. This establishment curbed the revolution completely throughout different phases, through its partnership with the Ministry of Interior. This was also the result of the weakness of civil parties and movements and the grave mistakes committed by Islamists. On the procedural level, these committees, which were formed several times, have failed for several reasons, either because of deliberately failing to mention the results reached by these committees or because they lacked the powers and necessary tools to facilitate their work, or because of their composition and the quality of the institutions that supervised them.

Naturally, an authority whose heart is the counterrevolution, as well as establishments that took part in the violations all the time, such as the police and army, would not form a transitional justice

committee or a fact-finding committee in a way so that the reports or decisions of this committee can be trusted.

Here, we will focus on the first fact-finding committee as a case study, the form and circumstances of its creation, and the conclusions it reached for several reasons, most important of which is that it was the first committee formed immediately after the revolution. The committee was formed amid the revolutionary action of the Egyptian revolution and the existence of popular momentum in the street that put pressure on the authority then. Therefore, it was expected that its recommendations would be taken, at least compared with other committees. This committee could have been a step toward establishing a path for transitional justice had its recommendations been built on and its work completed and had a political-popular-media agreement been reached on it. However, it failed due to the control of the military establishment over the management of the transitional process after the revolution and also due to the absence of political will on the part of the different groups of the revolution.

THIRD: EVALUATING RESULTS OF FIRST FACT-FINDING COMMITTEE

The first fact-finding committee was formed immediately after the revolution based on Decision No. 294 of 2011 issued by the Cabinet under the rule of the former Military Council concerning the incidents and crimes that took place during the revolution 26 January – February 2011. The committee was formed to investigate the events of the revolution. It comprised a group of judicial counselors and some of their assistants, who are rights specialists. The committee was given some fact-finding powers and asked to take the necessary measures that it deems fit vis-à-vis the incidents that took place on the Egyptian scene between 25 January 2011 when the revolution broke out and until the committee was asked to start its work on 9 February 2011. Some of these important powers included finding facts concerning the illegal practices that made the said events deviate from the civilized nature of the peaceful demonstrations of young people. They also included doing what it deems necessary, such as hearing witnesses, collecting information, summoning anyone involved in the said events, and having access to papers, documents, and minutes that it deems necessary. The committee had the power to receive correspondence from citizens and civil society organizations and others, including statements or information about the said events. Article 3 of the said Cabinet decision obliged state agencies and the competent bodies to provide the committee with all the information and data it requests in relation to the tasks assigned to it. Article 7 of the Cabinet decision stipulated that the committee shall submit its report and recommendations to the attorney general.⁶⁰

The committee submitted its report to the first post-revolution government, led by Essam Sharaf; the Supreme Council of Armed Forces, which ruled the country at the time after Mubarak stepped down; and the attorney general, Counselor

58 Hiba Abdel Sattar, Transitional Justice... How Is it Achieved?, in *Al Ahram*, 18 September 2014: <http://www.ahram.org.eg/NewsPrint/326473.aspx>

59 Minna Al Masri (and others), *The Right to Know the Truth and Human Rights Violations: Fact-Finding Committee Without Truth, Association for Freedom of Thought and Expression*, November 2013.

60 Wael Ali, *Al Masry Al Youm Publishes Full Text of Summary of Report of Fact-Finding Committee on 25 January Revolution*, in *Al Masry Al Youm*, 19 April 2011: <http://www.almasryalyoum.com/news/details/126472>

Abdel Majeed Mahmoud. The report reached the following important conclusions:

The committee established in its report that “policemen fired rubber bullets, blanks, and live ammunition in the face of demonstrators; or there was sniping from rooftops overlooking Tahrir Square, especially from the Ministry of Interior building, from the top of Nile Hilton Hotel, and from the top of the building of the American University. This was confirmed by the statements of those interviewed by the committee and by medical reports, which stated that the deaths were primarily caused by bullets and blank cartridges in the head, neck, and chest. Firing bullets requires permission from a committee chaired by the interior minister and including senior officers in the Ministry of Interior. Then, orders go down the chain of command to police officers, who carry them out.”⁶¹

The committees issued a number of important recommendations, including drafting a new constitution to establish the foundations of democratic rule through a constituent committee, reconsidering all the laws that restrict freedoms in Egypt, reconsidering the Parties’ Law and all the laws that regulate rights and public freedoms, and reconsidering the tax exemptions given to businessmen while imposing progressive taxes on income. The recommendations also included passing a law to combat all forms of religious, ethnic, economic, or social discrimination among citizens; ensuring the real independence of the judiciary; canceling all forms of intervention by the executive authority in the work of the judiciary; canceling all forms of extraordinary judiciary; facilitating the administration of effective justice; and modernizing the security service to ensure its professional competence and its respect for the law and for human rights. Besides, security agencies must not be the sole party to solve the problems of citizens, and they must be qualified professionally and psychologically. Moreover, the administrative apparatus of the state must be modernized to increase its efficiency and eliminate corruption in it and open routes for transparency to preserve public funds. A health insurance system must be put in place by providing free health care to all citizens; development policy must be linked to social justice; the post of president of the republic must be separated from the leadership of political parties; a national anti-corruption agency, which has immunity, must be established; the principle of respect for the law must be asserted, while subjecting all citizens to its provisions; judicial rulings must be respected, especially by the government; and freedom to establish political parties must be granted.⁶²

However, the conclusions reached by this committee – and the committees that followed it later – concerning blaming the Mubarak regime for the situation of political and economic corruption and also blaming it and its executive agencies – chief of which is the Ministry of Interior – for the fall of victims during the 25 January revolution were all in vain as Mubarak, the symbols of his rule, and police officers were acquitted of all charges. Likewise, most of the recommendations made by the committee to the new ruling authority in Egypt were not implemented on the ground and faced different problems and obstacles.

PART SEVEN: WHY WAS THE EGYPTIAN REVOLUTION NOT SUFFICIENTLY DOCUMENTED?

Immediately after the January revolution, there was a pressing need for documenting the action witnessed by the 25 January

revolution, which means preserving the historical memory of the revolution and its scenes and preserving the collective memory of a generation that witnessed the revolution and its interactions, events, actors, and the establishments and persons who committed crimes against victims who fell or whose bodies or rights were violated.

There were several initiatives that were launched either through official establishments – none of them succeeded – and initiatives by individuals and unofficial establishments, civil society organizations, or activists who saw that it is important to work on this issue, especially given the continuing attrition in various events and the fall of victims or imprisonment of others who were witnesses to the events.

First: Committee for Documentation of 25 January Revolution

The “Committee for the Documentation of the 25 January Revolution” is an initiative that emerged from the “official” Egyptian National Library and Archives a few months after the ousting of Mubarak on 11 February 2011. The National Library and Archives then assigned the job to Dr. Khalid Fahmi, a renowned Egyptian researcher and historian, former history professor at the American University, and the author of a book that resonated a great deal about the era of Muhammad Ali Pasha, founder of modern Egypt.

The committee set for itself several objectives at the time, including implementing a project that aims at collecting the material related to the revolution to make it available later to the public. The committee considered its work on this project to be a right for the Egyptian people, the one who triggered the revolution, and the right of future generations to see the documents and the pictures, films, and testimonies related to different aspects of the revolution, whether in the period that preceded the revolution or during the 18 days that it took until the former president stepped down or during the later weeks whose events are still unfolding until now. This is a part of the mission of the National Library and Archives, which is to safeguard the documents of the country and make them available to interested people and researchers studying Egypt’s history.

The committee developed a vision to establish an archive, which is as perfect as can be. It should be indexed and maintained in accordance with the standards followed in this domain. The target archive includes all digital and physical media, including documents, libraries, pictures, films, posters, publications, songs, works of art, and jokes. This is in addition to recording the testimonies of those who took part in the revolution, such as the testimonies of those who formed the popular committees throughout the Republic.⁶³

To implement this, the committee thought that there were several methods that it could follow to collect testimonies related to the events of the revolution, including collecting personal testimonies of the people who took part in the revolution, whether by planning, walking amid demonstrations, and staging sit-ins at squares. This also includes the testimonies of those who did not take part directly in any of the demonstrations or sit-ins at squares and the testimonies of those who did not take part directly in any of these events, but they witnessed it or were affected by it in any manner.⁶⁴

61 Ibid.

62 Ibid.

63 *Constituent Paper of the Committee for the Documentation of the 25 January Revolution*, unpublished paper.

64 Ibid.

The committee also sought to collect pictures, videos, and audio recordings that accompanied the events of the revolution during the 18-day period from 25 January until 11 February; collect posters, banners, publications, and works of art produced or distributed in the streets and squares during the days of the revolution; collect newspapers, magazines, and TV recordings that accompanied the days of the revolution; contact the different fact-finding committees that were formed in the wake of the revolution; collect the documentary material produced by these committees during the period of their work; contact human rights organizations and collect the reports they issued about human rights violations that occurred during the revolution; collect the slogans, shouts, songs, and jokes that circulated during the days of the revolution; monitor the role of religious establishments and groups (official and unofficial) and their position toward the revolution and collect the publications attributed to them or press interviews of people affiliated with them during the days of the revolution; and monitor the role of political parties and professional associations and collect reports, publications, and press interviews by people affiliated with them during the days of the revolution.⁶⁵

Of course, the committee faced some fundamental questions at the beginning of its work. The members of the committee then saw that these questions would define the notion and question of documentation itself, such as: When did the revolution end? When do we stop documenting? Is it when the referendum was held on constitutional amendments? Or when the parliamentary elections were held? Or when the presidential elections were held? Since we found ourselves walking in one funeral after the other for one of our martyrs, hold one protest after the other to champion one of our friends, and make one visit after the other to the Zeinhom morgue out of sympathy with the families of the victims of the Ministry of Interior, then it is right for us to ask: "Has the revolution really ended or is it still continuing?" Also, there is another question: "When did the revolution exactly break out?" Is it on 25 January? Or is it on 14 January 2011 when (Zine El Abidine) Ben Ali fled and the Tunisian revolution succeeded in removing the man who had ruled Tunisia for more than 20 years, inspiring hope in the hearts of some Egyptians? Or did the revolution start through previous events that made anger boil until it reached a climax on 25 January? That climax was the targeting of the Two Saints Church in Alexandria in late 2010. Or it could be the repressive practices of the Ministry of Interior, most infamous of which was the killing of the youth Khalid Saeed in the city of Alexandria in the same year, or even way before that in the uprising in el-Mahalla in 2007, the creation of the Kefaya Movement in 2004, or the demonstrations that erupted against the Gulf War in 2003, etc.⁶⁶

In the end, these events were crucial. They accumulated until they reached a climax in the beginning of 2011. They only lacked self-ignition whose focus was hundreds of kilometers away in Tunisia.

The committee worked for two years, 2011–2012, before it dissolved itself at the beginning of 2013. The work of the committee during that period was to collect documents related to the events of the revolution. All of the documents were later handed over to the National Library and Archives, such as electronic proofs of the last editions of the newspapers pertaining to the 18 days since the eruption of the revolution and until Mubarak stepped down and recording testimonies of a group of citizens and politicians

based on an announcement made by the committee to the participants in the revolution or those who witnessed some of its events to submit their testimonies about these events. The aim of the committee was not to explain the events or to confirm its own vision. This is why the members agreed in the work methodology on giving anyone who wants to give his testimony 20 minutes, which could be increased. The key question was: "What did you do on such and such a day?" Then, they would leave the person to tell the story.⁶⁷

The committee did not document any of the cases, in connection with the revolution, which were examined by the courts at the time. However, the members of the committee thought that the best way to document these cases was to collect the records of the case itself and the testimonies of the parties if possible, regardless of the legal outcome reached by the court. Of course, this is assuming that the court agrees to this. The short duration of the work of the committee and the climate of polarization that emerged later obstructed the work of the committee and prevented it from continuing any later paths that its members had intended to pursue.⁶⁸

The fate of the Committee for the Documentation of 25 January was dissolution in early 2013, just a few months prior to the toppling of President Mohammed Morsi. The dissolution of the committee was a decision taken by its chairman and members, who volunteered to work with it. The reasons for the dissolution were either subjective or objective. Most of these reasons had to do with obstacles created to the committee to disrupt its work. The most serious obstacle that faced the committee had to do with citizen fears of security breaking into the place where the documents are held and using their testimonies as evidence to convict them of carrying out acts during the revolution that could form grounds for incriminating them now. Thus, they requested guarantees from the committee to protect their testimonies and keep them for years and not release them except with their consent according to a contract with the committee. The advisers of the National Library and Archives denied the possibility of achieving this. In the end, the failure of the revolution caused the work of the committee to stop because every action that will be documented might be used later against the people involved in it. This is because the counterrevolution is in power now. Khalid Fahmi, chairman of the committee, put it as follows: "If we think philosophically, we will discover that the tragedy of the committee is that the revolution was not completed, and consequently, revolutionary acts have become criminalized now."⁶⁹

There were other bureaucratic measures that made the work of the committee difficult, such as the refusal of the National Library and Archives to give the committee the documentary material and newspapers proofs – which the members of the committee obtained and collected through their personal connections – to upload to the committee website, and so on. In the end, the project, which brought together volunteer researchers and historians to carry out a national project to document a very important stage ended in failure.

65 Ibid.

66 Safa Srour, Khalid Fahmi: Viewing the Revolution as a Conspiracy "Firm Conviction" by "Interior Ministry". Interview, in *Al Masry Al Youm*. 28 January 2015: <http://www.almasryalyoum.com/news/details/644110>

67 Safa Srour, Ibid.

68 Ibid.

69 Ibid.

SECOND: DOCUMENTATION INITIATIVES

There were several attempts and initiatives, either individually or by civil society organizations or research groups, which considered documentation important in light of the great attrition due to successive and fast developments. They considered the idea of documentation itself to be a revolutionary act since documentation is important to monitor events so as not to cover up the crimes that were committed by the regime or by the establishments that are leading the “counterrevolution” during the period that followed the fall of Mubarak. A 14-year-old girl did the necessary documentation for the 18 days on which the website “25 January Revolution... Full Documentation” depended.⁷⁰ According to the creators of the website, the girl, who was outside Egypt during the revolution, saved what people circulated online, including pictures, video recordings, articles, and even blogs and personal thoughts, and classified it chronologically.⁷¹

The importance of the website lies in that it contains a search specialized in the events of the revolution. It is divided into several categories, including “violence and clashes,” “million-man marches,” “revolution harbingers,” “army deployed,” and another specialized search under the name “personalities” containing around 183 names, including public figures that stood with or against the revolution and figures who became prominent during the revolution. In addition, the website documents press articles and videos that include revolutionary songs from the field, clashes, and media statements by officials and public figures. Under the same name “25 January Revolution,” another website documented its events. It included an important section that had the testimonies of citizens who were invited to participate under the section “tell your story in the revolution.”⁷² The last update of citizens’ testimonies dates back to June 2012.⁷³

THIRD: REVOLUTION MUSEUM... INCOMPLETE PROJECT

Immediately after the revolution, Hisham Ali Ireisha, an Egyptian professor who heads the architecture department at one of the Egyptian universities, presented a project to Essam Sharaf, the first prime minister to be selected by the revolution, to eternalize the memory of the 25 January revolution and its martyrs by turning the burning building of the former National Party into a museum. This museum would embody the revolution and its various narratives. Also, the roof of a car park near the Omar Makram Mosque at the heart of Tahrir Square would be turned into a marble square to remind people of the martyrs of the revolution through transparent crystal pillars.

The idea of the proposed project was partly based on covering the building of the “dissolved National Party” from outside with transparent glass so as to keep the traces of the fire on the building from outside as a witness to the most important moments of the Egyptian revolution, which is the day of “Friday of Anger.” It is considered a crucial day in the Egyptian revolution. The second phase of the project would include renovating the building of the defunct National Party and restoring it from inside and providing it with central air conditioning. Thus, it will turn into a museum that documents the revolution of the Egyptians against their ousted president through displaying everything that is connected to the revolution, such as the belongings of the revolutionaries and the clothes of the martyrs when they were killed. It will also show some aspects of the practices of the defunct regime

against Egyptians, including the injustice and persecution for almost three decades. The second part of the project Shumu’ al-Shuhada (Martyrs’ Candles), as explained by the person who conceived its idea, is to use the roof of a car park under construction near the Omar Makram Mosque at the heart of Tahrir Square as a large marble monument to commemorate the martyrs of the revolution.⁷⁴

However, the project did not see daylight. The building of the National Party was later demolished by the army despite the repeated appeals by political groups to maintain the building as a historical vestige of the revolution and of an important phase in the history of the country.

FOURTH: REVOLUTION MUSEUM IN PHARAONIC VILLAGE

It is a project that seems to have been fulfilled on the ground, but it actually does not exist now. It has totally disappeared without clear reasons. It is the inauguration of a museum about 25 January in the famous Pharaonic Village in Giza. The museum was established immediately after the revolution. It was opened by a number of famous media persons, artists, and politicians, some of whom turned against the revolution and its line after 3 July 2013.

The museum, according to the London-based *Al Sharq Al Awsat* newspaper, was opened on Monday, 7 March 2011, on the banks of the Nile, one month after the fall of Mubarak. The museum contained pictures of the martyrs of the revolution and their clothes and belongings. Also, a monument was inaugurated for them at the entrance of the museum. A large number of photos and portraits eternalizing the events of the revolution over 18 days were hung on the walls of the museum, which was established by the Pharaonic Village under the title “So That We Will Not Forget.” The photos and portraits captured slogans raised by the demonstrators and shots of their joy and sorrow. It resembled a historical recording, in the Pharaonic way, which used to record events on walls. The museum also contained items that the revolutionaries considered “spoils of war.” They are some live bullets fired on the demonstrators and different types of tear gas thrown by security forces at them. All of the items were put on display inside glass boxes, just as international museums do.⁷⁵

When we access the website of the Pharaonic Village now, we find links and pictures of only eight museums inside it. These are: Boats of Ancient Egypt, Mummification Exhibit, Pyramids and Sphinx Exhibit, Dr. Hassan Ragab’s Exhibit, Art and History of Islam, Coptic Exhibit, Cleopatra’s Exhibit, and Ancient Arts and Beliefs. There is no single reference to anything by the name “Revolution Museum,” as if it was a temporary project that ended when its time was over.

70 Link to the website “25 January Revolution... Full Documentation”: <http://www.egyptrev.net/>

71 Basma Mahdi, Story of 25 January Revolution... Who Writes History?, in *Al Manassa website* (link accessed on 1 May 2017) <https://almanassa.com/ar/story/863>

72 See link to website: <http://www.revolution25january.com>

73 Ibid.

74 Khalid Shamt, Museum Eternalizing Memory of Revolution, in *Al Jazeera Net*, no date provided: <https://goo.gl/ibMQIL>

75 Mohammed Abdu Hasanain, First Museum of 25 January Revolution on Banks of the Nile in Giza, in *Al Sharq Al Awsat*, 11 March 2011 (link accessed on 3 May 2017): <https://goo.gl/4fAeAi>

FIFTH: HEADQUARTERS OF THE OLD NATIONAL PARTY

Several political groups launched appeals, demanding turning the headquarters of the National Party on the Nile, located at the entrance of Tahrir Square, into a museum. The headquarters was set on fire on 28 January 2011 by the revolutionaries; this was a declaration at the time of tearing down the most prominent symbol of the rule of the old National Party. However, the building remained like this without a clear idea about how to benefit from it after the revolution. During the first three years after the fall of Mubarak, there were calls for turning it into a museum that symbolizes the defunct era. However, when the army took power after the ousting of President Mohammed Morsi, the government of Ibrahim Mhlib, the second government to be formed after 3 July 2013, agreed to demolish the building provided that Cairo Governorate would proceed with measures to demolish the building, while assigning the demolition works to the Armed Forces Engineering Authority. Once the demolition is over, the site would be used based on a decision by the Cabinet, without setting a date for the first step in the demolition process.

In March 2014, the government approved of the demolition of the burned building. Then, Cairo Governorate announced that it would demolish it and turn the site into a park. Former Minister of Antiquities Mohammed Ibrahim said that the building would be attached to the Egyptian Museum in Tahrir Square. A third statement was made by the former government about turning the building into a large hotel. However, some activists had demanded keeping the building intact to commemorate the revolution.⁷⁶

Some Egyptian activists are of the opinion that the Egyptian government, which is supported, they believe, by the military regime, had saved National Party leaders from penalty and decided only to demolish the building perhaps “to obliterate the symbol of the collapse of the regime in the face of the uprising of the people and to conceal evidence that had existed on the banks of the Nile that reminded everyone who saw it that the people of Egypt one day staged a revolution.”

The National Party, which had dominated the scene throughout the Mubarak era, was formed by former President Anwar Sadat and was considered during Sadat’s time and the Mubarak era to be the authority’s party. The party was chaired by the two presidents, both of whom belonged to the military establishment. The party was officially dissolved by the judiciary immediately after the January revolution.

SIXTH: GRAFFITI... POPULAR DOCUMENTATION

One of the archival projects, which constituted spontaneous popular documentation of the revolution and its slogans and key political messages, involved graffiti on the walls of Cairo. These drawings depicted the martyrs of the revolution and the symbols of the old regime and the counterrevolution. They also expressed some of the demands of the revolution, such as social justice and the trial of the leaders of the Mubarak regime. They symbolically embodied some of the significant events of the revolution, such as the fall of Mubarak, the events of Mohammed Mahmoud Street, and others. Graffiti murals marked a visual development in the Egyptian revolution; they depicted the faces of Field Marshal Tantawi and Mubarak; processions of martyrs, angels, and bodies; a Pharaonic warrior destroying the myths of tyrants; and a child eating street food with tears in his eyes.⁷⁷

In May 2012, under the authority of the Military Council, a part of the graffiti was removed on the pretext of a cleanup carried out by workers of Cairo Municipality. The same thing happened during the rule of President Mohammed Morsi as graffiti was removed from Mohammed Mahmoud Street, off Tahrir Square, late at night. The walls of the street were painted in yellow. Many people expressed dissatisfaction with this on social media sites at the time.

In 2013, when Mohammed Morsi was ousted and the Muslim Brotherhood-backed government was removed, and within the context of the war by the regime on the revolution, a systematic policy was adopted to eliminate anything that had any connection with the 25 January revolution. A law was enacted preventing demonstrations. This allowed for the arrest of peaceful demonstrators. Also, many graffiti artists were arrested. An artist known by the name “Ganzeer” had to leave the country after a smear campaign. The same year and the following years witnessed repeated attacks on freedom of opinion and expression. This included campaigns against cultural centers and publication houses and the imprisonment of novelists and writers on charges that violate freedom of opinion.⁷⁸

Things did not stop at this point. Erasing the popular and official memory included removing most scenes of the Egyptian revolution from the page on the website of the State Information Service, which is known to be affiliated with the Egyptian Intelligence. The website initially made no mention of some significant events during the revolution, such as the 28 January incidents, the escape of the police, and the burning of the headquarters of the old National Party. At a later stage, the page became inactive for unknown reasons.

SEVENTH: REMOVING THE REVOLUTION FROM CURRICULA

The movement staged by the July 1952 officers strengthened the notion of politicizing school curricula. The July 1952 coup deleted everything related to the family of Muhammad Ali Pasha, which had ruled Egypt for more than a century and a half. It also used the curricula to distort the liberal period that followed 1952. The symbols of the era were erased and their persons were crudely smeared.

The same thing was repeated with the 25 January revolution, which was initially welcomed by state institutions and media. However, in the years that followed the ouster of President Mohammed Morsi and the Muslim Brotherhood-backed government, these entities completely turned against the revolution. After 3 July, a state of confusion swept the educational process in Egypt. This process was affected by the political crises in the country. Thus, school curricula saw amendments, additions, and deletions as they were connected to political changes.

For example, the Egyptian Ministry of Education announced that the curricula had been completely “purged” of the additions introduced by the Muslim Brotherhood regime to it after they took power. The ministry had also amended the curricula at the beginning of the school year by removing one of the lessons

76 Mohammad Rida, Headquarters of National Party, from Moral Collapse to Forced Demolition, in *Al Youm Al Sabi*, 15 April 2015: <https://goo.gl/zEZtNN>

77 Mohammed Sabbagh, The Guardian, Tahrir Graffiti... Erasing What Remains of the Revolution, in Zahma website (taken from *The Guardian*) 1 April 2016: <https://goo.gl/IP1xWg>

78 Ibid.

taught to high-school students under the heading “Difference Between Revolution and Coup.” The ministry stopped the printing of the textbook on Psychology and Sociology to high-school students before it reached the printing press. The lesson spoke at length about the difference between a popular revolution and a military coup. The amendments to the curricula also included reprinting the National Education textbook for high-school students because the line it contained did not agree with the political line of the 3 July regime. The chapter on legitimacy was deleted; it was part of the National Education textbook.⁷⁹ Entire chapters of the textbooks on Psychology and National Education for high-school students were deleted on the pretext that they contained violating lessons. They were deleted and reprinted.⁸⁰

CONCLUSIONS AND LESSONS LEARNT

This paper attempts to review the factors that led to the losing of the opportunity for reforming the security services; it being the largest obstacle that hampered the Egyptian revolution. This paper discusses the problems faced with this kind of reform, including the growing political polarization between the opposition forces after the ousting of Mubarak, and the failure of those opposing powers to reach a political and societal agreement on the importance of reform as an essential effort in the democratization process.

Also, the paper attempts to reflect on the political system, which managed the Egyptian state before the revolution: its main structures, elements of configuration and its internal and external alliances.

The paper addresses the performance of the fact-finding committee that was formed directly after the ousting of Mubarak, and how it failed to achieve its basic goals. This failure indirectly impacted investigations into the crimes of the Mubarak regime, and eventually the inability to prosecute members of the security services.

This paper analyzes the reasons several projects to document the Egyptian revolution have been unsuccessful. The researcher particularly focuses on the government-led project through the Egyptian National Archive, as well as other initiatives by individuals, research centers, and civil society organizations.

The lesson learnt from the aborted Egyptian revolution is that restoring or building a strong democratic process in Egypt is contingent on having a broader political reform agenda; the most integral component of which is a clear path for transitional justice and the reform of the security services.

79 Walaa Hussein, Egyptian Curricula Provide Room for Political Wrangling... With Change in Regimes, in *al-monitor*, 2 January 2014: <http://www.al-monitor.com/pulse/ar/originals/2014/01/egypt-curriculum-dictated-ruling-regime.html#>

80 Ibid (slight change in wording).

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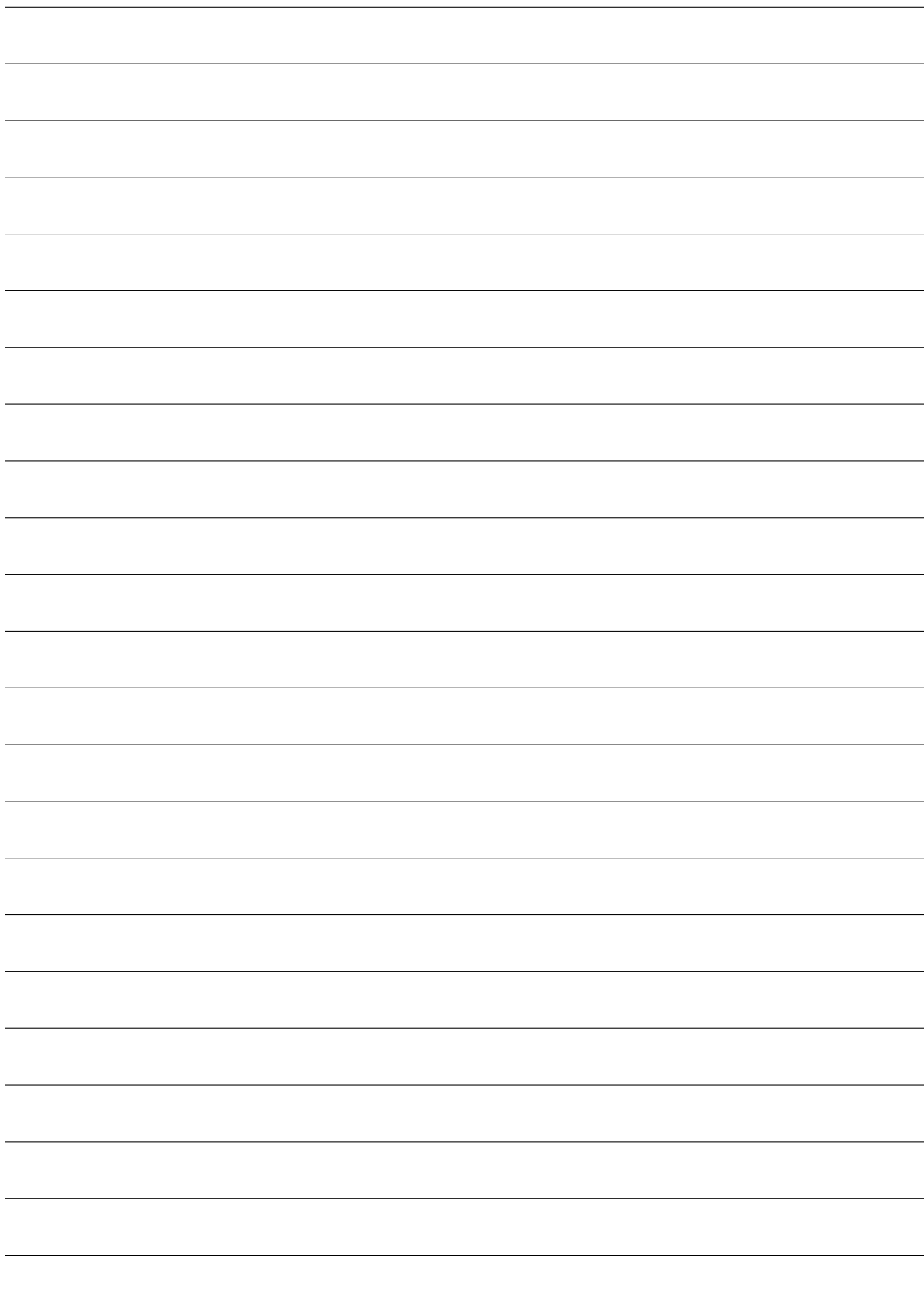
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Democratic Transition Guide

[The Estonian Experience]



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AUTHORS

TOOMAS HIIO

Historian, Head of Research at the Estonian Institute of Historical Memory (since 2017) and Deputy Director of the Estonian War Museum – General Laidoner Museum (since 2005). Member of the Board of the Estonian Foundation for the Investigation of Crimes Against Humanity (1998–2009) and of the Estonian Institute of Historical Memory (2008–2017).

MEELIS MARIPUU

Member of the Board of the Estonian Institute of Historical Memory (since 2009) and Managing Director of S-KESKUS, the non-governmental center for contemporary history (since 2005). Member of the Board of the Estonian Foundation for the Investigation of Crimes Against Humanity (1999–2009).

MEELIS SAUEAUK

Senior Researcher at the Estonian Institute of Historical Memory (since 2014). Research Fellow at the Estonian Foundation for the Investigation of Crimes against Humanity (2006–2009).

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TRANSFORMATION OF THE POLITICAL SYSTEM

TOOMAS HIIO

LOSS OF INDEPENDENCE DURING WORLD WAR II¹

Occupation. The member states of the League of Nations, Estonia, Latvia, and Lithuania were occupied by the Soviet Union in June 1940. Tens of thousands of the Red Army and Soviet Baltic Fleet soldiers and sailors were stationed to the territories of the Baltic states.²

After that the Estonian government resigned. The list of members of the next government, a puppet government, was proposed by the Soviet Legation in Tallinn. Andrej Zhdanov, a special emissary of Joseph Stalin, was sent to Tallinn and coerced the President of the Republic, Konstantin Päts, to appoint a puppet government. Similar events took place in Latvia and Lithuania. A “transitional period” in all three Baltic states created the illusion of the continuation of the former legal order with the so-called people’s governments, controlled by Soviet special representatives, under the cover of the Soviet diplomats, and by the Soviet secret police, NKVD, was finalized by the formal incorporation of all three Baltic states into the Soviet Union in the beginning of August 1940. Three weeks earlier the Soviet-controlled and Soviet-type elections, with only one candidate in each electoral district, were carried out in each Baltic country. Elected puppet parliaments had voted unanimously for the reorganisation of their countries into soviet republics, and asked the Soviet government for incorporation of their states into the “friendly family of the Soviet nations”.

Non-recognition policy of the USA. Simultaneously with the first session of the puppet parliaments in all three occupied Baltic states, on 23 July 1940, the US acting Secretary of State Sumner Welles issued a declaration, condemning the political changes in all three Baltic states. It was the beginning of the non-recognition policy of the Western countries in respect of incorporation of the Baltic states that continued until the collapse of the Soviet Union.

Soviet reorganisation of society. At the end of August 1940 the constitutions of all three Baltic soviet union republics, based on Stalinist constitution of the USSR from December 1936, came into force. The puppet parliaments declared themselves to the temporary Supreme Soviets and continued in this capacity until new supreme soviets were elected in 1947. Temporary Supreme Soviets appointed new governments, councils of people’s commissars. Although some members of the “people’s governments” continued in new councils of people’s commissars, now also the former underground communists³ and some citizens of the Soviet Union were appointed to the people’s commissars’ (ministers) posts respectively in Estonia, Latvia and Lithuania.

Before the end of the year 1940 the Soviet legislation was introduced, including the criminal code of the Russian Soviet Socialist Federal Republic of 1926. Estonian currency, kroon, was changed to the Soviet rouble using the extortionate exchange rate 1 kroon = 1,25 roubles.

During 1940–1941 Estonia was ruled in fact by the Plenipotentiary of the Central Committee of the All-Union Communist (bolshevist) Party and the Council of People’s Commissars of

the USSR in Estonia Vladimir Bochkarev and his staff. To each ESSR people’s commissariat a deputy people’s commissar, in fact a supervisor from respective branch institution of the party or the USSR government was appointed. The security services, the People’s Commissariat of Internal Affairs (NKVD) and the People’s Commissariat the State Security (NKGB), created in February 1941 with their branch offices (respective ESSR people’s commissariats) had extraordinary important role.

Political terror and population losses. First arrests of the political opponents took place already in June 1940. Since autumn the massive political arrests began, culminating with the deportation of men, women and children from all three Baltic states on 14 June 1941. Repressions and deportation were directed against the bearers of the statehood: the politicians and higher state officials, military officers, policemen, part of educational elites, businessmen, entrepreneurs, wealthier peasants etc. During 1939–1941 Estonia has lost every tenth resident: when in 1939 there was about 1,134,000 inhabitants in the Republic of Estonia, so according to the registration of the population, carried through by the German occupation authorities in the end of 1941, there were little bit less than 1,000,000.⁴

After the German occupation in 1941–1944, according to the registration of the population carried through by the Soviet authorities in autumn 1944, only about 900,000 persons were present in Estonia, i.e. during 1939–1944 Estonia has lost every fifth resident.⁵

1 To this chapter see Toomas Hiio, Meelis Maripuu, Indrek Paavle, eds., *Estonia 1940–1945: reports of the Estonian International Commission for the Investigation of Crimes Against Humanity*, Estonian International Commission for the Investigation of Crimes Against Humanity, Tallinn: Inimsusvastaste Kuritegude Uurimise Eesti Sihtasutus, 2006; Andres Kasekamp, *A history of the Baltic states*, Basingstoke–New York: Palgrave Macmillan, 2010.

2 First Soviet military bases were stationed to the Baltic countries after the defeat of Poland beginning with October 1939 following another Soviet ultimatum, but though according to the agreements between the Soviet Union and each Baltic state.

3 The communist parties were illegal in all three Baltic states. The central committee of the Estonian CP was located in the Soviet Union and was subordinated to the Comintern and in turn to the All-Union Communist (bolshevist) Party of the Soviet Union. ECP was the smallest comparing to the other Baltic states with some 100–150 members in 1940.

4 Not all of them were direct victims of the Soviet repressions: among them were the more than 20,000 Baltic Germans, settled to the Germany after the Hitler-Stalin Pact was signed. In summer 1941 more than 30,000 men were mobilised to the Red Army from Estonia, but sent to the labour units, and more than 25,000 were evacuated (mostly the party and Soviet officials, but also skilled workers and specialists). The most of circa 7000 arrested and a majority 10,000 deported persons, who were sent to the Gulag camps or forced settlement in Northern Russia and Siberia, died during first few years. Circa 2000 political prisoners and civilians were executed in Estonia or murdered by the retreating staff of the state security institutions or the Red Army soldiers during the combat in Estonia from July to October 1941.

5 The biggest categories among them were more than 70,000 individuals who escaped to the Germany and Sweden in autumn 1944, including the men who were mobilised in the German armed forces, and probably also part of the men mobilised to the Red Army in Estonia during 1944–1945 (altogether about 20,000 men).

Estonia has lost all its national minorities: the Jews (0.4 % in 1934) who remained in Estonia became the victims of the Holocaust already in 1941 (more than ⅔ of Estonian Jews succeeded to escape to the Soviet Union and the most of them, who had survived there, returned after the end of the war) and the Swedes (7500 individuals) were evacuated to Sweden in 1943–1944. In 1944–1945 the parts of Northeast and Southeast Estonia with mostly Russian population were dispatched from ESSR to the Russian Federation. When in 1939 the proportion of ethnic Estonians in the whole population was little bit less than 90 %, so in 1945 more than 95 %.

SOVIETISATION AND THE SOVIET LIFE FROM 1944⁶

After the return of the Soviets in 1944 the Sovietisation continued. The model of 1930s with forced industrialisation, collectivisation of the agriculture was followed including the liquidation of private ownership and the sovietisation of educational system and culture. However, under the slogans of “blossoming of the culture and education of the Soviet nations” the language of instruction in the schools and universities remained Estonian. The Russian-speaking population had their own schools. There were few Russian-language departments in the higher education establishments also.

Continuation of the political terror. The armed resistance of the so-called forest brothers was suppressed up to 1950s. During 1944–1953 more than 35,000 individuals were arrested on political reasons and sent to Gulag camps. In 1949 more than 20,000 individuals, mostly peasants with their families, were deported to Siberia. After Stalin’s death the survivors were released and returned to Estonia during the second half of 1950s, but remained under surveillance until the collapse of the Soviet Union.

Population change. According to last Soviet census of 1989 there were about 1,5 million inhabitants in Estonia. Only 64 % of them were ethnic Estonians yet. Other were mostly Russian-speaking immigrants. Big part of them were brought to Estonia as the workers of big industrial enterprises that mostly served the needs of the Soviet armament production and heavy industry. The labour craft of Estonian mining industry, producing oil shale, mostly used for fuelling of two big power plants, was predominantly Russian-speaking, too.

Estonia remained an important part of the Soviet military system with tens of thousands of soldiers and officers stationed in Estonia. Among others the medium range nuclear missiles were stationed in Estonia at the end of 1950s. In Paldiski a nuclear submarine training center was built up and a strategic air force base was located in Tartu, the second largest town in Estonia. Estonian young men were conscripted into mandatory military service to the Soviet Army. Absolute majority of them served in the units outside of Estonia.

Organisation of the Soviet government in Estonia. Estonia was governed by the local branch of the Communist Party of the Soviet Union (CPSU), the Estonian Communist Party (ECP), which was commanded and controlled by the apparatus of the Central Committee of the CPSU. The higher leadership of the ECP was appointed by the Politburo of the CPSU CC. Local Soviet authorities, the ESSR Supreme Soviet with its Praesidium and the Council of Ministers, were controlled by the ECP CC. There were three types of ministries in the Soviet Union:

the all-union, all-union-republican and republican.⁷ This allowed to subordinate all important fields to the direct control of central authorities in Moscow.

The dynamics of the personnel of the Soviet authorities in Estonia had four phases, however without very clear borders. During 1944–1950 the leading posts were in the hands of former Estonian underground⁸ communists from the interwar period and their fellow travellers, who joined the party soon after the beginning of the Soviet occupation in June 1940. In 1949–1950 a lot of them were fired and many also arrested under the accusation of “bourgeois nationalism”. They were replaced with so-called Soviet Estonians (*liidueestlased* in Estonian), men and women, who had lived or were born in the Soviet Union during interwar period⁹ and dispatched to Estonia in big numbers after the WW II, but also with Russians and members of other Soviet nations. Since 1960s they were replaced step by step by Estonians, who had born in Estonia and had lived in Estonia during interwar period, but had received their “baptism of fire” during the World War II in the Red Army Estonian national units or in the Soviet rear. Since 1970s the replacement of “old cadres” with younger men and women born in Estonia began. They were mostly persons without any strong conviction to the communist ideology, treating their membership in the Communist Youth League and later in the Party as an unavoidable step in their career. An important moment in the life of this generation was the short period of hope to the “human-faced socialism” during 1960s that was finished with the suppression of Prague Spring in 1968. At the same time, the Estonian branch of the Communist Youth League in Estonia became a mass organisation and the most of the youngsters beginning with the age of 14 were forced to join it.

During the whole period the power was firmly in the hands of old cadres. The 1st Secretary of the CC of the ECP Johannes¹⁰ Käbin (1905–1999) kept this position from 1950–1978. He was born in Estonia but his parents moved to St. Petersburg already in 1910. He was replaced by Karl Vaino (born 1923 in an Estonian settlement Siberia) led the party during 1978–1988.

The Chairman of the Supreme Soviet of the ESSR during 1961–1970 Alexei Müürisepp died in the office and was replaced

6 To the period until Stalin’s death see Toomas Hiio, Meelis Maripuu, Indrek Paavle, eds., *Estonia since 1944: reports of the Estonian International Commission for the Investigation of Crimes Against Humanity*, Estonian International Commission for the Investigation of Crimes Against Humanity, Tallinn: Inimsusvastaste Kuritegude Uurimise Eesti Sihtasutus, 2009. On some more detailed issues see the articles, published on the website of Estonian Institute of Historical Memory: <http://mnemosyne.ee/en/publications/>. Shorter generalisations see *Estonica: Encyclopaedia about Estonia*, http://www.estonica.org/en/History/1945-1985_The_Soviet_Period/.

7 Subordinate departments in the soviet republics of all-union ministries were under direct control of Moscow central offices, for example the ministry of defence. The administration of all-union-republican ministries was a combination with central office in Moscow and subordinate ministry in the soviet republic. “Republican” ministries administrated the branches of economy of local importance and culture; there was a ministry of local industry in ESSR, for example.

8 They were called in Estonia “prison communists”, because the most of Estonian communists were arrested during 1923–1924 and sentenced for long time forced labour. They were released with an amnesty in May 1938.

9 A lot of Estonians emigrated to Russia from the second half of 19th century until the Great War. The number of them was estimated in the beginning of 1920s in the Soviet Russia at more than 100,000.

10 In many documents and Russian-language texts the Russian version of Johannes, Ivan has been used.

by Artur Vader (1970–1978). Johannes Käbin was demoted to this ceremonial post in 1978. They all had come from the Soviet Union in 1940s. In 1983 Arnold Rüütel (born 1928) was appointed to this post. He held this position until the end of the Soviet Union. Rüütel was born in Estonia and was popular among Estonians. It is corroborated by the fact of his election to the President of Estonia in 2001.

The government, Council of Ministers, was chaired by Valter Klauson (1914–1988) during 1961–1984. He was dispatched to Estonia after the Soviet occupation. He was followed by Bruno Saul (born 1932 in Estonia). He and the last Chairman of the Council of Ministers of the ESSR Indrek Toome (born 1943) during 1988–1990 belonged to the new cadres already.

Soviet security service in Estonia. The State Security Service – Estonian branch office of the KGB – was a local office of the All-Union KGB. The chief of the KGB in Estonia during 1961–1982 was Major General August Pork (1917–2002), an Estonian born in Russia. During 1982–1990 he was followed with Lieutenant General Karl Kortelainen, born 1930 in an Estonian settlement in Siberia. The last KGB-chief dispatched in Estonia during 1990–1991 Major General Rein Sillar (born 1948) belonged to the new local cadres. The dynamics of the personnel in the KGB were similar to those of higher leadership of the party and Soviet institutions. Since 1960s young Estonian men and women with higher education were hired among others – especially for the fields of secret police work where the knowledge of the local language and circumstances was needed. As in all countries of the Soviet Bloc there was a big number of informal collaborators, mostly hired using their personal weaknesses or as a condition of forgiving the minor criminal offences.

Anti-Soviet resistance. After the end of armed resistance of the forest brothers in 1950s the resistance was continued by numerous Anti-Soviet organisations of the high school students. The most of them were exposed and the members were sentenced to the prison camps. During 1960s and 1970s the organisations were founded that demanded the finishing of the Soviet occupation. Small demonstrations took place supporting the Hungarian uprising, Prague Spring and protesting against the Soviet invasion to Afghanistan. The movement of the Helsinki groups after Helsinki summit of 1975 to supervise the following of the human rights in the Soviet Union was not active in Estonia; the Estonian, as also the Latvian and Lithuanian resistance members demanded the termination of the Soviet occupation. Their most important achievement was the Baltic Appeal, a public letter to the general secretary of the United Nations, the Soviet Union, East and West Germany, and signatories of the Atlantic Charter by 45 Lithuanian, Latvian and Estonian citizens, big part of them were the former political prisoners, that was sent on 23 August 1979, on the 40th anniversary of the Hitler-Stalin Pact. The signatories demanded public disclosure of the pact and its secret protocols and restoration of the independence of the Baltic states. The appeal constituted the basis of the European Parliament's resolution of 13 January 1983 on the situation in Estonia, Latvia and Lithuania.

Period of deterioration of the Soviet rule. After the new Soviet constitution was affirmed in October 1977, aiming among others the creation of the Soviet nation, the Russification in the national soviet republics was strengthened, including the increasing use of Russian language in the public life and expanding the teaching of Russian in the national schools and even kindergartens. These actions incurred one of the biggest

acts of civilian resistance in Estonia before the collapse of the Soviet Union. In September and October 1980 the youth riots took place in Tallinn, protesting among others against the Russification, that were suppressed by the militia forces and KGB using violence. Following to that 40 Estonian intellectuals wrote a public letter, protesting the politics of the authorities in lessening the importance of national language and the indifference of the central agencies towards the interests of the ESSR. The letter was not published in the USSR, but was leaked via Finland and Sweden to the West and red out in the Estonian programs of the Voice of America and Radio Free Europe. The signatories were “prophylactised” (*профилактизация*, a procedure including the conversation with a state security officer with threats) by the KGB and punished with the ban of publication or public presentation, deprivation of some perquisites etc.

Membership of the Communist Party in Estonia. There was more than 100,000 members in ECP during the collapse of the Soviet Union. A little bit more than half of them were ethnic Estonians. The number of those party members among ethnic Estonians, who were dispatched to Estonia after the end of the WW II (i.e. Soviet citizens) is not known.

Differently from East European countries, which retained their independence, though as members of the Soviet Bloc, in Estonia the “Soviet-Estonian identity” did not emerged in fact. The absolute majority of ethnic Estonians regardless of their affiliation or non-affiliation to the party or the Communist Youth League felt themselves firstly as Estonians and only then, if at all, as the Soviet citizens. Majority of Estonian party members had joined the party for career or by opportunism or similar reasons. They left the party during a very short time in 1990 and a viable communist organisation was never restored in Estonia. But many members of Estonian parliament elected since 1992 were and are the former members of the ECP, belonging now to all parties from the left to the right.

RESTORATION OF INDEPENDENCE¹¹

First political movements. The restoration of Estonian independence on 20 August 1991 began together with the reforms of Mikhail Gorbachev in the whole Soviet Union. In Estonian case an extraordinary important role had the members of Estonian exile organisations, who supported the independence movement in Estonia with information, books, printing facilities and money and raised the issue of the need of termination of the Soviet occupation in the media of their countries of residence and in international organisations.

During 1986/1987–1990 the groups emerged that formed the base of the new political movements. A movement of preservation of Estonian national heritage began already in 1970s with volunteer work in raising awareness of Estonian national heritage and taking care of national monuments that were not demolished by the Soviets. In December 1987 the Estonian National Heritage Society was founded and became quickly to a country-wide mass movement, supported financially by the Estonian exile

11 See Mart Laar, *The power of freedom: Central and Eastern Europe after 1945*, Tallinn: Sihtasutus Unitas, 2010; Shorter generalisations see *Estonica*: Encyclopaedia about Estonia, http://www.estonica.org/en/History/1985-1991_Restoration_of_independence/.

organisations, but also by donations of members. In the 1980s, the Soviet Union had the increasing difficulties with supply with foodstuffs, caused by incapability of the Soviet agricultural sector. As one of the means in the framework of the Soviet Food Programme (1981) the extensive production of fertilisers was foreseen. In Northern Estonia the mining of phosphates was planned with strip mines. Thousands of miners and other needed labour craft were to be imported from other parts of the Soviet Union. A big protest movement against the plans of the Soviet central agencies of fertilisers production began in March 1987 (so-called phosphate war) that resulted in stopping of the development of the project of phosphate mining in Estonia. Part of the activists of this movement tried later to participate in Estonian politics under the flags of green movement, but not very successfully. National Heritage Society and the “phosphate war” were able to mobilise the youth, especially high school and university students, to the activities connected with Estonian environment protection and national heritage.

In August 1987 an organisation MRP-AEG (Estonian abbreviation of the words The Estonian Group for the Disclosure of the Molotov – Ribbentrop Pact¹²) was founded by the former dissidents that demanded the recognition of the existence of the secret protocol of Hitler – Stalin pact by the Soviet Government and annulment of it. The members of MRP-AEG became the initiators of the first new Estonian political party, the Party of Estonian National Independence, founded in August 1988.

The year 1988 was a year of the beginning of the countrywide independence movement. The public appearance of the Estonian national symbol, the blue-black-white flag was prohibited during the Soviet period. In spring 1988 the Estonian national flags were taken largely into use at the public events. The most of them were old flags that had been hidden since the World War II. During the song festivals with some hundreds of thousands of participants in summer 1988 were sung already under blue-black-white colours despite of still valid ban to hoist them. On 24 February 1989, the 71st anniversary of the Republic of Estonia, the Estonian flag was hoisted on the parliament building instead of the ESSR flag.

The supporters of the Gorbachev's perestroika had established the Popular Front in Spring 1988 that united different people from the reform-communists to the nationalists and grow rapidly into a mass organisation. The supporters of the Popular Front belonged mainly to the middle-aged generation, while in the national heritage movement literally the grandparents with life experience of interwar Estonia and World War II found each other with their grandchildren.

Soviet Perestroika in Estonia. In summer 1988 Gorbachev expelled unpopular party chief Karl Vaino, and invited Vaino Väljas, who had been the Soviet Ambassador in Venezuela and Nicaragua since 1980, to become the ECP CC 1st secretary. Väljas was popular, he was Estonian and he supported the changes. On 16 November 1988 the Estonian Sovereignty Declaration was issued by the ESSR Supreme Soviet, asserting Estonia's sovereignty and the declaring the supremacy of the ESSR laws over the laws of the Soviet Union.

On 23 August 1989 the Baltic Way (Baltic Chain) was organised by the popular fronts of Estonia, Lithuania and Latvia. It was a peaceful political demonstration where approximately two million people from Estonia, Latvia and Lithuania joined their hands to form a human chain from Tallinn to Vilnius (more than 600 km) to commemorate their national states and citizens

who fell victims of the agreement of the Soviet Union and Nazi Germany, signed exactly 50 years earlier, on 23 August 1939.

Political directions inside of the independence movement.

Two factions emerged in the Estonian independence movement. One, the Estonian members of the ESSR Supreme Soviet and most of the members of the Popular Front, wanted to achieve Estonian sovereignty with reforms in the framework of Gorbachev's perestroika, initially not declaring the goal of secession. The other, supported by the Party of Estonian National Independence and the Estonian National Heritage Society, demanded the restoration of the Republic of Estonia, occupied in 1940 by the Soviet Union, based on the principle of legal continuity with reference to the policy of non-recognition by Western countries.

The supporters of legal continuity began on 24 February 1989 with voluntary registration of Estonian citizens; those who were Estonian citizens on 16 June 1940, and their descendants. A special certificate of Estonian citizenship was issued to everybody who was accepted as an Estonian citizen by the registration boards. On 24 February 1990 the Estonian Congress was elected by the registered Estonian citizens that came to its first session on 11 and 12 March 1990. The Congress, with 499 elected delegates decided for the restoration of Estonian statehood on the principle of legal continuity and elected a 78-member executive organ, the Estonian Committee.

On 18 March 1990, the first free elections in the ESSR took place for the ESSR Supreme Soviet (Supreme Council). Instead of the earlier 285 members, the new composition had only 105 members. All adult persons on the territory of the ESSR had the right to vote. For the members of the Soviet armed forces in Estonia four seats in the Supreme Council were reserved. Supporters of independence won 73 seats. The new Council of Ministers was formed by the leader of the Popular Front, Edgar Savisaar. The former Chairman of the Praesidium of the Supreme Soviet, Arnold Rüütel, continued as Chairman of the ESSR Supreme Council.

In April 1990, the ESSR Supreme Council abolished Soviet conscription in the territory of Estonia. On 8 May 1990, the official name Estonian Soviet Socialist Republic was replaced with the Republic of Estonia and Estonian national symbols came into official use. On 7 August 1990, the ESSR Supreme Council stated that the relationship between Estonia and the USSR should be founded on the principles of the Tartu Peace Treaty of 2 February 1920.

Dissolution of the Communist Party. The Estonian Communist Party held its Congress on 23–25 March 1990. The party was split into two, Estonians who supported the creation of independent ECP with the goal of an independent state, while most Russian speaking members founded a new “ECP on the platform of the CPSU”. A majority of Estonian members left the ECP soon after. The few Estonians who remained in the “independent ECP” reorganised their party in November 1992 to the Estonian Democratic Labour Party which did not win any seats in Parliament. “The ECP on the platform of the CPSU” was banned after Estonia had regained its independence.

The Gorbachev ideas of reforming the Soviet Union (1987–1989) appealed to the Estonian communists and many supporters of the Popular Front. But the idea of full independence in a form of restoration of the pre-war republic, gained

12 Parallel name of Hitler-Stalin Pact of 23 August 1939 by the names of signatories Vyacheslav Molotov and Joachim von Ribbentrop.

ground also among them from Autumn 1988. Western powers supported the Gorbachev reforms, and were until 1990–1991 against the dissolution of the Soviet Union, warning Baltic politicians not to work against the reforms.

Pro-Soviet resistance to the independence movement.

The third part of the political environment were the people who wished for the continuation of the ESSR in the Soviet Union. Russian-speaking workers and the staff of heavy industry plants founded the International Movement of Workers in the Estonian Soviet Socialist Republic (Intermovement) in July 1988, as an opposition to the Popular Front. Their best known action was an unsuccessful attempt to take over Parliament and government on 15 May 1990. The Chairman of the Council of Ministers warned the residents of Tallinn by radio, and the members of the Intermovement were forced to leave by volunteers, who had rushed to the government site. Intermovement was banned by the Estonian government on 25 August 1991.

Independence referendum. On 3 March 1991, a independence referendum was held. The active service staff of the Soviet armed forces in the Estonian territory had no right to participate. 83 % of the electoral lists participated and 78 % voted for Estonian independence.

Among the most important acts issued by the Estonian Supreme Council was the Republic of Estonia Principles of Ownership Reform Act, passed on 13 June 1991. This act became one of three main cornerstones for the restoration of Estonian statehood, the other two were the citizenship act and international recognition of the restoration of Estonian statehood. The act stated “nationalization, collectivization and expropriation of property in the course of unlawful repression, including mass repression, and by other methods [...] during the period between 16 June 1940 and 1 June 1981 are deemed to be unlawful expropriation of property.”¹³ Paradoxically the abolishment of private property by the Soviets helped to restore it, because new private property relationships had not emerged during the Soviet period. The turn back to June 1940, through the restoration of statehood, also made the restoration of legal status of property possible.

Restoration of the independence on 20 August 1991.

The decisive moment for Estonian independence was the unsuccessful coup d'état in Moscow on 19–21 August 1991. An airborne regiment of the Soviet Army was sent to Tallinn from Pskov on tracked infantry fighting vehicles and took control of the Estonian capital. Government sites, the radio and television center and the TV-tower were defended by the Volunteers. Volunteers were members of two paramilitary organisations: the Defence League, which had been restored in February 1990, and the Home Guard which was founded in May 1990 after the attempted putch by the Intermovement. While the Defence League was supported by the Estonian Congress, the Home Guard men were mostly the supporters of the Popular Front.

The confrontation of the Estonian paramilitary organisations with the Soviet troops did not turn violent. Estonians had a few small arms against the Soviet regular troops and the guns of their infantry fighting vehicles. The Soviet officers, however, were confused and did not know exactly what they were tasked with.

The Estonian Supreme Council and the Estonian Congress agreed on 20 August that Estonian independence should be restored on the principle of legal continuity at once, *de jure* and *de facto*. With same declaration, the formation of the Constituent Assembly was decided; 30 members of the Assembly came from Supreme Council and 30 members from the Estonian Congress.

The restoration of Estonian independence was recognised by a number of countries.

Bearer of Estonian legal continuity in exile. Legal continuation of the Republic of Estonia during the Soviet occupation had been based on two institutions: diplomatic representations and the exile government. The Estonian Legation in London and the Consulate General in New York continued their activities during 1940–1991, and were recognised by a number of Western countries. Estonian passports, issued by these institutions were recognised as travel documents by many countries until 1991.

On 18 September 1944, when the Germans were evacuating their forces from Tallinn and the Red Army had not yet arrived, the last Prime Minister of Estonia in 1940, Jüri Uluots, now in the capacity of acting President of the Republic (President Päts was deported to the USSR in July 1940), appointed the government headed by Otto Tief. The actions of the Estonian politicians were not recognised by the German occupation forces, but in September 1944 the main goal of the latter was the evacuation of troops and offices from Estonia. The Red Army took Tallinn on 22 September and most of the government ministers were soon arrested by the Soviet State Security, but some succeeded in escaping to Sweden. Uluots died in 1945. The oldest member of the government, August Rei, took over the post of acting President of the Republic of Estonia and in 1953 appointed new members of the exile Government. After his death in 1963 he was replaced by the oldest member of the exile government at the time. The Estonian exile Government was treated as the bearer of legal continuity similarly to Polish government in exile.

RESTORATION OF THE STATEHOOD¹⁴

During the transitional period from August 1991 to October 1992, the Chairman of the Supreme Council of the Republic of Estonia, Arnold Rüütel, fulfilled the duties of Head of State, and Edgar Savisaar became the Prime Minister. Savisaar was replaced by Tiit Vähi in January 1992 after the government crisis. Most of the Soviet institutions, including the KGB, ended their activities in Estonia. A couple of months later, in December 1991, the Soviet Union itself was dissolved. Before that, in September 1991, Estonia and the other Baltic countries became members of the United Nations.

Despite of the deteriorated economic situation, the foundations of the renewed Republic of Estonia were completed within a year. The 1938 citizenship act was reinstated on 26 February 1992. According to the implementation regulation of this act, women and men, who were Estonian citizens on 16 June 1940, and their direct descendants, were legal Estonian citizens. The participation in the elections of hundreds of thousands, of possibly pro-Soviet voices, who came to Estonia after World War II were disenfranchised by this act.

Despite recommendations by many foreign economy experts not to, currency reform was carried out on 20 June 1992. The Estonian kroon was stated as the official currency of the Estonian

¹³ See Republic of Estonia Principles of Ownership Reform Act, <https://www.riigiteataja.ee/en/eli/525062015006/consolide>.

¹⁴ See Estonica: Encyclopaedia about Estonia, http://www.estonica.org/en/Society/Development_of_the_Estonian_political_landscape_until_2006/?r=/en/Society/Development_of_the_Estonian_political_landscape_until_2006/.

territory, at fixed exchange rate of 8 kroon to 1 German Mark. This exchange rate remained until Estonia joined the Eurozone 19 years later, on 1 January 2011.

A week later, on 28 June 1992, a referendum was held to approve the new Constitution. 67 % of voters participated, and 92 % of them voted for approving the Constitution which entered into law on 3 July 1992.¹⁵ The fourth constitution of Estonia (the former were adopted in 1920, 1933 and 1937/1938) was a constitution of a parliamentary republic, with a 101-seat unicameral parliament (*Riigikogu*). Members of Parliament were elected for four years. The President of the Republic, as head of state, had limited powers, was elected by the Parliament or special electoral council (in the third round; including in addition to the parliament the representatives of the towns and rural municipalities) for five years, with the right to stand for re-elected once.

On 20 September 1992, the elections to the Parliament, together with the first round of presidential elections were held. The parliamentary elections were won by the Pro-Patria Union (the followers of the Estonian Congress) who got 29 seats. The Chairman of the Pro-Patria Union Mart Laar became the first Prime Minister of independent Estonia. In October 1992, a second round of presidential elections took place, Lennart Meri was elected. The last acting President of exile government, Heinrich Mark, symbolically handed over his powers to Lennart Meri.

In August 1994 the last Soviet (then Russian already) troops stationed in Estonia left, according to an agreement between Russian President Boris Yeltsin and Lennart Meri.

Era of restitution. The first half of the 1990s was characterised as an era of the restoration of Estonian statehood, with the ultimate purpose of returning to Europe and joining Euro-Atlantic international organisations. The proportion of foreign trade to Russia decreased rapidly in favour of European countries and North America. The new government began with radical economic reforms that were supported by the majority of Estonian citizens. Besides the restitution of property and real estate, most enterprises from the Soviet era were privatised using the example of East German Treuhand model. Real estate, confiscated by the Soviet authorities, was returned to the former owners or their legal successors. The NGOs, closed by the Soviet authorities during 1940s, were restored. The monuments demolished by the Soviets were restored, financed by voluntary donations and supported with voluntary work. Most of them were the monuments to fallen men in the War of Independence (1918–1920) that were erected at graveyards of every parish, and demolished by the Soviets during 1940s. The number of exile Estonians who returned to the homeland was relatively small, compare with the number of Estonians who had left Estonia in 1944. Some of them played influential role in Estonian state and society, including some government ministers, the Commander of the Armed Forces during 1993–1995, and the President of the Republic during 2006–2016.

In the middle of the 1990s, the Estonian parliament decided to apply for membership in the EU and NATO. Estonia joined both international organisations in 2004.

LESSONS LEARNT AND RECOMMENDATIONS

Despite the events of worldwide importance, like the collapse of the Soviet Union and the Eastern Bloc, we have to avoid superficial generalisation. Every political ideology uses a current social

and political environment to take the power, democratically or violently, or supported by a military invasion of another country. The restoration of Estonian statehood became possible due to the collapse of the Soviet Union, but how it was realised was defined by national preconditions and the decisions of the people who did participate in the turn.

National identity should not be forgotten here. Estonian national identity is based on language and culture, but also on a similar background (an absolute majority of Estonians belonged to the peasantry until the Great War). The biggest achievement of the Estonians was independence, proclaimed in 1918. Due to the Lutheran faith and parish schools, founded at the end of 17th century, the majority of Estonians were literate. Democratic tradition is important. In the Estonian case, it began during the 1860s with about a thousand rural municipalities of self government by the peasantry. The period of 1918/1920–1934 was a period of a parliamentary republic with frequent changes of governments. During 1934–1940, Estonia was ruled in an authoritarian way, but the regime was among the mildest, compared with other authoritarian regimes and dictatorships at this time Europe. This was supported by a common background of Estonians, and the homogeneity of the population. Estonian national identity was anti-German and anti-Russian. Estonian lands were part of the Russian Empire since 1710 but most of the members of the local higher classes were, from the 13th century to the Great War, the descendants of crusaders and merchants and later immigrants, coming mostly from German lands. The Germanization and later Russification of Estonian peasants did not take place due to the small number of members of local higher classes, the restrictions against Estonian peasants to join the legal-public associations of noblemen, merchants, craftsmen and clergy, and last but not least, the very different language.

The communist ideology was treated as a form of Russian imperial supremacy in Estonia. The land reform of 1919 made most Estonians small landowners. Soviet collectivisation of agriculture in the 1940s, and the confiscation of landed property disinclined Estonians furthermore against the Soviets. One has not to forget the cruel political repressions directed against the young elites of the Republic of Estonia, and the forced attempts of Russification. In 1980s, the only real supporters of the Soviet regime were the people sent to Estonia, beginning in the 1940s, from other parts of the Soviet Union. In contrast with the strong national identity of Estonia, most of the people who were sent to Estonia had only a Soviet identity which lost its foundations with collapse of the Soviet Union.

The agreement achieved between the Estonian Congress, with the goal of the restoration of the Republic of Estonia by way of restitution, and the ESSR Supreme Soviet and Popular Front, initially trying to find a more moderate way of secession from the Soviet Union, was accomplished finally on the restoration of “old” republic with the recognition of Western countries. A referendum held in the beginning of 1991 supported the independence and the Estonian citizenship definition helped to lessen the pro-Soviet political influence. An antagonistic confrontation between different directions of independence movement was avoided. This was supported by a strong national identity and by the fact that irrespective of

15 The Constitution of the Republic of Estonia, <https://www.riigiteataja.ee/en/eli/521052015001/consolide>.

their political affiliations, the absolute majority of Estonians supported independence.

An important lesson learnt is that the attempts to win the hearts and minds of the pro-Soviet, Russian-speaking part of the population, who mostly immigrated to Estonia after the World War II, could have been more active. But here, the big number of late immigrants, about 1/3 of whole population, who are strongly influenced by Russian TV-channels in a country bordering with Russia should be taken into account. The strongest argument for supporting Estonia among the pro-Soviet people was the living standards in Estonia versus Russia. In this comparison, the most Russian-speaking Estonians preferred to stay in

Estonia. That was not the case in many other former non-Russian parts of the Soviet Union.

A recommendation derived from Estonian experience of the years 1987–1992 is to avoid the escalation of unneeded conflicts between the different factions of the independence movement. This recommendation is corroborated by the numerous attempts of pro-Soviet forces to create such conflicts. A general recommendation is not to try to import the experience of one nation, to a political environment of another nation or another time. History and culture make every nation and fate unique, a simple copy-paste could result in fatal consequences.

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DISMANTLING THE STATE SECURITY APPARATUS

MEELIS SAUEAUK

INTRODUCTION

The Soviet Union's Committee for State Security (USSR KGB) and its predecessors (VeCHEKA – OGPU – NKVD – NKGB – MGB) were of the world's largest and most powerful intelligence and security services; created in 1917 and initially evolved under the conditions of the "Red Terror". Under orders from the higher-ranking Communist Party organs, it was the primary instrument of terror. The KGB identified enemies of the Soviet regime both within the Soviet Union as well as abroad. In the so-called socialist countries, the KGB was the "older brother" of the secret services of those countries, which similarly called themselves "Chekists" according to the KGB's example.

Thanks to historical KGB foreign intelligence documents preserved at the Estonian National Archives, we can trace the interests and activities of this service in Estonia through 1924–1940. From that time, the existence of several parallel structures that operated with the same objective, yet competed against each other in a state rivalry, which already characterised the so-called "state security organs" or "security organs". The functions of the state security organs are traditionally delineated, as they had evolved during the KGB era. These include foreign intelligence, counterintelligence, military counterintelligence and security; the struggle against "anti-Soviet elements" (political police) and against the hostile activity of religious organisations, safeguarding state security in the fields of transportation and the state economy, guarding the state's borders, protection of the leaders of the state and the Communist Party, and other such tasks.

As has been mentioned above, the state security organs were already engaged in foreign intelligence in Estonia during its pre-war period of independence. After the mutual assistance pact forced on Estonia by the Soviet Union at the start of the Second World War, Red Army bases were established in Estonia, bringing with them the army's special Chekist departments. After Estonia's annexation and incorporation into the Soviet Union in 1940, a subordinate office of the KGB's predecessor of that time – the People's Commissariat for Internal Affairs (NKVD) – was also formed in Estonia (respectively in the Estonian Soviet Socialist Republic – the ESSR). The structure of the ESSR NKVD corresponded to that of the USSR NKVD, the lines of work of their subunits overlapped. That is how it remained in the future as well – the ESSR's state security organs emulated the USSR-wide organisation in terms of its structure, only in a scaled-down form.

The Criminal Code of the Russian SFSR was put into effect in Estonia during the final months of 1940, including the notorious articles concerning "counterrevolutionary crimes" (58-1a, etc.), on the basis of which the security organs set about sending Estonian citizens into imprisonment in the territory of the Soviet Union. Yet the true Red Terror was launched in 1941 immediately prior to the start of the war between Germany and the Soviet Union, and in the course of the ensuing warfare. The mass deportation carried out in 1941, where about 10,000 people, including entire families, were taken from Estonia to the Soviet Union's internal oblasts, the bloodshed carried out by the NKVD's wartime

so-called destruction battalions, and the mass murders connected with the deportation of imprisoned persons assured the state security organs of a frightening reputation that they could not shake until the end of their operational existence.

DESCRIPTION OF THE DEFAULT SITUATION

At the end of 1943, when planning the recapture of Estonia, Latvia and Lithuania, subunits of the state security organs for these countries were formed again in the rear area in the Soviet Union. Upon the recapture of these countries, these state security organ subunits were responsible for taking control in these countries, establishing themselves and setting about executing their assignments. Since the population still remembered the Terror of 1941 very well, the Germans occupying Estonia and their henchmen did not have to go to a great deal of trouble to frighten people with the horrors of the Soviet regime. Unfortunately, this undertaking in frightening the population proved to be not merely a propaganda lie, rather the terror and mass arrests began in Estonia again, and these were most extensive, precisely in 1945. It was also not long until mass deportation was carried out once again – in March of 1949, over 20,000 people, again including entire families, were taken all at once to the Soviet Union's "most distant regions" (primarily the region extending from the Southern Ural mountains to Lake Baikal, including areas of Kazakhstan, which were not far from the Semipalatinsk [Nuclear] Test Site). The struggle waged by the state security organs against freedom fighters hiding in the woods, who were either imprisoned or murdered on the spot, was topical until the mid-1950s. All this created an overall atmosphere of terror and violence where nobody could feel secure.

The only institution in the Estonian SSR, which at least theoretically, was authorised to control the state security organs, was the party apparat of the local branch of the Communist Party of the Soviet Union (CPSU) – the Estonian Communist Party (ECP). Yet even the Party apparat operated in Estonia in accordance with the dictates of the Soviet leadership. As a rule, a division of tasks was in effect between these two institutions, where the former suppressed resistance using terror, and the latter dealt with agitation and propaganda aimed at suppressing resistance. As a rule, the Chairman of the ESSR KGB also belonged to the ECP's leading council – the Bureau of the Central Committee of the ECP. The leadership of the ECP never had the kind of power over the state security organs as did the leadership of the CPSU.

The state security organs achieved their largest size as an organisation at the outset of the 1950s when the militia (which was the equivalent of uniformed police force of Western countries), the internal security troops (i.e. military force), etc., which had all traditionally been part of the administrative field of the Ministry of Internal Affairs, were combined with the Ministry of State Security (MGB). According to some sources, the personnel of the USSR MGB had grown to a number between 200,000 and 207,000 (not including the border guards) by 1952. In 1949,

the staff of the central apparatus of the ESSR MGB and its peripheral organs (a total of 15 municipal and county departments) numbered a total of 1,292 positions, including 711 operational staff positions that were directly involved in operational work or in the running of such work. As of 31 December 1949, 636 operational staff positions (89.5 %) and 493 non-operational staff positions (84.5 %) of that total number were staffed with employees. Thus the ESSR MGB had a total number of 1,129 employees on staff at that time. About a quarter of these employees were ethnic Estonian and this relative proportion remained the same until the termination of the KGB's activity. After a brief period that followed the death of the Soviet dictator Joseph Stalin, when the MGB was placed under the jurisdiction of the Ministry of Internal Affairs (1953–1954), the Committee for State Security was formed under the jurisdiction of the USSR Council of Ministers and similarly, its subordinate institution was also formed in Estonia: the Committee for State Security under the Estonian SSR Council of Ministers. The status of the Committee was strengthened somewhat in 1978 and it became simply the USSR KGB (correspondingly the ESSR KGB in Estonia). The KGB distanced itself from the mass terror of the Stalinist era during its initial years and at the same time, the number of its personnel was significantly reduced. A new Estonian SSR Criminal Code was put in effect in 1961.

The more important departments of the central apparatus of the Estonian SSR KGB were:

- 1st Department – dealt with foreign intelligence
- 2nd Department – dealt with counterintelligence
- 4th Department – counterintelligence and security in the field of transportation and communications
- 5th Department – department for combating “ideological sabotage”
- 7th Department – covert surveillance
- Investigation Department – dealt with investigating criminal cases.

Smaller subunits and units for technical and administrative support operated in addition to the above-mentioned units.

In the context of Estonia, the most central unit was the ESSR KGB 5th Department, the task of which consisted of the complete suppression of all manner of dissidence and manifestations interpreted as being anti-Soviet. The department's spheres of work covered all the more important public objects.¹ At the end of the 1980s, about a thousand people worked in the ESSR KGB, about half of which were operational agents.

Its so-called operational departments functioned by the use of secret collaborators; the main categories of which were the agent, the resident, and the tenant of the secret apartment or apartment for covert meetings. The number of operational agents in Estonia during the final years of the KGB's activity has been estimated at between 2,500 and 3,000.

DESCRIPTION OF THE TRANSITION

In 1988/89, when Estonia directed its course towards seceding from the Soviet Union, Estonia's leadership faced a dilemma – what to do with the KGB. One of the first plans was to take over the KGB's functions and to distribute them among different institutions. On 13 April 1989, an ESSR governmental committee was formed for reorganising the ESSR KGB. The committee's proposals, nevertheless, were not implemented. The committee

also criticised the draft bill of the USSR State Security Organs Act. Changing times also brought a change in ESSR KGB personnel, when Rein Sillar, a KGB cadre officer who was born and raised in Estonia, was appointed Chairman of the Committee for State Security in March of 1990 (persons of non-Estonian origin had formerly been preferred for positions in the leadership of the ESSR state security organs, excluding a few exceptions). It is believed that the reorganisation of the KGB and its partial subordination to the government of the Estonian SSR would actually have come to pass, if the August putsch of 1991 had not taken place.

The government made the decision to do away with the KGB in Estonia a few days after the restoration of independence in August of 1991. A government order issued on 26 August 1991 instructed the Chairman of the ESSR KGB, R. Sillar, to halt the work of the organ under his leadership, on that very same day, until the government issues a special order, and to form a joint committee consisting of authorised representatives of the Republic of Estonia and representatives of the ESSR KGB to resolve issues associated with the KGB. The Ministry of Internal Affairs issued an order for closing off and sealing the workrooms of the ESSR KGB. For its own part, the government pledged to guarantee the human rights of KGB employees and the inviolability of their personal liberty on an equal footing with other inhabitants of Estonia. Regardless of the resoluteness of this document, almost no measures whatsoever followed from it. The KGB continued to operate in its buildings (except for its local departments) until the end of 1991.

The fact that a corresponding agreement had already been reached on 4 September 1991 with Vadim Bakatin, who had risen to the position of heading the USSR KGB, indicated that conditions were favourable for achieving an agreement with the new leadership of the USSR KGB. The agreement was in accordance with the principles of the latter, the most important of which was doing away with the KGB as such, and the distribution of its functions among different institutions.²

In Moscow on 4 September 1991, the Chairman of the Government of the Republic of Estonia Edgar Savisaar, the Chairman of the USSR KGB, V. Bakatin, and the Chairman of the ESSR KGB, R. Sillar signed the protocol “Concerning the mutual obligations of the Republic of Estonia, the USSR KGB, and the Estonian KGB”, which prescribed the establishment of a trilateral committee of experts (the Government of the Republic of Estonia, the USSR KGB, and the ESSR KGB), which was to present a list of issues that needed to be solved, first of all, together with draft agreements for implementing the provisions of the protocol. Thus, this protocol took the termination of the KGB's activity back to its starting point. Both the KGB and the Government of the Republic of Estonia accepted different obligations, among which the KGB itself was to be responsible for the preservation of its property and archives, while the Government of the Republic of Estonia, on the other hand, was responsible for securing the social, political and personal rights of KGB employees, pensioners and the members of their families, and was obligated to continue financing the KGB and to provide for its economic upkeep (excluding employment pay, which the USSR KGB was

1 Concerning the 5th Department of the ESSR KGB and other structural information, see for instance: Harri Mägi, *ENSV KGB tegevuse lõpetamine*, Tallinn: Varrak, 2012, 47–54.

2 Вадим Викторович Бакатин, *Избавление от КГБ*, Москва: “Новости”, 1992, 77.

supposed to provide). Only the KGB's local departments were to be shut down.³

On 9 October 1991, E. Savisaar, V. Bakatin, and R. Sillar signed the protocol "Concerning the implementation of practical measures connected to terminating the activity of the ESSR KGB". The protocol prescribed that:

- a trilateral committee of experts was to be formed for inventorying the KGB's real estate and movable property, technical means, and weaponry located in the territory of the Republic of Estonia, and for preparing separate protocols for handing buildings, special equipment, means of transportation, weaponry and other tangible assets over to the Republic of Estonia. The handing over of information detailing the structure of the ESSR KGB and lists of its personnel was also prescribed;
- a certain portion of the ESSR KGB archives was to be handed over to the Republic of Estonia.

The USSR KGB was prepared to hand over to Estonia the agent-operational materials of the ESSR KGB in the event that the Republic of Estonia would provide certain legal guarantees (see the chapter "Regime Archives"). In actuality, it was the archives, in particular, that practically were the only object of agreement of any permanent value.

- The Republic of Estonia took upon itself the obligation to guarantee the social, political and personal rights of the ESSR KGB's former employees, pensioners and the members of their families in accordance with generally recognised norms of international law, the laws of the Republic of Estonia, and bilateral and multilateral agreements with the Soviet Union. Even more so, the USSR KGB and the Government of the Republic of Estonia were required to submit proposals on the issues of the legal and social protection of the ESSR KGB's former employees, pensioners and the members of their families, and of providing them with pensions and housing, in order to sign the corresponding agreements at the international level.⁴

The following working groups were formed for the takeover by order of the Government of the Republic of Estonia:

- 1/ working group for issues concerning real estate and movable property;
- 2/ working group for issues concerning weapons, special equipment, and other such matters;
- 3/ working group for issues concerning archives and documentation, and
- 4/ working group for issues concerning governmental communications, private communications, and other such matters.

The takeover of the local state security departments took place first of all. Unfortunately, the entire documentation of the work of those departments had already been removed from almost all of the departments prior to their takeover. Buildings and their furnishings were handed over mostly in undamaged condition. A statement in the protocol was signed on 25 October, according to which weapons and ammunition were handed over to the Estonian side: about 200 Kalashnikov assault rifles, over 1,400 pistols, about 600 hand grenades, over 300,000 cartridges, etc.

The handover of KGB property and the termination of the institution were completed in December, when the "Final act concerning the termination of the activity of the ESSR Committee for State Security" was signed on 18 December 1991. It was signed by the Minister of State of the Republic of Estonia Raivo Vare, the fully authorised representative of the Federal State Security Service,⁵ Vyacheslav Shironin, and the former Chairman of the ESSR KGB, Rein Sillar.

According to the act, the measures connected to terminating the activity of the ESSR KGB had been implemented and the KGB's personnel had been removed from their posts or transferred to continue their service outside of the Republic of Estonia (with the exception of 25 people); buildings, property, means for automobile transportation, special equipment, weaponry and ammunition were handed over to the Republic of Estonia to the agreed extent, in accordance with agreements, archival collections and other materials were handed over to the Estonian Police Bureau; additionally, an agreement was prepared concerning the provision of former KGB employees and pensioners with legal and social protection, pension insurance and housing. The provisions of this agreement were to be followed until the conclusion of an agreement at the international level.⁶

CURRENT STATUS

Although the termination of the KGB in Estonia could have been considered completed at that point in time, an important development later came to light, as along with the final act, an agreement concerning social guarantees for former KGB employees and their families had also been signed. The public only found out about this in 2000 when a copy of this document was presented as evidence in court. This induced the Riigikogu (Estonian parliament) to form a Riigikogu committee of inquiry (its chairman was member of the Riigikogu Aivar Altosaar) as late as 2001 for investigating the termination of the KGB, but primarily for ascertaining the facts and circumstances of the signing of the agreement.⁷

The so-called social guarantees agreement bears the date 18 December 1991 and the title "Agreement concerning guaranteeing legal and social protection, pensions and housing for former ESSR KGB co-workers and pensioners, and the members of their families". The agreement bears the signatures of R. Vare and V. Shironin; although it had been drawn up and worded to be signed by the head of the Federal State Security Service, V. Bakatin, and the Chairman of the Government of the Republic of Estonia, E. Savisaar.

Pursuant to the agreement, the Government of the Republic of Estonia undertook the obligation to:

- guarantee the social, political and personal rights of former KGB co-workers, pensioners and the members of their families and not to permit the restriction of their rights and liberties, their punishment pursuant to criminal procedure, and bringing them to justice in other ways, for their preceding

3 Протокол о взаимных обязательствах Правительства Эстонской Республики, КГБ СССР и КГБ Эстонии, 4 September 1991, Estonian National Archives, ERA.R-1.5.1236, 207–210.

4 Протокол о реализации практических мер, связанных с прекращением деятельности КГБ Эстонской ССР, 9 October 1991, Estonian National Archives, ERA.R-1.5.1236, 211–215.

5 USSR legislation of 3 December 1991 reorganised the USSR KGB as the Federal State Security Service.

6 Final act concerning the termination of the activity of the ESSR Committee for State Security, 8 December 1991, Estonian National Archives, ERA.R-1.5.1236, 18–20.

7 Riigikogu decision to form a committee of inquiry to ascertain the facts and circumstances associated with the termination of the activity of the former Estonian SSR Committee for State Security. Passed on 16 January 2001 – *Riigi Teataja*, <https://www.riigiteataja.ee/akt/72639> (cited on 25 July 2017).

service or work in the state security organs, if their activity was in accordance with legislation that was in effect;

- guarantee the payment of pensions, benefits and compensations deriving from Russia to the KGB's military pensioners and the members of their families who remain living in Estonia;
- carry out the exchange of residential premises of former KGB co-workers and the members of their families who are leaving Estonia and the shipping of their property out of the country pursuant to the laws of the Republic of Estonia;
- recognise documents verifying graduation from USSR KGB institutions of education on an equal footing with the diplomas of other USSR institutions of higher education.

It had been judged that the actual conclusion of this agreement would have either ruled out or significantly hampered the conduct of the lustration process.

The lustration process as a whole in Estonia focused on the elimination of the effect of the KGB and of persons associated with it in independent Estonia.⁸ One of the driving forces in this process was the formation of an ad hoc committee in 1993 for investigating the activity of the security and intelligence organs of the Soviet Union and of other countries in Estonia (the committee chairman was the member of the Riigikogu and former political prisoner Enn Tarto).⁹ This committee was formed for investigating matters connected with the activity and termination of the above-mentioned organs and also the ESSR KGB, and for working out a legal mechanism for using relevant materials. The committee was charged with the task of submitting draft legislation concerning the procedure for the public disclosure of activities, employees, and networks of agents of the security and intelligence organs of the Soviet Union and other countries. The committee was obligated to pass the relevant materials on to investigative and court organs, or to the Chancellor of Justice in the event that it discovered violation of law, and also if facts and circumstances came to light casting doubt on the oath of conscience of any particular individual.

The ad hoc committee worked out rules and legislation for the preservation and use of the KGB archives that had been taken over.¹⁰ The committee also tried, but failed to achieve the return from Russia of documents that had been taken away.

The most important accomplishment of the ad hoc committee was working out draft legislation for registering KGB employees and individuals who had collaborated with it (along with the employees and collaborators of other intelligence and security services of the Soviet Union and Nazi Germany). The legislation that went into effect in March of 1995 specified the services (including the KGB), the employees of which had to register themselves with the Estonian Internal Security Service within one year, meaning that such individuals had to confess their cooperation with such services. Individuals (agents, residents, confidants, etc.) who had collaborated with these services were also subject to the same requirement. Such confessions were considered state secrets. Collaborators who did not confess were to be publicly disclosed in the *Riigi Teataja*.¹¹ This registration legislation has been assessed positively because, on the one hand, it enabled the state to obtain information about individuals who had cooperated with secret services and, on the other hand, it enabled those individuals to establish relations of loyalty to the Republic of Estonia and to safeguard themselves against blackmail by a foreign country. Of those who have not registered themselves, so far, the identity of over 600 former KGB operatives has been publicly disclosed.

The ad hoc committee also dealt with starting up the research of international crimes with no statute of limitations¹² and assessed the work of the governmental committee that terminated the activity of the KGB. In the opinion of the committee, the governmental committee for terminating the activity of the KGB did not have a clear and coordinated position in relation to the objectives of its work. The committee concluded that the work of the termination committee cannot be considered satisfactory and its actions cannot be considered the termination of the KGB, but rather, at best, the formal ending of the activities of the KGB.

LESSONS LEARNT

It is practical to lay open the experiences gained in Estonia from the termination of the KGB, on the basis of the final report of the committee of inquiry formed in 2001, to investigate the termination. The final report of the Committee of Inquiry into the Termination of the Activity of the Former ESSR Committee for State Security, completed in 2002, viewed the termination of the KGB in Estonia in a quite critical light.¹³ The committee's main conclusions were as follows:

- 1/ The committee expressed approval of the choice made by the Government of the Republic of Estonia, at that time, to terminate the ESSR Committee for State Security, and of the fact that the KGB's legal activity in Estonia was halted.
- 2/ In the opinion of the committee, the Government of the Republic of Estonia was not sufficiently consistent and demanding in the fulfilment of many of the points agreed upon in the protocols of 4 September and 9 October 1991, and in demanding their fulfilment (first and foremost in matters concerning the archives):
 - a/ the demand for the return of operational files and files on networks of agents was not seen through to the end. The Government of the Republic of Estonia should have initiated legislation in the Supreme Council to work out

8 See the chapter "Lustration".

9 Riigikogu decision to form an ad hoc committee to investigate the activities of the security and intelligence organs of the Soviet Union and other countries in Estonia. Passed on 18 May 1993 – *Riigi Teataja*, <https://www.riigiteataja.ee/akt/13094339> (cited on 25 July 2017).

10 See the chapter "Regime archives" and the legislation Procedure for Collection, Registration, Preservation and Use of Materials of Security and Intelligence Organisations of Other Countries which have Operated in Estonia Act, passed on 10 March 1994 – *Riigi Teataja*, <https://www.riigiteataja.ee/en/eli/522042014002/consolide> (cited on 1 April 2017).

11 Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Security Organisations or Intelligence or Counterintelligence Organisations of Armed Forces of States which have Occupied Estonia Act, passed on 6 February 1995 – *Riigi Teataja*, <https://www.riigiteataja.ee/en/eli/524042014001/consolide> (cited on 1 April 2017).

12 See the chapter "Investigation and Prosecution of the Crimes of the Regime".

13 Final report on the termination of the activity of the former ESSR Committee for State Security (part I: *Eesti Päevaleht*, 10 April 2002, <http://epl.delfi.ee/news/eesti/endise-ensv-riikliku-julgeoleku-komitee-tegevuse-lopetamise-lopparuanne-i-osa?id=50920257>; part II: <http://epl.delfi.ee/news/eesti/endise-ensv-riikliku-julgeoleku-komitee-tegevuse-lopetamise-lopparuanne-ii-osa?id=50920258>; part III: <http://epl.delfi.ee/news/eesti/endise-ensv-riikliku-julgeoleku-komitee-tegevuse-lopetamise-lopparuanne-iii-osa?id=50920259> (cited on 20 July 2017).

legislative guarantees that the USSR KGB was pursuing that would have satisfied both sides;¹⁴

b/ the return of KGB archival files concerning other Estonian citizens that the USSR KGB pledged to comply with within the space of one year was not demanded (For this reason, Estonia was left without thousands of investigation and filtration files);

3/ The government was not decisive and consistent enough in halting or obstructing the activity of the KGB, including its local departments. At the same time, it should have been explicitly stated in the protocols that the preservation of all documentation must be guaranteed and that its destruction was prohibited. This, however, was not done.

4/ The process of terminating the ESSR KGB was not sufficiently open in the opinion of the committee, although even the protocol of 4 September 1991 prescribed that the public would be periodically informed of the negotiations concerning the termination and of the agreements arrived at. The committee of inquiry felt that the KGB would not have had advantages under conditions of greater publicity.

5/ The control of the Government of the Republic of Estonia over the activity of the governmental committee was insufficient.

6/ In the opinion of the committee, the conduct of business in terminating the KGB was faulty. The minutes of meetings were not recorded (at least such minutes have not survived, similarly no correspondence, rough drafts, final report, and other such material have been preserved).

The committee of inquiry focused its attention on which problems remained or are still to this day topical for the Estonian state:

1/ The Estonian side did not obtain the lists of KGB personnel in the course of its termination.

2/ Materials connected with the KGB's networks of agents and its operational materials, and thousands of other KGB archival files concerning Estonian citizens remain in Russia. The committee noted that, on the one hand, this has an aspect related to state security for the Estonian state because those thousands of people who on the basis of the law have not confessed before the Republic of Estonia their cooperation with the repressive organ of the occupying regime are the potential objects of foreign influence. On the other hand, the aspect of the protection of the rights and interests of Estonian citizens, which the Estonian state is obligated to stand for, is also important. This is manifested by the fact that information concerning Estonian citizens gathered by the ESSR KGB in the course of its operational work is at the disposal of a foreign country, as well as by the fact that criminal, filtration or other files that could serve as the basis for resolving people's pension issues are deposited in Russia. Historical and cultural history aspects also cannot go unmentioned, since thousands of files deposited in and at the disposal of a foreign country concerning the ESSR KGB's networks of agents, operational work, and other such material are indispensable sources for researching that totalitarian regime, its organs of repression, and the period of occupation.

3/ The alleged disappearance of the "foreign travel files" (files containing background checks of individuals who wished to visit capitalist countries).

4/ The disappearance of the so-called agreement protecting the social guarantees of KGB personnel bearing the signatures of R. Vare and V. Shironin (18 December 1991). Although this document was judged to be invalid in the course of legal proceedings, and the members of the Government of the Republic of Estonia, of that time, also did not verify the conclusion of this agreement, it was assumed that matters associated with this agreement could cause headaches for the Estonian state in the future as well.

In summary, the Riigikogu committee of inquiry expressed approval that the activity of the ESSR KGB was halted. By taking over the KGB, the Estonian state acquired a significant quantity of weapons and archival documents. Beyond that, special means of communication and many different kinds of equipment needed by special services were acquired that at that time still had practical value. Broadly speaking, the committee of inquiry felt that it was justified to assess the process of terminating the ESSR KGB as having been satisfactory.

RECOMMENDATIONS

Based on the above, we can also formulate a few recommendations relating to the termination of the activities of secret services of a former regime. Here it must be taken into account that in every specific case, the tactics and results depend primarily on the political situation and on how strong a political agreement for lustration is succeeded in achieving. In an ideal situation (which as we know almost does not exist in reality), recommendations could be as follows:

1/ The governmental committee that is authorised to carry out the termination of the secret service should have firm objectives, a comprehensive approach and a clear plan for taking over the property of the service and for determining their future ownership;

2/ The affairs of the committee must be managed properly and its activity must be documented;

3/ The activity of the committee and the problems that arise should be as public as possible and under the control of parliament;

4/ Advisors and informers with inside information on the situation in the secret service should be involved in the work of the committee;

5/ In the event of taking over property, the protocols of inventories from previous years should be requested on a compulsory basis in order to compare them to the quantity of property that is actually handed over.

14 Concerning taking over documentation and the archives, see the chapter "Regime archives" for further information.

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REGIME ARCHIVES

MEELIS SAUEAUK

INTRODUCTION

Historical themes were of great importance in the Singing Revolution that erupted in Estonia in 1988. The reason for this was the wish of Estonians to study and write their own history that would be free of communist falsification, and to fill the “white patches” or blank gaps in history that the foreign power’s treatment of history had concealed. First of all among these “white patches” were the communist terror and the fate of the individuals who suffered in that terror. The years 1988–1991 were a strange transitional period when the Estonian organ of the Communist Party of the Soviet Union – the Estonian Communist Party (ECP) and the Soviet state security service (KGB) tried to demonstrate a certain complaisance in publicly disclosing information concerning the communist terror. This was part of Soviet state policy – of public disclosure (Glasnost). The disclosure of information took place under the complete control of these institutions, and the public was not allowed access to their secret archives (the archives of the Soviet administration were likewise off limits). Similarly, outside of those institutions, there was no clear idea of the composition of the archives or of current records. The Soviet KGB, for its own part, tried to use public disclosure with the aim of halting the disintegration of the Soviet system of government. It provided Soviet judicial authorities and prosecuting authorities with access to its archival materials in rehabilitating victims of Stalinist terror.

DESCRIPTION OF THE DEFAULT SITUATION

The most important communist secret service archive in Estonian territory was the archive of the Estonian territorial organ of the Committee for State Security (KGB) – the Estonian SSR KGB – in Tallinn.¹ The complete content and volume of this archive has not been publicly disclosed to this day. On the basis of analogy with the archives of former KGB subunits preserved in other regions of the former Soviet Union, there are grounds for believing that all archived materials of the Estonian SSR KGB and its predecessors from the entire period of their activity, from 1940–1941 and starting from 1944 onward until the present time, were deposited in the archive. This had to include regulative documents, correspondence and records management, operational account files, departmental administration files, files on cadre employees and agents, internal investigation files, investigation files, filtration files, special auditing files, card files and other information apparatus, the secret library, the photo archive, etc. etc. The organisation of the KGB archive, the so-called “operational archive”, and the reception, systematisation, preservation and use of documents were all under the jurisdiction of the KGB’s 10th Department. Additionally, materials that were not archived, that were in use and in circulation were also part of the KGB’s documentation.

According to existing information, the removal of KGB archival material from Estonia already began at the end of 1989. This

was probably connected to events in Germany that ensued from the fall of the Berlin Wall, where the danger that secret service materials could find their way into “foreign hands” became real. According to the former leaders of the ESSR KGB, the USSR KGB “dislocated” its archives as its own property to another location. First of all, archived personal and work files of its network of agents (agents, residents and the tenants of secret apartments whose work had ended or had been discontinued and whose personal files and work files had been placed in the archive) were removed. In January of 1990, operational account files (processing and surveillance files of groups and individuals) were also taken out of Estonia for storage elsewhere. At the same time, the KGB took the KGB Communist Party organisation archive back from the Estonian Communist Party archive and carted it off. In the late spring/early summer of 1990, the personal files of operational agents were taken away, and their work files were allegedly destroyed. The card file of the networks of agents was similarly destroyed at the time of the August putsch in 1991. Since the information concerning these actions derives primarily from oral sources, and documents concerning these actions have not been made public, it cannot be claimed with full certainty that everything really happened like that.

DESCRIPTION OF THE TRANSITION

After the restoration of Estonia’s independence on 20 August 1991 and the decision of the Government of the Republic of Estonia to discontinue the activity of the KGB in Estonia (26 August 1991), negotiations began with the USSR KGB for the termination of the ESSR KGB and also for handing its archival materials over to the Republic of Estonia. According to the agreement signed on 9 October 1991 by the Prime Minister of Estonia, the chairman of the USSR KGB, and the chairman of the ESSR KGB, the signatories were obligated to trilaterally form a special committee for handing over the archival materials, and the archival collections that were to be handed over were designated. These collections included:

- 1/ Investigation files;
- 2/ Filtration files (personal files of persons detained in so-called vetting-filtration camps in 1944–1946);
- 3/ Materials from the investigation of war crimes;
- 4/ The “special library”.²

By 25 November 1991, the committee was also supposed find a way to maintain “peace and concord among the citizenry” in its task of working out a procedure for handing over and preserving KGB materials on the “armed conflicts” of the 1940s and 1950s

1 The main sources used for the descriptive part in putting together this overview are the book: Harri Mägi, *ENSV KGB tegevuse lõpetamine*, Tallinn: Varrak, 2012, and the manuscript by Meelis Maripuu *Eesti kogemus KGB dokumentidega* (2016, in the possession of the Estonian Institute of Historical Memory). The author thanks M. Maripuu for his assistance and advice.

2 Protocol concerning practical measures connected to the termination of the ESSR KGB, 9 October 1991 – Mägi, *ENSV KGB*, 168–172.

in Estonia and on the persons who perished in them, as well as materials from KGB supervisory investigations carried out to investigate the violation of legality.

It is not known why only this limited quantity of KGB materials was selected to be handed over. It can be said in advance that the above-mentioned collections ultimately formed the main part of what was handed over to Estonia. The KGB nevertheless expressed its willingness in the same protocol to also hand over materials on agent-operational activities and materials concerning secret collaborators (agents, etc.) in accordance with a separate agreement after “sufficient legislative guarantees” have been established in the Republic of Estonia for maintaining the secrecy and security of individuals who have cooperated with the KGB. It can be said in advance that since the dynamics of Russian–Estonian relations did not develop in the direction of good-neighbourliness, then for this or some other reason, such an agreement was not concluded in the future.

On the basis of the above, the statement of the handing over of the ESSR KGB archive collections and other documentary materials was signed on 24 October 1991. In addition to the collections listed above, a selection of activity documents from the 1940s and 1950s, primarily concerning the struggle against the resistance movement, a collection of KGB internal investigation materials from the same time period, and other smaller collections of materials were handed over to the Republic of Estonia as “operational materials”. It was noted that materials received at headquarters from KGB regional departments and so-called special audit materials can also be destroyed if they have no historical or other value. The greater portion of special audit materials (according to their serial numbers approximately 80,000 files) consisted of so-called foreign travel files, which contained materials concerning individuals who had applied for permits to travel to capitalist countries. The listed materials were handed over to the Estonian Police Board operating under the jurisdiction of the Ministry of Internal Affairs without involving the national archive system and archivists. The justification given for transferring these materials to the internal institutional police archive was the fact that the national archive system is open to all and the procedure for the protection of private information had not yet been worked out. The transfer of materials lasted until December of 1991. The final act of the termination of the activity of the ESSR KGB was signed in that same month and it noted among other things that, “In accordance with existing agreements, archival collections and other materials of state and historical importance for the Republic of Estonia were handed over to the Estonian Police Board”. Historians, however, were not involved in assessing the historical importance of the archival materials that were to be transferred. On the other hand, “historical importance” meant that as a rule, these materials were of no actual operational importance. They dealt with a time period that was long past and with persons who were mostly already dead or who no longer participated actively in social-political life. The transformation of the Police Board, which was given the responsibility of managing the KGB files, from the Soviet militia into a law enforcement agency of an independent state based on the rule of law similarly did not take place overnight, for which reason it did not display any noticeable activeness in making the KGB and Ministry of Internal Affairs archives deposited there accessible to the public.

In summary, the KGB handed only a small portion of its archive over to the Republic of Estonia. Thereat, many important groups of documents, like correspondence and normative

materials, personal files of secret collaborators, personal files of cadre employees, and documents concerning operational activity from the 1960s–1980s, were excluded in their entirety from the materials that were handed over. **The complete composition and preservation of the ESSR KGB archive and of documentation that had not yet been archived at that time is unknown at the present time. The most valuable part of what has been handed over to the Estonian state nevertheless makes it possible to research communist crimes at their high point in the 1940s and 1950s, and to ascertain the fates of their victims and identify the individuals who committed crimes against humanity.**

KGB materials initially remained off limits to researchers and the public after their transfer in 1991. Historians and archivists had already been the driving force behind the opening up of access to archives during the period of Glasnost. In February of 1989, Estonian archivists and historians addressed the public in a memorandum, appealing for access for researchers to the archival records of the Estonian Communist Party, the Ministry of Internal Affairs of the Estonian SSR, and the KGB. In reality, however, this was accomplished only after the restoration of independence in 1991. Steps were taken first of all to take over the ECP archive in September of 1991. On 4 December 1991, a committee composed of archivists and historians determined the principles for the subsequent use of ECP archival records. Most archival documents were declassified and restrictions on use remained in effect for only personal files.

In October of 1991, the director of the Estonian Archival Board Peep Pillak also presented a public demand for KGB materials to be transferred to the national archive, which was being reorganised at that time. Yet another year and a half passed before the order issued by the Government of the Republic of Estonia on 19 April 1993 prescribed the transfer of KGB materials from the Police Board’s archive to Estonia’s national archive system. The Estonian Archival Board formed a committee for launching the takeover process. The employees of archives were involved in carrying out an inventory check on the materials that were to be transferred.

By the end of 1993, most of the archival collections of the ESSR Committee for State Security together with their accompanying finding aids had been brought to the depositories of the Estonian National Archives Branch Archive (Communist Party Archive) in Tallinn.³ Some materials, including special audit materials (“foreign travel files”) and operational materials from the 1940s and 1950s made their way to the National Archives somewhat later by way of the Estonian Internal Security Service, yet by the outset of 1995, even these materials had been transferred in their entirety. Thus 82,529 files, or less than 70 % of the quantity of archival records that had allegedly been taken over from the KGB without conducting an inventory check, made it to the National Archives. A large portion of the “special audit” files had “gone missing” yet it is not known exactly how many.

In addition to the above-mentioned materials, another small quantity of KGB foreign intelligence files concerning Estonia was transferred to the National Archives of Estonia from the Estonian Government Office in 1997. How the Estonian authorities came into possession of these files is not precisely known. Currently, a total of 114,431 files of KGB documents and collections

3 Valdur Ohmann, “Nõukogude perioodi ajaloo uurimise allikalise baasi avaldamine 1990.–ndal aastal”, in *Ajaloolise tõe otsinguid*, Tallinn, 1999.

of photographs are preserved in 19 National Archives' collections. In connection with Soviet era reforms of the ministries of State Security and Internal Affairs, and with the transfer of spheres of responsibility from the jurisdiction of one institution to that of another, some documents originating from the KGB made their way to the National Archives from the ESSR Ministry of Internal Affairs. In addition to documents, books from the ESSR KGB special library, that were also promised to be handed over but only 98 titles of which were actually handed over by the KGB, have been deposited at the National Archives library.

In May of 1993, an ad hoc committee for investigating the actions of the state security and intelligence services of foreign countries in Estonia (chairman Enn Tarto) was formed, with members from all the political parties represented in parliament. The committee's tasks included the investigation of all that was connected to the activity and termination of the Estonian SSR Committee for State Security, and also the working out of the legal mechanism for using KGB materials. Among other things, the committee demanded that the archive of the former Estonian SSR Ministry of Internal Affairs also be handed over to the Estonian National Archives, which indeed was later gradually carried out.

Together with the Archival Board, the parliamentary committee worked out temporary regulations to provide researchers with access to KGB archives. According to these regulations, every person was allowed access to materials concerning himself. As such, Estonia was the second country (after Germany) from the former "socialist bloc" where the materials of the communist secret service were made accessible. Permission for access to the KGB archive was adopted as legislation on 10 March 1994 that went into effect one month later.

The Procedure for Collection, Registration, Preservation and Use of Materials of Security and Intelligence Organisations of Other Countries Which Have Operated in Estonia Act that went into effect regulated the collection, registration, preservation and use of materials connected with security and intelligence organisations of other countries that have operated in Estonia (*resp* the Soviet Union and Nazi Germany), and their activities.⁴ These materials were declared the property of the Republic of Estonia, and the Estonian National Archives were made responsible for them. Regarding the right to their use and access, it was prescribed that every individual has the right to peruse information in the archives concerning himself either in person or by way of an authorised representative. In the event that the person in question was dead, the circle of relatives was defined as to who was permitted to gain access to the relevant materials (§ 9). Materials containing information concerning the private life of the subject were to be categorised as "restricted access" materials (§ 10). In addition to the above-mentioned individuals, persons for whom it was necessary for conducting research work and to whom the director of the archive had issued a permit for such access, along with investigation and inquiry organs, court organs and organs of the prosecutor's office, parties participating in court trials and their authorised representatives, and executive organs for carrying out court verdicts within the extent of commenced civil, administrative or criminal proceedings, had the right to gain access to restricted access materials. The legislation also made provision for the right to challenge the decision to restrict the use of materials.

This essentially put into effect the preceding principle that **the Republic of Estonia does not treat or protect state secrets**

of the Soviet Union (including the KGB) as Estonian state secrets, for this reason the declassification of these archival materials or any other such procedure was not necessary. In principle, access restrictions were only meant for private personal data, but in practice, separating private personal information from other information, a task which was assigned to archival employees, was very difficult to accomplish. The approach on the part of the archives took on a fairly liberal form, and in order to resolve ambiguous situations, the practice was adopted where the researcher had to sign an obligation not to disclose the private personal data of third parties in order to use archival records with unrestricted access. This procedure has proven to be rather successful in Estonia. No court action has been initiated and over the course of more than 20 years of practical experience, there have been only a couple of cases where the archive has decided to restrict access to archival materials in some specific case on the basis of a protest by the data subject.

KGB and ECP archival material started being used very extensively since 1995. Archival files were the basis for the rehabilitation of individuals and for the associated return of property. To this end, the archive issued official notices to applicants. Individuals were able to peruse their own files and those of their forebears without restriction in the archive's reading room in Tallinn. Professional historians were able to enjoy practically unrestricted access to KGB files. The archive's research staff quickly set about working out reference materials for assisting interested persons and researchers in researching and understanding the hitherto unknown activities of the KGB, and in finding the materials they were looking for.

The transfer of the archives to a public archive provided an immediate impulse to work that was being conducted in research and publication. The first treatment based on KGB documents of the KGB's role in "working over" Estonian expatriates that had fled to the West was published in the following year after the KGB archives had been handed over.⁵ Its author, Dr. Indrek Jürjo had himself been the chairman of the committee appointed by the Estonian Archival Board for taking over KGB documents, which gave him an excellent starting position. Looking back at that time twenty years ago, Jürjo's book functioned as an aftershock that accompanied the transfer of KGB documents at that time, which shook society considerably and affects the research of Estonia's recent history to this day. In one sense, the book quickly became a kind of reference book. Verification of the possible collaboration of specific persons with the Soviet secret services was sought from its sizeable index of names. On the other hand, this touched off a broader discussion in Estonia on the authenticity and credibility of KGB materials, since many of Jürjo's archival discoveries and inferences were not at all to the liking of many people and provided unpleasant surprises in the case of people who had until then been known as bearers of Estonian culture or national sentiments. The emergence of this set of problems and their examination in historical treatments corroborates the importance, in terms of schools of thought, of the study of these problems and the role such research has

4 Procedure for Collection, Registration, Preservation and Use of Materials of Security and Intelligence Organisations of Other Countries Which Have Operated in Estonia Act, passed on 10 March 1994, in *Riigi Teataja* (<https://www.riigiteataja.ee/en/eli/522042014002/consolide>), accessed 1 April 2017.

5 Indrek Jürjo, *Pagulus ja Nõukogude Eesti. Vaateid KGB, EKP ja VEKSA arhiivimaterjalide põhjal*, Tallinn, 1996.

in shaping the study of Estonia's recent history. The pioneering nature of this treatment also manifests itself in its own way in the author's later commentary: "This is in a sense a thankless topic. Fear of being suspected of collaboration causes an enormous amount of negative reactions and I'm constantly reviled. This negativity is tiring. Had I written about repressions against cultural figures, military personnel or clergymen, then everyone would pat me on the shoulder. Nobody would dispute the findings and argue that the sources can't be believed." The attitude of society has settled down over the past twenty years and many of the facts that became known from this book have become general knowledge. People no longer wonder where this knowledge originates from.⁶ A second edition of this book has already been published.

Additions to Jürjo's book have appeared in subsequent years in the form of a few monographs and publications of sources (the primary publisher of which has been the Estonian National Archives). The repressions of the Stalinist era, the structure of the state security apparatus and its relations with the ECP, the resistance movement and the struggle against it, and other such topics are conveyed in these studies. Some ESSR KGB documents have been publicly disclosed digitally within the framework of the www.kgbdocuments.eu Lithuanian–Latvian–Estonian joint project.

CURRENT STATUS

According to the Estonian Archives Act, access to every archival record preserved at the National Archives is open to all, if restrictions established in the Public Information Act, the Personal Data Protection Act, the State Secrets and Classified Information on Foreign Affairs Act, or in other legislation do not extend to it.⁷

Requirements concerning the protection of personal data that have become tougher year after year have started regulating access restrictions on materials containing personal data concerning third parties in a more clear-cut manner. The Personal Data Protection Act (passed in 1996, 2003 and 2008) has gone through a noteworthy evolution over the years. One of the aims of the wording of the new Personal Data Protection Act (IKS)⁸ that went into effect in 2008 was to regulate the processing of personal data for research and statistical purposes, which had previously not been provided for (IKS § 16). The general principle of the act is that the processing of personal data is allowed only with the consent of the data subject (IKS § 10). Without consent, it is permissible to process the data of those individuals since whose death over 30 years have passed (IKS § 13). The implementation of the principles established by the new legislation extended the number of KGB archival collections subject to access restrictions. Thus at the current time, only 4 KGB collections, of a total of 19, can be used without restrictions.

The basis for access restriction is IKS § 4 section 2, which defines so-called "sensitive personal data" among the overall body of personal data. These are:

- 1/ data revealing political opinions or religious or philosophical beliefs, except data relating to being a member of a legal profession in private law registered pursuant to the procedure provided by law;
- 2/ data revealing ethnic or racial origin;
- 3/ data on state of health or disability;
- 4/ data on genetic information;

5/ biometric data (above all fingerprints, palm prints, eye iris images and genetic data);

6/ information on sex life;

7/ information on trade union membership;

8/ information concerning commission of an offence or falling victim to an offence before a public court hearing, or making of a decision in the matter of the offence or termination of the court proceeding in the matter.

Information on the existence and conditions for use of archival records with restricted access is public. All archival material in Estonia, including materials of the former KGB, can be found via the network search website ais.ra.ee. KGB and Ministry of Internal Affairs archival collections can be found in the National Archives directory of collections.⁹ KGB and ECP materials are physically preserved in the City of Tartu in modern depositories, which were completed along with the main building of the National Archives in 2016.

According to the procedure established at the National Archives, restriction of access is initially applied to the collection as a whole, yet in issuing materials to researchers, decisions are made based on individual files. In order to gain access to KGB archival records to which access is restricted, the researcher must give grounds for his need for access and the National Archives must verify the researcher's need for access, which may derive from his occupational tasks or research interest. For this the researcher submits an application for an access permit. If the researcher's right to access information derives from legislation (fulfilment of occupational tasks, perusing information concerning oneself, perusing with the written consent of the data subject, or other such circumstance), the grounds provided can be minimal and the archive does not implement a deliberation of the decision. In all other cases, a description of the research theme and the expected result that is as detailed as possible must be presented in the application, because the National Archives decide on providing access by way of deliberation. In the course of deliberation, it is decided whether a researcher has a valid reason for access to information subject to access restriction. In the course of deliberation, it is ascertained whether the public benefit anticipated to accrue from the use of data to which access is restricted outweighs the infringement of someone's rights or interests, which may accompany the use of this data. The risks of the data subject and the National Archives that may arise in connection with granting access are also assessed in the course of deliberation. At the State Archive, where KGB documents are deposited, the head of the Access and Enquiry Department decides whether access is granted or refused. If a file with restricted access is digitised, it can nevertheless be used only in the internal network of the archive's reading room. Access permits are valid for one year.

In Estonian society, matters associated with KGB documents preserved in Estonian archives have lost their sensational aura. People have arrived at the belief that major exposés can no longer come from those documents, and have largely come to

6 Pearu Kuusk, "Arhiveeritud agentide tagasitulek", in *Sirp*, 12 December 2015.

7 Archives Act, passed on 17 February 2011, in *Riigi Teataja*; <https://www.riigiteataja.ee/en/eli/504032016002/consolide>, accessed 1 April 2017.

8 Personal Data Protection Act, passed on 15 February 2007, in *Riigi Teataja*; <https://www.riigiteataja.ee/en/eli/507032016001/consolide>, accessed 1 April 2017.

9 Directory of collections – *National Archives* – <http://www.ra.ee/erafondiloend/index.php/structure/index?id=181>, accessed 1 April 2017.

terms with the fact that individuals were extensively involved in covert collaboration with the KGB. A relatively similar perception of the credibility of KGB documents as historical source material prevails among Estonian historians, which allows these documents to be used in research work while carefully applying source criticism. This is all the more so that in the case of many questions, these documents are necessarily the only written sources. Alongside this, a small number of researchers also exists who consider practically the whole of the KGB material *a priori* to consist of fabrications, disinformation, phony confessions and testimony obtained through violence, or other such spurious material.

In summary, it can be recognised that in regard to the protection of personal data and the interests of scholarly research, a fairly reasonable balance has been achieved in Estonia concerning KGB materials. This prevents non-authorised persons interested in the subject from obtaining delicate personal data concerning third parties, yet provides researchers access to materials of interest to them on the condition of their joint responsibility.

LESSONS LEARNT

Estonia's experience in taking over the materials of the former totalitarian regime's secret services demonstrates that the completeness of the takeover and the conditions for accessing those materials depend above all on the political situation. If the new government has decided to make a complete break with the former regime and has declared the actions of the former regime's secret service to be criminal or in violation of human rights, this provides a good starting position for the entire transformation process. Otherwise, negative reactions inevitably emerge – the destruction and removal of documents, the concealment of data, etc. Differences in the political situation also make it more difficult to adopt the experiences of other countries because the same approaches cannot be applied in different political situations. Yet whether the lustration process is nonexistent, ostensible or actual surely remains a circumstance of decisive importance. Only in the latter case is it possible to use the documentation of the former regime successfully for building up a new polity and a state based on the rule of law that respects human rights.

In Estonia's case, two experiences above all can be highlighted as having been positive: abandoning the keeping and protection of the Soviet Union's state secrets, and the immediate transfer of materials to the public national archival system. The former made it possible to avoid declaring information from the Soviet era a state secret of the Republic of Estonia, and the time-consuming procedures for declassifying this information, etc. The latter made it possible to preserve and use these materials under general conditions, not leaving the decision to one agency or making access possible for only a limited number of researchers. This ensured that the first studies disclosing KGB archival materials could be published in 1996. These studies generated intense debate in that part of society that was interested in the topic, and made it possible to immediately begin discussion concerning the verification of KGB materials as well, among other things. It is noteworthy that court disputes and more serious incidents, where the need to restrict access to KGB materials would have been raised, did not emerge.

In terms of the use of documents, the work done by the Estonian National Archives in creating and managing a digital search system merits recognition. Using this system, it is possible for individuals, regardless of their location, to find KGB collections and documents preserved in the archive, to place orders for their delivery to the reading room, and also to use digital versions of materials to which access is not restricted.

As negative experiences, Estonia has to note primarily the deficiencies in competence in archival matters and also specific to the secret services, the taking over the archives. This made it possible for a situation to emerge where the party representing the Republic of Estonia in the negotiations did not have an adequate understanding of the composition, quantity and preservation of KGB materials, for this reason it was incapable of achieving the takeover of a broader and larger quantity of materials. It is unclear from the documents drawn up concerning the takeover whether the KGB submitted registers of the collections or documents contained in its operational archive. The delegation representing the Republic of Estonia, however, lacked members or advisors who would have been capable of bringing such competence to the negotiations.

The opinion has also been expressed that it is even a good thing that not all KGB materials were handed over to Estonia, first and foremost, materials containing information on the personnel of secret agent networks. This has allegedly prevented a situation where a significant quantity of people in a small society like Estonia (with a population of slightly more than one million) would have been forced to be left out of the building up an independent country, since they would have been compromised by their collaboration with the KGB. In the opinion of that same expert, the confessions of such persons concerning their collaboration submitted to the Estonian Internal Security Service mitigated the security risk (see the text *Dismantling the State Security Apparatus*).

On the other hand, the position is widespread that leaving KGB archives and information in a foreign country is a security risk because it makes former collaborators liable to manipulation by that foreign country, or it makes it possible to use the information gathered concerning them for blackmail, exerting influence, or compromising the individuals involved.

The ambivalence of the two viewpoints mentioned above and the shortness of temporal distance hinders arriving at a conclusive assessment of the transfer and takeover of the Soviet secret service archives in Estonia at this time.

RECOMMENDATIONS

Based on the experience gained in Estonia, a few recommendations can be made for taking over the archives of the secret services of former regimes, taking into account that these are not necessarily universal in every political situation:

- 1/ The takeover of archives should take place with the participation of professional historians and archivists;
- 2/ The heads of the secret services to be taken over and the heads of their archival services must be responsible for the completeness of the preservation of the archives;
- 3/ To minimise the damage of political crosswinds and non-professional preservation, the archives of secret services that have been taken over should immediately be transferred to a public archive for their preservation and for putting them in order;

- 4/ The classification of archival materials should be assessed from the standpoint of the new system of government, not according to that of the old regime, while also taking into account the possibilities of their use in the lustration process as a whole;
- 5/ In the event of radical lustration, the classification of archival materials as a state secret should be removed, and the information contained in them should be protected in accordance with the protection of personal data;
- 6/ A situation where all materials are initially made public and thereafter access starts to be restricted can generate confusion or antipathy, for this reason this kind of course of events should be avoided;
- 7/ Everyone should have the opportunity without restrictions to peruse materials drawn up concerning themselves, similarly everyone should have the opportunity to peruse information concerning their deceased forebears/relatives;
- 8/ Access should not be restricted for scholarly research, yet the use and disclosure of data should take place with the (joint) responsibility of the researcher;
- 9/ Registers of documents should be public and, if possible, accessible digitally;
- 10/ Normative documents and reports of secret services, along with other more important documents necessary for understanding their actions, should be public and accessible digitally via the internet.

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LUSTRATION

TOOMAS HIIO

INTRODUCTION

Estonia's independence was restored on 20 August 1991. In September, Estonia became a member of the United Nations together with the other Baltic States. Most of the world's countries recognise Estonia as a state that was created in February of 1918 and the independence of which was restored in 1991 (legal continuity). Russia and a number of other countries consider Estonia to be a state that was born in 1991 due to the collapse of the Soviet Union.

In August of 1991, the Constitutional Assembly, formed on the basis of parity by members of two political forces (30 + 30), the Supreme Council of the Republic of Estonia elected by residents of Estonia in 1990, and the Estonian Congress representing only Estonian citizens by legal succession, drew up a new constitution that was approved in a referendum held in June of 1992 and went into effect on 3 July 1992. Monetary reform was also implemented in June of 1992, in which Estonia abandoned the Soviet rouble, which was rapidly decreasing in value, and adopted the Estonian kroon with its exchange rate fixed at 8:1 Deutschmarks.

On 20 September 1992, the country's parliament, the 7th Riigikogu with 101 members, was elected in accordance with the new constitution. Political parties that set rapid integration with the West (returning to Europe, as it was referred to back then) as their objective won the election. Mart Laar, the young leader of the patriotic Pro Patria (Fatherland) Party oriented towards the West, formed the government. In October of that same year, Lennart Meri was elected president. As a film director and writer during the Soviet era, and as Minister of Foreign Affairs in the transitional government (1990–1991), Meri had already worked in the name of upholding the idea of Estonia belonging to the West and Estonia's return to Europe. Estonia is a parliamentary republic, but until 2011, the President was the supreme commander of national defence of Estonia, from which derived his right to appoint the Commander of the Defence Forces to his post.¹

A course of radical reform began with the aim of quickly joining the European Union and NATO. One of the election slogans of Mart Laar's party was "Let's make a clean sweep!" Its poster depicted a University of Tartu Professor of Estonian History sweeping a yard with a broom, which was supposed to symbolise the aim of quickly doing away with the Soviet legacy. Yet Pro Patria's political opponents interpreted this primarily as the aim to purge the public sector of Soviet era officials and former members of the Communist Party. Many young people were hired in the public sector once Pro Patria was in power. This was particularly conspicuous in the Ministry of Foreign Affairs and the Ministry of Defence, which were built up from scratch. There was no Ministry of Defence in the Estonian SSR, and the small staff of its Ministry of Foreign Affairs primarily fulfilled tasks related to protocol when one or another foreign delegation visited the Estonian SSR.

In 1996, the 8th Riigikogu, which was elected in 1995, adopted the main orientations of Estonia's national defence policy, in which the objective was set for Estonia to become a full member

of NATO and an associated member of the Western European Union (WEU).²

The last Russian troops, the successors of the former Soviet Army, withdrew from Estonia on 31 August 1994.

ESTONIAN SYSTEM OF VETTING

Only a few post-communist countries succeeded in implementing lustration in relation to the party that was formerly in power and its officials. In Estonia as well, lustration was limited only to purging cadre employees and secret collaborators of the former intelligence and state security service of the Soviet Union – the USSR Committee for State Security (KGB) – from official positions of greater responsibility in the Republic of Estonia, and not allowing them to work in such positions.

Almost no files of the KGB's network of agents ended up at the disposal of the Republic of Estonia. Thus for the most part, it is not possible to rely on the former state security archives for background checks in Estonia.

In July of 1992, immediately after the new constitution went into effect and before the parliamentary election, legislation was passed concerning the requirements and procedure for taking an oath of conscience. The legislation enumerates the posts for which candidates are required to take the oath of conscience:

"[...] a candidate standing in an election of the President, of the Riigikogu or of the council of a local authority, or a person who seeks the position of Prime Minister, minister, Chief Justice of the Supreme Court, justice of the Supreme Court, judge, Chancellor of Justice, Auditor General, President of the Bank of Estonia, Commander or Commander-in-Chief of the Defence Forces, or any other elected or appointed position in an agency of the national government or a local authority [...]"³

A person taking the oath of conscience affirms that he "has not been in the service or worked as an agent of the state security organs or armed forces intelligence or counterintelligence of states that have occupied Estonia, and has not participated in prosecuting and repressing citizens for their political convictions, disloyalty, class affiliation or for having been in the civil service or served in the defence forces of the Republic of Estonia."⁴

In February of 1995, the Riigikogu passed the Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Security Organisations or Intelligence or Counterintelligence Organisations of Armed Forces of States which Have Occupied Estonia Act.⁵ This act obligated individuals who had

1 From 2011 onwards, the Government of the Republic of Estonia appoints the Commander of the Defence Forces to office.

2 Approval of the main orientations of Estonia's national defence policy, 7 May 1996, <https://www.riigiteataja.ee/akt/13009161> (only in Estonian).

3 Act on Procedure for Taking Oath, § 1, <https://www.riigiteataja.ee/en/eli/520052014002/consolide> (cited on 24 July 2017).

4 Ibid.

5 Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Security Organisations or Intelligence or ►

collaborated with the state security services of states that have occupied Estonia to register themselves at the Estonian Internal Security Service within one year and to submit a written confession concerning their service or collaboration with the state security service of a state that has occupied Estonia. The names of those individuals who had not confessed their service or collaboration within one year, concerning whose collaboration or service the Estonian Internal Security Service had sufficient information, were publicly disclosed in the *Riigi Teataja* (State Gazette, official journal). At the present time, the names of more than a hundred individuals have been disclosed.

Service in the state security organ of a state that has occupied Estonia, or collaboration with it, does not allow a person to apply for positions enumerated in the oath of conscience. The task of the Estonian Internal Security Service is to monitor that such persons will not apply for such positions: “The Internal Security Service is required to forward the information which contests the oath taken by the person if the person has not contested the notice of the Internal Security Service specified in subsection 8 (2) of this act during the period of time provided for in subsection 8 (4) or after it has been established by a court decision which has entered into force that the person has served in or co-operated with security or intelligence organisations to the Office of the Prosecutor General who has the obligation to contest the oath in court pursuant to the Prosecutor’s Office Act and the Republic of Estonia Act on Procedure for Taking Oath.”⁶

In addition to the oath of conscience, other measures were also employed, for instance as a rule, former KGB personnel living in Estonia who were not citizens were not issued permanent residence permits, to say nothing of citizenship, so that if a security risk came to light, it would be possible to revoke the right of the persons involved to remain in Estonia.

INTERNAL SECURITY AGENCIES

In the Soviet Union, the Ministry of Internal Affairs was a USSR-wide ministry to which the ministries of internal affairs of the union republics were subordinated. The Ministry of Internal Affairs was an agency with broad jurisdiction. In addition to law enforcement organs (the militia) and fire fighting, prisons and a number of other agencies were subordinated to the Ministry of Internal Affairs. The Ministry of Internal Affairs had its own armed forces – the so-called interior troops. A battalion of interior troops was also stationed in Tallinn. It was manned by conscripts who were mostly from outside of Estonia. In the Soviet Union, the KGB, the Committee for State Security which had the rights of a state committee since 1978, was an independent organ of the central government, fulfilled the tasks of domestic intelligence and counterintelligence. The KGB was also a USSR-wide agency and the Estonian SSR Committee for State Security (the ESSR KGB) was its territorial subordinate division. In the Soviet Union, the Committee for State Security was also the security service of the Communist Party. As a rule, the chairman of the KGB was also a member of the Politburo of the Central Committee of the Communist Party of the Soviet Union.

TERMINATION OF THE KGB IN ESTONIA

Needless to say, the Republic of Estonia could not take over the KGB’s Estonian subordinate division as its own domestic

security service (a few states that were born when the Soviet Union collapsed took the former KGB as their security service). A large proportion of the Estonian SSR KGB personnel were not citizens of Estonia, and people who had served in the KGB could not be counted on to be loyal to the Republic of Estonia. There was reason to assume that they were more likely to be loyal to the Soviet Union’s legal successor, the Russian Federation.

On 9 September 1991, three weeks after the declaration of independence, the transitional government formed a governmental committee, chaired by Hardo Aasmäe, for terminating the KGB in Estonia. Aasmäe was educated as a geographer. He had been a member of the USSR Congress of People’s Deputies in 1989–1991 and was the mayor of Tallinn in 1990–1992. As one of the leaders of the Estonian Popular Front, he was part of the immediate circle of Edgar Savisaar, the Prime Minister of the transitional government. Work began even earlier on terminating the KGB. On 29 August 1991, the Prime Minister of the transitional government, Savisaar, and the last chairman of the Estonian SSR KGB, Rein Sillar, wrote jointly to the last chairman of the USSR KGB, Vadim Bakatin, to begin the termination of the KGB in Estonia. On 5 September, a protocol of mutual obligations was signed between the government of Estonia, the ESSR KGB, and the USSR KGB. On 9 October, a protocol of the practical measures connected to the termination of the ESSR KGB was signed. The KGB’s activity in Estonia was halted at more or less the same time as the dissolution of the Soviet Union took place, on 18 December 1991. The final act was signed by the last Chairman of the ESSR KGB, Rein Sillar, Minister of State of the Republic of Estonia, Raivo Vare, and on behalf of the USSR KGB, Vyacheslav Shironin. The final act stated among other things that “measures connected to terminating the activity of the ESSR KGB have been implemented and the personnel of the ESSR KGB has been dismissed from service or transferred to continue service outside of the Republic of Estonia with the exception of 25 people, whose dismissal or transfer will be completed by 31 December 1991.”

The results of the termination of the KGB caused dissatisfaction in Estonia. On 16 January 2001 in connection with the question of the right of a former KGB employee to live in Estonia, the Riigikogu formed an eight-member committee of inquiry to ascertain the facts and circumstances connected to the termination of the activity of the Estonian SSR Committee for State Security, which was meant to objectively and impartially determine the factual and legal circumstances connected to the termination of the KGB’s activity.⁷ The committee’s report was completed in March of 2002.⁸

► Counterintelligence Organisations of Armed Forces of States which Have Occupied Estonia Act, 6 February 1995, <https://www.riigiteataja.ee/en/eli/524042014001/consolide> (cited on 24 July 2017).

6 Ibid, § 5 (5).

7 Formation of a committee of inquiry to ascertain the facts and circumstances connected to the termination of the activity of the former Estonian SSR Committee for State Security, 16 January 2001, <https://www.riigiteataja.ee/akt/72639> (only in Estonian).

8 Available on the internet: three parts, only in Estonian: <http://epl.delfi.ee/news/eesti/endise-ensv-riikliku-julgeoleku-komitee-tegevuse-lopetamise-lopparuanne-i-osa?id=50920257>, <http://epl.delfi.ee/news/eesti/endise-ensv-riikliku-julgeoleku-komitee-tegevuse-lopetamise-lopparuanne-ii-osa?id=50920258>, and <http://epl.delfi.ee/news/eesti/endise-ensv-riikliku-julgeoleku-komitee-tegevuse-lopetamise-lopparuanne-iii-osa?id=50920259> (cited on 24 July 2017).

The committee identified the following problems connected with the termination of the KGB, which could still have been topical in 2002:

- 1/ The Estonian side did not obtain lists of KGB personnel in the course of terminating the KGB;
 - 2/ Materials on the networks of agents and operational materials, and thousands of other KGB archival files concerning Estonian citizens were taken to Russia;
 - 3/ Some foreign travel files (these are files that were drawn up concerning every person applying to travel abroad) went missing at the time of the termination of the KGB;
 - 4/ The copy of the agreement signed by Raivo Vare and Vyacheslav Shironin concerning social guarantees for former KGB personnel in the Republic of Estonia was missing altogether.
- The committee admittedly commended the government's work in terminating the KGB but stated that "it is nevertheless surprising that during the period of establishing the country's independence, matters connected to terminating the state security and intelligence organ of the occupying regime were not considered a top priority."⁹

THE USE OF KGB ARCHIVAL MATERIALS

Most of the KGB's paperwork was classified and was subject to the classification procedure in effect in the Soviet Union. It is known that starting in 1989, a large portion of the documents that were in the ESSR KGB's departmental archive was removed from Estonia. The authorities of the Republic of Estonia did not consider it possible to take over the ESSR KGB's central agency by force in August and September of 1991 after the restoration of the independence of the Republic of Estonia. Admittedly, however, a few local KGB departments, for instance in Tartu, were taken over. In the course of these takeovers, some KGB files that were held in local departments allegedly went missing. On 24 October 1991, in the course of organising the takeover of the ESSR KGB, an agreement was concluded concerning the procedure for handing over the Estonian KGB archival collections and other materials to the Police Bureau of the Republic of Estonia.

The KGB archival files that were in Estonia or arrived in Estonia were initially handed over to the Police Bureau of the Republic of Estonia. On 19 April 1993, the Government of the Republic of Estonia issued an order according to which the Ministry of Internal Affairs was to transfer some of the Estonian SSR KGB and Estonian SSR Ministry of Internal Affairs archival documents held in the Police Bureau's Information and Analysis Bureau Archive to the national archive system.¹⁰

A separate state security services archive was not established in Estonia. The files of the former KGB archive were gradually transferred to the present-day National Archives, where they are accessible for public use if restrictions arising from the protection of sensitive personal data do not prevent this.¹¹ Thus for instance, the use of most foreign travel files and other personal files is restricted if the persons concerning whom these files were kept are alive or if less than 30 years have passed since their death. The files affected are principally the so-called foreign travel files, or files that were drawn up concerning persons who applied for a permit to travel abroad. The use of these files is permitted for the subjects themselves of the files or with their permission, or in the event

that the subject of the file is deceased, with the permission of a close relatives.

It is known that not all documents that by agreement were to be returned were actually brought back from Russia in 1991. It is also known that some documents have ended up in the hands of private individuals, including documents that have been designated for destruction. The fate of a number of foreign travel files is not known. Not many cases are known where these documents have been used to blackmail one or another individual with the threat of exposing his previous collaboration with the KGB, but such cases have occurred.

In the lustration process, KGB files were used primarily in researching crimes against humanity and war crimes. Since this material mostly covers the 1940s and 1950s, this made it possible to identify the crimes committed, the perpetrators of these crimes, the persons who gave the orders for these criminal actions, and the secret agents involved, etc. The Estonian Internal Security Service has sifted through KGB material within the framework of criminal investigation (see the chapter *Investigation and Prosecution of the Crimes of the Regime*).

The so-called foreign travel files, which could contain direct or indirect information on the collaborative ties between the individual being checked and the KGB, also developed into a separate opportunity for carrying out the lustration process. Thus for instance, information was disclosed in the media in 1997 concerning Toomas Savi, who at that time was the speaker of the Riigikogu, that in 1964 he had been referred to, in his foreign travel file, as a KGB "trustee".¹² At that time, Savi's oath of conscience was not questioned because the Estonian Internal Security Service acknowledged that there was no information at its disposal that would prove that Savi was in the service of the state security organs or intelligence or counterintelligence organs of the armed forces of states that have occupied Estonia as a staff employee or agent.¹³

Professional historians have also used foreign travel files to ascertain the KGB connections of one or another individual.

THE FORMATION OF THE ESTONIAN INTERNAL SECURITY SERVICE – THE SECURITY AGENCY OF THE REPUBLIC OF ESTONIA

The security service of the Republic of Estonia – the "Security Police" – was initially established as a department of the Police

9 Ibid.

10 Order no. 172-k issued on 19 April 1993 by the Government of the Republic of Estonia, 19 April 1993, <https://www.riigiteataja.ee/akt/13091784> (only in Estonian, cited on 24 July 2017).

11 See for example Archival Information System (http://ais.ra.ee/static/misonais_en.html), ERAF.129SM, ENSV Riikliku Julgeoleku Komitee lõpetamata uurimistoimikute kollektsoon (Collection of files of unfinished investigations of the State Security Committee of the ESSR), Ajalugu (History) (only in Estonian, cited on 24 July 2017), and others like ERAF.130SM, ERAF.131SM etc.

12 The "trustee" was a separate form of covert collaboration with the KGB where cooperation took place with "Soviet patriots" on a strictly voluntary basis. The nature of his connections with the KGB and the tasks he was assigned were secret.

13 "Toomas Savi seostamine KGB-ga on alusetu", in *Õhtuleht*, 21 May 1997; <http://www.ohtuleht.ee/3582/toomas-savi-seostamine-kgb-ga-on-alusetu> (cited on 24th July 2017).

Bureau on 12 February 1991, even before the formal restoration of independence on 20 August 1991. The Estonian Security Police was established as a new agency, and the vast majority of its employees had never worked in security agencies before, rather they transferred from the police, or were young people with postsecondary education hired from other areas of specialisation. A small portion of technical staff from the former Estonian SSR KGB was nevertheless taken over, which when viewed in retrospect was not justified in the case of every individual concerned.

On 21 April 1993, the Riigikogu adopted a decision concerning the formation of the independent Security Police in the administrative field of the Ministry of Internal Affairs. The Government of the Republic of Estonia appointed the commissioner of the Security Police to his post on 16 June 1993. The first commissioner was Jüri Pihl, whose background was in law enforcement and who had headed the Security Police since its inception. The Security Authorities Act went into effect on 1 March 2001, converting the Security Police Bureau from a police agency into a security agency. The Security Police retained police powers in criminal investigations.¹⁴ A team for investigating crimes against humanity was formed in 1995 as part of the staff of the Security Police. It investigates crimes against humanity, war crimes and genocide committed during the Soviet and German occupations (1940–1991).

The Estonian Internal Security Service is the security agency of the Republic of Estonia responsible for the following functions:

- collection and processing of information for the prevention and combating of activities aimed at changing by force the constitutional order and territorial integrity of Estonia;
- collection and processing of information for the prevention and combating of intelligence activities directed against the state;
- collection and processing of information for the prevention and combating of terrorism (including financing and supporting thereof);
- protection of state secrets and classified information of foreign states, performance of security vetting;
- non-proliferation of weapons of mass destruction, conduct of proceedings of offences related to explosive substances;
- anti-corruption combat;
- conduct of proceedings of other offences within the investigative jurisdiction of the Board.¹⁵

CONCLUSIONS AND LESSONS LEARNT

Unlike the countries of the Eastern Bloc in Eastern Europe, Lithuania, Latvia and Estonia were occupied, therefore these countries did not have their “own” domestic security agencies during communist rule. The Republic of Estonia was restored on the basis of legal continuity as a country occupied by the Soviet Union in 1940, which in and of itself already ruled out the “growing up” of the local department of the Soviet Union’s KGB to become the domestic security agency of the Republic of Estonia.

The Estonian division of the Soviet Union’s KGB was terminated within a few months after the restoration of Estonia’s independence. Certain social guarantees for individuals who had previously served in the KGB and remained living in Estonia were guaranteed by agreement between the USSR KGB and

the transitional government of the Republic of Estonia. In return, the USSR KGB agreed to transfer to Estonia some of the KGB’s archival documents concerning Estonia.

The termination of the KGB in Estonia did not take place as properly as it should have. Of course, the era in which it took place must also be kept in mind – Estonia’s economic situation was catastrophic, the future perspectives of the Estonian state were unclear, and at the same time, the entire Soviet Union collapsed. Regardless of this, several tons of KGB documents concerning Estonia were successfully brought to Estonia. For the most part, these documents did not have anything to do with the KGB’s activity and network of agents in Estonia from the 1960s to the 1990s but were instead of historical value. A large portion of the files brought to Estonia were the investigation files of victims of mass repressions, political imprisonments and deportation committed in the 1940s and 1950s.

The KGB’s archival materials were not materials of an agency of the Republic of Estonia and they had no connection to Estonia’s domestic security agencies that were built back up again starting in 1991. This is one reason why a separate state security archive was not formed in Estonia. Instead, the documents were soon transferred to the Estonian National Archives. This, but especially the unrestricted access to those documents for researchers, has fostered the research of primarily the political mass repressions of the era of Soviet occupation, and of the communist period as a whole.

Background checks, the investigation of international crimes committed in the past, and the identification of former collaborators with the state security agencies of states that have occupied Estonia are within the jurisdiction of the Estonian Internal Security Service. For the above mentioned reason – newer materials concerning the KGB’s network of agents are not in Estonia – two laws have been passed for resolving these questions. Persons applying for more important official positions have to take an oath of conscience by which they swear that they have not cooperated with the state security organs of states that have occupied Estonia or participated in political repressions. Persons who have collaborated with state security organs of states that have occupied Estonia were registered on the basis of voluntary confessions. The names of whoever did not appear for registration within a year were disclosed in the *Riigi Teataja*, if their names and the fact of their collaboration had been ascertained.

The distinctive feature of Estonia’s experience is that state security documents concerning persons who were in active service at the time that the independence of the Republic of Estonia was restored were for the most part not at the disposal of Estonian agencies. For this reason, the method of the oath of conscience and voluntary confession was chosen. This is not a one-hundred percent success story, but for the most part, the effect of the KGB’s legacy in Estonia’s domestic policy has been successfully avoided. Some individuals have nevertheless been caught and convicted for collaboration with Russia’s intelligence services, whereas their collaboration had begun before 1991. The best known case is that of Hermann Simm, who was the former chief

14 See Re-establishment of the Security Police, <https://www.kapo.ee/en/content/re-establishment-security-police.html> (cited on 24 July 2017); Security Authorities Act, 20 December 2000, <https://www.riigiteataja.ee/en/eli/521062017015/consolide> (cited on 24 July 2017).

15 See Areas of activity, <https://www.kapo.ee/en/content/areas-activity.html> (cited on 24 July 2017).

of the Estonian Defence Ministry's security department and was sentenced to 12.5 years in prison in 2009. His collaboration with the KGB had begun before 1991.¹⁶

The key to Estonia's success was how quickly it built up its new domestic security service, which helped to prevent the legacy of

a totalitarian state security service, the KGB, from leaking into the security agencies of the Republic of Estonia.

16 See "How many more?", in *The Economist*, 26 February 2009; <http://www.economist.com/node/13184989> (cited on 24 July 2017).

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INVESTIGATION AND PROSECUTION OF THE CRIMES OF THE REGIME

MEELIS SAUEAUK

INTRODUCTION

The Soviet regime committed acts of terror in Estonia in the 1940s and 1950s – mass murders, deportations, etc., which by their nature are qualified as international crimes without statutory limitations – genocide, crimes against humanity, and war crimes. Approximately 2,000 people were killed and about 10,000 people were deported *en masse* in 1941. Mass arrests were made, hundreds of people were executed or perished in prison camps, and over 1,500 people were murdered in the woods in 1944–1945. Over 20,000 people were banished from Estonia in the course of the mass deportation of 1949, etc. A total of about 70,000 people were murdered on the spot, arrested, or deported from Estonia to the Soviet Union.

DESCRIPTION OF THE DEFAULT SITUATION

After Stalin's death in 1953, the new political orientation was admittedly set towards doing away with mass repressions, and imprisoned persons and deportees started being released in stages. A few leaders of State Security were also prosecuted, but it was inconceivable in the Soviet Union and the Estonian SSR that the acts committed would officially be treated as anything other than “mistakes” and even less so that judicial investigations would be carried out concerning such matters. In the latter half of the 1980s a “new wave” began in the rehabilitation process in the Soviet Union, the distinct feature of which was “further investigation” connected to repressions. The main objective here became the “rehabilitation” of victims.

The investigation of international crimes without statutory limitations has had a central role as a measure of transitional justice since the time of the Nuremberg Trials of Nazis. It became permissible to openly and publicly discuss crimes committed mainly during the Stalinist era in Estonia during the process of restoring independence starting in 1988. After the Estonian SSR declared its sovereignty, the Extrajudicial Mass Repressions in Soviet Estonia in the 1940s–1950s Act was passed, which declaratively proposed that the Estonian SSR Prosecutor's Office should begin reviewing applications and notifications concerning mass murders and other acts against humanity committed in Soviet Estonia, and should make decisions on questions concerning the commencement of criminal proceedings and the criminal prosecution of offenders. Even though a few criminal proceedings were thereafter launched at the Prosecutor's Office concerning the murders of 1941, their investigation did not lead to any convictions. Although victims were rehabilitated and property that had been confiscated from them also started to be returned to them, the perpetrators of these crimes were not brought to justice.

DESCRIPTION OF THE TRANSITION

It was only the restoration of Estonia's independence in August of 1991 that opened up the legal and political preconditions for investigating the crimes of communism and prosecuting the perpetrators of those crimes. Already on 26 September 1991, Estonia joined two UN conventions – the Convention on the Prevention and Punishment of the Crime of Genocide (1948), and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968) – by decision of its transitional parliament, the Supreme Council. With these conventions, Estonia also took upon itself the obligation to work out the corresponding legislative framework and to commence investigation of crimes without statutory limitations and of the perpetrators of those crimes.

The Estonian State Commission on Examination of the Policies of Repression (ORURK) was established in accordance with the decision issued on 26 March 1992 by the Presidium of the Supreme Council of the Republic of Estonia. The committee's task was to:

- 1/ analyse the repressive policy imposed in the territory of the Republic of Estonia in the 20th century during the years of occupation by the Soviet Union and Germany;
- 2/ identify crimes of genocide committed against citizens of the Republic of Estonia during the periods of occupation;
- 3/ assess the economic damage caused to the Estonian people by the occupations;
- 4/ form an objective, research-based assessment of the actions of the 20th century occupying regimes in Estonia.¹ Although carrying out criminal investigations was not within the jurisdiction of OKURK (the chairman of which was the writer Jaan Kross, and later the clergyman, theologian, historian and man of letters Vello Salo), the broad-based and comprehensive expertise of the committee greatly contributed to improving the state of the investigation of international crimes not subject to statutory limitations. The Estonian International Commission for Investigating Crimes against Humanity (the chairman of which was the former Finnish Ambassador to the UN and Sweden Minister Max Jakobson), established in 1998 at the initiative of the President of the Republic of Estonia Lennart Meri, continued doing roughly the same work, using as its legal framework, the Rome Statute of the International Criminal Court definitions of international crimes.

Nevertheless, from among the Baltic States, it took Estonia the longest to start implementing criminal-judicial measures. A curious situation emerged where in 1994; a parliamentary ad hoc committee (the chairman of which was Enn Tarto)

¹ Riigikogu, questions of the State Committee for Investigating the Repressive Policy of Occupations, passed on 17 June 1993 *Riigi Teataja*; <https://www.riigiteataja.ee/akt/13098133> (cited on 1 April 2017).

requested the commencement of criminal proceedings to investigate the mass deportations of the 1940s and 1950s, yet this could not be done because the corresponding provisions were missing from the Penal Code.² At about the same time for instance (in March of 1994), the former head of the Latvian branch of the Soviet secret service Alfons Noviks was arrested in Latvia and charged with genocide against the Latvian people.

Amongst a background of political bickering, it took until the end of that same year, when finally on 9 November 1994, the Riigikogu passed an amendment to the Criminal Code of the Republic of Estonia, which derived from the time of Soviet rule, establishing responsibility for crimes against humanity and war crimes. Its Article 61-1 stated that “For crimes against humanity, including genocide, as per definition of these crimes in international law, that is for deliberate acts whose aim it is to fully or partially eradicate a group, based on national, ethnic, racial or religious distinction, which is resisting an occupation regime, or any other social group; for the killing of a member of such a group or for causing him/her grave or very grave bodily injuries or mental dysfunction or for torturing him/her; for removal of his/her children by force; for deportation of the indigenous population or for banishment into exile once an armed invasion, occupation or annexation has occurred, and for depriving them of their economic, political and social human rights or for restriction of these rights – the penalty is deprivation of liberty for between 8–15 years or the death penalty.”³ This definition differed slightly from those usually found in international legislation. For example, deliberate acts against a group, which is resisting the occupation regime, or against a social group, were categorised as crimes against humanity, and the crime of genocide was in a way included in the crimes against humanity.

The pre-trial investigation of crimes against humanity is a task that was assigned to the Estonian Security Police Board (since 2013 in English – *Estonian Internal Security Service*). The Security Police Board was established in 1993 and was formed without employing former employees of the Soviet state security forces – the KGB, except for some technical specialists. A special unit for investigating crimes against humanity was established within the structure of the Security Police Board.

The Security Police acted quickly and by the spring of 1995, five criminal cases were already pending for investigating crimes against humanity and war crimes. Although the Security Police started out by investigating crimes from the Soviet era, it has also worked in parallel on investigating crimes from the time of the German occupation. The criminal cases concerning war crimes and crimes against humanity being processed by the Internal Security Service can be roughly divided into four categories:

- 1/ Crimes committed during the Soviet occupation of 1940/41;
- 2/ Crimes committed during the German occupation (1941–1944);
- 3/ Crimes against civilians committed in Estonia for the purpose of suppressing resistance to the occupying regime during the Soviet occupation of 1944–1991;
- 4/ The mass deportation of March, 1949.⁴

One of the first investigations was launched and carried out concerning the former regional head of state security Vassili Riis. The investigation concerning Riis was launched in 1995 in accordance with the Criminal Code article on crimes against humanity. In 1941, Riis (1910–98), gave written consent to the arrest or deportation of 1,062 citizens of the Republic of Estonia. In 1996,

the criminal case was transferred to the Court, but the trial was suspended due to the poor health of the defendant and terminated in 1998 due to his death.

Some of the subsequent investigations also suffered the same fate – the accused was in such a condition that it was no longer possible for him to stand trial due to his age and the state of his health. Thanks to the time factor (about 50 years had already passed since the crimes under consideration had been committed), most of the higher-ranking figures and the individuals who gave the orders, as well as witnesses, were no longer alive. The archival material that the KGB had handed over to the Republic of Estonia had many gaps in it, for this reason the acquisition of written evidence also required a great deal of work. Thus the investigation of crimes against humanity became a race against time.

The first investigation to result in a court case was in 1999 when the former KGB employee and operative officer Johannes Klaassepp was sentenced according to Article 61-1 of the Criminal Code for participation in the mass deportation of 1949, deporting 15 people and attempting to deport two more. The youngest of Klaassepp's victims was 4 years old. Enn Sarv, a member of ORURK, was involved in the trial as an expert and drew up a comprehensive statement on the deportation and its legal assessment. The court verdict sentenced Klaassepp to eight years conditional imprisonment with a probation period of two years, and subsequently became a precedent for such cases. Altogether, Estonian courts have found eight people guilty of the deportation of the March, 1949 as a crime against humanity.

CURRENT STATUS

The ascertainment of offenders continued under slightly amended legal grounds after the reform of the Penal Code carried out at the turn of the century in Estonia. The new Penal Code that went into effect in 2002 added an article on genocide alongside the necessary elements of crimes against humanity. The new definitions of crimes against humanity and of genocide according to the valid Penal Code are as follows:

“§ 89. Crimes against humanity – Systematic or large-scale deprivation or restriction of human rights and freedoms, instigated or directed by a state, organisation or group, or killing, torture, rape, causing health damage, forced displacement, expulsion, subjection to prostitution, unfounded deprivation of liberty, or other abuse of civilians, is punishable by 8 to 20 years imprisonment or life imprisonment.

§ 90. Genocide – A person who, with the intention to destroy, in whole or in part, a national, ethnic, racial or religious group, a group resisting occupation or any other social group, kills or tortures members of the group, causes health damage to members of the group, imposes coercive measures preventing child-birth within the group or forcibly transfers children of the group, or subjects members of such group to living conditions which have caused danger for the total or partial physical destruction

2 Harri Mägi, *ENSV KGB tegevuse lõpetamine*, Tallinn: Varrak, 2012, 125–126.

3 Kriminaalkodeks (Criminal Code), *Riigi Teataja*; <https://www.riigiteataja.ee/akt/184289> (cited on 1 April 2017).

4 Estonian Internal Security Service, “20 years of investigating universal crimes”, in *Estonian Internal Security Service Annual Review 2015*, Tallinn, 2016, 39.

of the group, shall be punished by 10 to 20 years imprisonment or life imprisonment.”⁵

As we can see, the crime of genocide is now considered to be a separate crime distinct from a crime against humanity, yet the concept of a crime of genocide remains expanded compared to that of the Convention on the Prevention and Punishment of the Crime of Genocide. The treatment of genocide has been internationally contested since the adoption of the concept, and different countries and institutions have interpreted it differently in their legislation as well.⁶

Over the 20-plus intervening years, a total of 12 criminal cases have been prosecuted in Estonian courts under the section of crimes against humanity, and 11 persons have been convicted:

- 1/ 8 persons have been convicted in connection with the deportation of March, 1949 (J. Klaassepp, V. Beskov, M. Neverovski, V. Loginov, J. Karpov, A. Kolk, V. Kask and P. Kislyi (Kislõi)). These persons were former Soviet state security officers (MGB or MVD) and were sentenced for crimes against humanity (See the description of the sections from the Penal Code or Criminal Code). As a rule, the sentence for such crimes was imprisonment for 8 years suspended on probation. Tactically speaking, the investigation of deportations was conducted region by region because this was also how the carrying out of the deportation operation was organised;
- 2/ 3 persons have been convicted of murdering members of the national armed resistance (“forest brothers”) in the 1940s–1950s – K. L. Paulov, V. Penart and R. Tuvi;
- 3/ No person prosecuted for crimes against humanity has been acquitted. In addition, court proceedings were terminated due to the death of the person on trial (11 persons) and due to poor health (7 persons).⁷

The majority of criminal cases against the Soviets are initiated by the Internal Security Service (the former Security Police Board) and its special unit for investigating crimes against humanity. In a few cases (like the Paulov case, who was sentenced for the murders of members of the national armed resistance), criminal proceedings are initiated on the request of citizens. All convicted persons were former officers of the Soviet secret police (NKVD/MGB/KGB) or militia who were operating at the executive level of the deportation operation.

Last, but not least, the Estonian Parliament passed the Declaration of the Crimes of the Occupying Regime in Estonia in 2002, which declared the communist regime of the Soviet Union criminal, which committed crimes against humanity, and the organs of the Soviet Union that violently carried out these crimes, like the NKVD, NKGB, KGB and others, and tribunals and special counsels formed by these agencies, as well as destruction battalions and people’s defence battalions and their activity. The Riigikogu stressed that the Communist Party of the Soviet Union and its subordinate organisation, the Estonian Communist Party, which controlled the repressive organs of the Soviet Union, are responsible for the crimes against humanity and war crimes committed in Estonia by those repressive organs.⁸

LESSONS LEARNT

In the case of Estonia, the investigation of the crimes of the former regime has developed into an instrument of retrospective justice. This has been done as an attempt to establish justice in regard to crimes that have been committed about half a century ago

and the offenders of which were persons who no longer played a political role in Estonia during the period of transition. While the investigating agencies have been criticised for the fact that the leading figures in the crimes were not convicted, the situation developed in this way because the leading figures were no longer alive by the time the investigation was carried out. The number and volume of investigations corresponded to the resources allocated for this purpose by the government.

Primarily, the fact that communist crimes were given a legal assessment in the form of court verdicts – both domestically and Europe-wide – can be considered positive. In 2004, August Kolk and Pjotr Kislyiy, found guilty of deportation, and Vladimir Penart, convicted of murdering “forest brothers”, lodged appeals with the European Court of Human Rights against the Republic of Estonia. The appeals emphasised that, pursuant to the principles of criminal law, a person is not punishable for an act that was not a crime under the law in force at the time of its commission. The appellants claimed that at the moment the crimes were committed, the 1926 Criminal Code of the Russian SFSR – which did not establish a punishment for a crime against humanity – was effective in Estonia. As the deportation of Estonian nationals and the persecution of “forest brothers” had been carried out under the law of the USSR, the appellants claimed they could not have known that their acts were criminal. The appeals also claimed that, as the Charter of the Nuremberg Tribunal had been developed in order to ensure the punishment of German war criminals for crimes committed during World War II, its principles did not apply to crimes committed by the Soviet authorities after the war. In 2006, the European Court of Human Rights declared all the appellants’ arguments unfounded and rejected the appeals. The court concluded that, even if the acts committed by Penart, Kolk and Kislyiy were regarded as “lawful” pursuant to Soviet law, they were, however, crimes against humanity pursuant to international law. In so doing, the court’s decision equated the crimes of Communism and Nazism, corroborating that the same international principles and legal sources applied to both. The court refuted the appellants’ claims that the principles of the Nuremberg Trials – one of the sources of contemporary international law – did not apply to the USSR, which had won World War II, and that the crimes could be justified by the “specific nature” of the legal system of the criminal regime. In addition, the European Court of Human Rights explicitly noted that, in violation of international law, Estonia was occupied by the Soviet Union from 1940 to 1941 and from 1944 to 1991, and statements to the contrary could not be taken seriously by the international community. In fact, the long period of occupation was the reason the individuals having committed international crimes without statutory limitations in Estonia while serving the communist regime could not be held criminally liable earlier.⁹

5 Karistusseadustik (Penal Code), passed on 6 June 2001, *Riigi Teataja*; <https://www.riigiteataja.ee/akt/126022014006> (cited on 1 April 2017)

6 Eva-Clarita Pettai, Vello Pettai, *Transitional and retrospective justice in the Baltic States*, Cambridge, 2015, 80.

7 Kaitsepolitseiamet (Estonian Internal Security Service), “International crimes not subject to statutory limitations”, *Kaitsepolitseiamet*; <https://www.kapo.ee/eng/areas-of-activity/international-crimes-notsubject-to-statutory-limitations/background-information> (cited on 1 April 2017). Data from the Estonian Internal Security Service.

8 Riigikogu, Declaration of the Crimes of the Occupying Regime in Estonia, passed on 18 June 2002, *Riigi Teataja*; <https://www.riigiteataja.ee/akt/174385> (cited on 1 April 2017).

9 Estonian Internal Security Service, “20 years of investigating”, 40–41.

The investigation of mass deportation, region by region, and county by county, which formed a separate structural unit of the operation, can be considered a success. This admittedly took more time, but it made it possible to structurally work through the entire mechanism and to achieve synergy in both the investigation and the course of the court session. It was possible for all individuals interested in the matter from the entire region to attend the court session.

In the opinion of Eva-Clarita Pettai and Vello Pettai, in comparison to Latvia and Lithuania, in Estonia, though the national media would report on individual trials and their outcomes, this rarely went beyond mere statements of facts, and the criminal justice process remained rather disconnected from broader historical and moral discourses on the Soviet period.¹⁰

A deficiency was that due to limited resources and a certain delay in establishing the necessary legislative framework, valuable time for investigation was lost. The accused and the witnesses grew successively more elderly and in some important cases (Vassili Riis, Idel Jakobson, Arnold Meri and others), they did not last until the court session, or to its conclusion. At the current time, the investigation of crimes without statutory limitations is in the home stretch in Estonia because the last individuals that can potentially be accused will soon pass away.

RECOMMENDATIONS

Based on Estonia's experience, the following recommendations should be highlighted for dealing with international crimes without statutory limitations:

- 1/ In working out the legislative framework, the aim of future trials – the restoration of justice – and the corresponding norms of international law should be carefully followed;
- 2/ When the crimes under investigation have been committed decades ago, limited time should be taken into consideration in planning the investigation and thus to concentrate resources;
- 3/ Experienced historians and experts on secret services should be added to the staff of the investigating agency or be included in their work;
- 4/ A committee consisting of historians, sociologists, etc. that would help to study the crimes that have been committed more broadly and completely should be added to criminal investigations that have focused on gathering evidence for bringing charges against perpetrators who are still alive;
- 5/ The investigation procedure should correspond to rules prescribed by legislation and respect the human rights of the accused;
- 6/ The victims of crimes who participate in the trial as aggrieved parties and witnesses should be provided with access to victim support and legal advice that is free of charge similarly to other crime victims, and taking into consideration their distinctive nature in order to alleviate re-experiencing traumas of the past;
- 7/ The reporting of the investigation and the court trial in the press should correspond to the principles of the presumption of innocence and should not develop into a part of current political competition.

10 Pettai & Pettai, *Transitional and retrospective justice*, 113.

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REHABILITATION OF VICTIMS

TOOMAS HIIO

The period of 1940–1991 in Estonian history was the era of the Soviet (1940–1941 and 1944–1991) and German (1941–1944) occupation. Consequently, the political repression against Estonian citizens and residents, committed during this time, were not a consequence of the politics of the Republic of Estonia. The occupation forces were responsible and their legal successors are responsible for these deeds. The participation of Estonian citizens and residents, however, in the genocide, crimes against humanity, and war crimes committed by the Soviet and Nazi regimes has been condemned by the Estonian state on the highest level a number of times.

In 1995, the German Federal Republic paid compensation to Estonia for the National Socialist persecution of Estonian citizens and residents.¹ The legal successor of the Soviet Union, the Russian Federation, recognises Estonia as a state, born during the dissolution of the Soviet Union.

REHABILITATION BEFORE THE REGAINING OF ESTONIAN INDEPENDENCE ON 20 AUGUST 1991

The rehabilitation of the victims of the Stalinist terror began in the Soviet Union after the death of Joseph Stalin. During the second half of the 1950s, most of the survived political prisoners were released from the GULAG camps, and the deported men and women sent to forced settlement sites² were also released. Most of the former political prisoners and deportees returned to Estonia. However, for some categories of persons, certain restrictions remained in force, for example the ban on living in large towns, and returning to their former place of residence.³

During the years of the perestroika in the Soviet Union, a couple of acts were passed by the Supreme Soviet of Estonian Soviet Socialist Republic (ESSR). On 7 December 1988, the Act on Nonjudicial Mass Repressions in the Soviet Union during the 1940–1950s was adopted.⁴ The ESSR Supreme Soviet condemned entirely and unconditionally the nonjudicial mass repressions during the 1940–1950s, and acknowledged them as unlawful acts against humanity. All former deportees were rehabilitated with all legal consequences. People who were repressed by the special boards⁵ were rehabilitated according to the procedures that were to be prescribed in the legislation. The ESSR Prosecutor Office was tasked with examination of applications concerning the mass murders and other crimes against humanity on the territory of Soviet Estonia and deciding the issue of the prosecution of the offenders. In addition, the ESSR Council of Ministers had to create the procedure for compensation for the losses of the victims of nonjudicial mass repressions, to begin with the commemoration of the victims of Stalinism, to re-establish the lists of nonjudicially repressed persons, and to guarantee the preservation of the documents reflecting the mass

repressions and other deeds against humanity committed on the territory of Soviet Estonia.

This document was a part of the rehabilitation process in the Soviet Union as a whole, connected to the work of the USSR special commission, founded in October 1988, and chaired by Alexander Yakovlev. The first step was quite careful and concerned only so-called unjudicial repressions – the deportations and sentences by the special boards.

On 19 February 1990 the ESSR Supreme Soviet issued the enactment “On the Rehabilitation of Unjudicially Repressed and Groundlessly Sentenced Persons”. Unlike the act of 1988, anyone who was sentenced pursuant to a number of articles of the Criminal Code of the Russian Soviet Federal Socialist Republic, valid on the territory of the ESSR from 1940–1961, or unjudicially repressed, whose criminal investigation was ended in a way that had not involved the rehabilitation was effected. A person eligible for rehabilitation was any person sentenced according to the articles of 58-1a to 58-14 of the abovementioned criminal code, as long as the sentenced persons had not killed or tortured civilians or prisoners of war, and had not participated in espionage, diversions, terrorist acts, and robbery. In addition, all individuals were rehabilitated, who were sentenced according to multiple other articles of the abovementioned criminal code.⁶

The only exception was the participation of a sentenced individual for crimes that were not covered by the rehabilitation. In addition, anyone who was sentenced by the Soviet authorities for the deeds that were not crimes according to the legislation of the Republic of Estonia until 1940, were rehabilitated. Finally, Articles 68; Anti-Soviet agitation and propaganda, and 194; Dissemination of knowingly wrong fables derogating the Soviet

1 Staatssekretär des Auswärtigen Amtes an dem Botschafter der Republik Estland, Bonn, den 22. Juni 1995.

2 Henceforth the word exile or exiled will be used sometimes as synonym of deportation or deported. The location of forced settlement was usually some remoted village or Kolkhoz in Siberian countryside, where the deportees had to live usually side by side with local inhabitants, but under supervision of the commandant of given location of forced settlement.

3 See comprehensive study: Aivar Niglas, “Release ahead of time of Estonian citizens and residents repressed for political reasons by the Soviet authorities and their rehabilitation from 1953 to the 1960s”, in *Estonia since 1944: Reports of the Estonian International Commission for the Investigation of Crimes Against Humanity*, Tallinn: Estonian Foundation for the Investigation of Crimes Against Humanity, 2009, 461–489.

4 See “Kohtuväliste massirepressioonide kohta Nõukogude Eestis 1940–1950-il aastail (only in Estonian),” <https://www.riigiteataja.ee/akt/23991> (cited on 24 May 2017).

5 Special board (*особое совещание*) – a nonjudicial body of the USSR People’s Commissariat of Internal Affairs (later of the Ministry of State Security) that acted in the functions of judicial authority and sentenced the people with political indictments basing only on the file of investigation, without presence of accused person.

6 59¹³, 60–62, 64, 66, 68–70, 79¹, 79², 79³, 79⁴ and 122, and 59² (1) b and (2), 59^{3a}, 59⁴, 59⁵, 59⁶, 59¹⁰, 81, 82, 84, 121, 166-a, 182¹, 192-a, 193⁷ (g), 193¹⁰. See English translation of the Criminal Code of the Russian Soviet Federal Socialist Republic at: Criminal Code of the RSFSR, <http://www.cyberusrr.com/rus/uk-rsfsr.html> (cited on 24 May 2017).

State or the societal order of Criminal Code of the ESSR, valid from 1961, were declared null and void.⁷ The Supreme Court of the ESSR was tasked with the issuing of certificates for the rehabilitation of rehabilitated individuals. The Council of Ministers of the ESSR were tasked with the procedures for the compensation of material losses to the individuals who were rehabilitated.

A month after the invasion of the Red Army, in July 1940, the puppet parliament, appointed by the Soviet invaders, declared all land the people's property; private land ownership was formally abolished.⁸ The destruction of Estonian rural lifestyle, based on small landownership, voluntary associations of peasants and rural municipalities, was finalised on 25 March 1949, when more than 20,000 individuals, mostly members of peasant families, were deported to Siberia. The remaining rural population was forced to join the Kolkhozes, a Soviet form of agricultural production and rural lifestyle. Two acts that addressed the restitution of (land) property were indirectly connected to the rehabilitation. The ESSR Supreme Soviet adopted the Farm Act on 6 December 1989.⁹ The Farm Act of 1989 imposed the re-establishment of small landownership. The priority to re-establish began with individuals who owned the farms prior to 23 July 1940 (the date of the act that had declared all land to the people's property) or his or her legal successor. Farm Act of 1989 also had a provision for rehabilitated persons who had abandoned their claim of the return of their farm.¹⁰

The Republic of Estonia Principles of Ownership Reform Act was passed on 13 June 1991.¹¹ The purpose of this act was "to restructure ownership relations in order to ensure the inviolability of property and free enterprise, to undo the injustices caused by the violation of the right of ownership and to create the preconditions for the transfer to a market economy," and the "return of property to or compensation of former owners or their legal successors". The entitled subjects of ownership reform were former owners of unlawfully expropriated property and their legal successors. Entitled subjects were defined in Article 7 of this act as:

- 1/ "natural persons whose property was nationalised or communised in the course of collectivisation and persons whose property was unlawfully expropriated in the course of unlawful repression and who have been rehabilitated [...] if they were citizens of the Republic of Estonia on 16 June 1940";
- 2/ "natural persons whose property was unlawfully expropriated pursuant to an unlawful decision or due to the arbitrary action of officials or who, due to a real danger of repression, were forced to give up or abandon their property [...] or if they were citizens of the Republic of Estonia on 16 June 1940 and the existence of the unlawful decision or arbitrary action of officials or real danger of repression has been proved in court."

(There are a lot of other provisions in the act, but these two belong to the context of rehabilitation.)

The Pension Act¹² was passed on 15 April 1991 by the Supreme Council of the Republic of Estonia¹³ and included special provisions for rehabilitated persons. According to Article 7, old-age pensions, disability allowance or survivorship allowance of the rehabilitated persons was increased by 20 % of the minimum wage. For rehabilitated persons, time under investigation, imprisonment or forced settlement (of deportees) was multiplied by three and calculated by their pension age. The pension was calculated from the average wage of the selected five consecutive years from among the last 15 years before the pension age, but the rehabilitated persons could exclude from this five year period, any months they were in custody, or forced settlement.

The Pension Act was replaced with State Pension Insurance Act,¹⁴ on 5 December 2001. Since 2003, the rehabilitation of the victims of political repressions of occupying regimes is regulated by the Persons Repressed by Occupying Powers Act (see below).

REHABILITATION AFTER THE REGAINING OF ESTONIAN INDEPENDENCE

On 19 February 1992, the Supreme Council of the Republic of Estonia passed the Rehabilitation of Unjudicially Repressed and Groundlessly Sentenced Persons Act. This document was the first act of the Republic of Estonia in the field of rehabilitation. The scope of the rehabilitation was fundamentally changed; according to the act all decisions by the "repressive organs of the USSR" were declared null and void by which extrajudicial repressions had been carried out in respect of:

- 1/ citizens of the Republic of Estonia regardless of the location where the decision had been taken,
- 2/ individuals for acts committed in the Republic of Estonia,
- 3/ individuals in Estonia for acts committed outside the Republic of Estonia.

All individuals whose sentences were the result of these three definitions, were declared to be the victims of deliberate violence committed by the Soviet state. The act provides for the rehabilitation of individuals, who had fought for the independence of Estonia and against the injustice caused to the Estonian people, who had been sentenced by a number of articles of the Criminal Code of the RSFSR and the ESSR Criminal Code (replaced the RSFSR Criminal Code on the territory of Estonia in 1961).¹⁵ With same

7 The Penal Code of the Republic of Estonia was adopted on 6 June 2001, see English translation <https://www.riigiteataja.ee/en/eli/511032014001/consolide> (cited on 24 May 2017). Until this time the ESSR Criminal Code of 1961 was valid with many revisions that were adopted during 1990–2001.

8 Estonian Constitutional Assembly had adopted the Land Act that abolished the big landownership in October 1919. The lands of former manorial estates, owned mainly by the Baltic German noblemen, were divided between the Estonian peasants. This decision made the small landownership to the foundation of Estonian economy and society. Rural population constituted about 70 % of Estonian population in 1940.

9 See Eesti NSV taluseadus (Farm Act of the Estonian SSR), 6 December 1989, <https://www.riigiteataja.ee/akt/30680> (only in Estonian, cited on 15 June 2017).

10 Farm Act, § 8.

11 See English translation: <https://www.riigiteataja.ee/en/eli/525062015006/consolide> (cited on 24 May 2017).

12 See Eesti Vabariigi pensioniseadus (only in Estonian), <https://www.riigiteataja.ee/akt/30517> (cited on 24 May 2017).

13 On 18 March 1990 free elections were carried through to the ESSR Supreme Soviet. On 8 May 1990 the Supreme Soviet (Supreme Council) changed the name Estonian Soviet Socialist Republic to the Republic of Estonia and the national symbols of Estonia from 1918–1940, flag and coat of arms, were taken into use. On 20 August 1991 the Supreme Council declared the re-establishment of independence. New parliament was elected in September 1992 after the constitution was adopted at the referendum in June 1992. The time from March 1990 to October 1992, when the new parliament took the oath, has been defined as transitional period.

14 See in English: State Pension Insurance Act, <https://www.riigiteataja.ee/en/eli/516012017008/consolide> (cited on 24 May 2017).

15 Criminal Code of the RSFSR: articles no. 58-1a–58-14, 59-2, 59-3, 59-4–59-6, 59-10, 59-13, 60–62, 64, 66, 68–70, 79-1–79-4, 81, 82, 84, 121, 122, 125, 126, 182 p. 1, 192a, 193-7 p. "g" and 193-10; ESSR Criminal Code, when the crimes were committed before 20 August 1991: 62–64, 66–68, 70, 73, 74, 74-1, 78–80, 81, 86-1, 87, 137, 167, 177, 189.1, 194-1–194.4, 220–222, 224.

act, the legislature simultaneously acknowledged the activities of these individuals for the fight for the independence of the Republic of Estonia. The Supreme Court of the Republic of Estonia was authorised to deny the rehabilitation of the persons who were sentenced by the Soviet authorities according to abovementioned articles of the Criminal Code of the RSFSR and the ESSR Criminal Code, if an individual had participated in genocide or crimes against humanity, or the deliberate killing, injuring, or torturing of the prisoners of war or civilians. The confiscation or appropriation of the property of the unjudicially repressed and groundlessly sentenced persons was declared null and void and their property was returned to them or compensated according to the Republic of Estonia Principles of Ownership Reform Act, passed on 13 June 1991 (see above). The applications for the rehabilitation were to be sent to the Supreme Court.

The above mentioned acts guaranteed the rehabilitation of the victims of the Soviet and Nazi occupations in compliance with the capacities of the re-established Republic of Estonia: the re-establishment of all civic rights of individuals repressed according to political indictments, the restitution of their property confiscated by the Soviets, and the increase of the pension of former victims. The Republic of Estonia does not bear the responsibility for the crimes of occupying forces, but the goal of the Republic of Estonia is to support its citizens and residents who had suffered simply for being a citizen of the Republic of Estonia, or fighting for the re-establishment of Estonian independence.

During 1994–1995, the Estonian Supreme Court issued a number of judgments in cases of individuals, who had been sentenced by the Soviet courts according to the “usual” articles of the criminal code, who were asking for their rehabilitation, and arguing that they were punished for resistance against the Soviet occupation forces. Most cases were connected to thefts of state property by the individuals, hiding from the Soviet authorities and fighting against the Soviet authorities (so-called Forest Brothers). The court did not pass judgement on the rehabilitation in all such applications. However, in some cases the Supreme Court stated that “hiding himself from the Soviet occupation forces was the fight for the independence of the Republic of Estonia and against the injustice caused to the people of Estonia.”¹⁶ In another case the court stated that “hiding himself in July 1941 from the Soviet occupation forces and participation in the Forest Brothers movement was the fight for the independence of the Republic of Estonia and against the injustice caused to the people of Estonia.”¹⁷ In one case, the Supreme Court stated that “hiding himself in the woods was fighting for the independence of the Republic of Estonia and against the injustice caused to the people of Estonia in accordance with the objectives of the resistance.”¹⁸

DISCLOSURE OF PERPETRATORS

The political repressions by the Soviet authorities were declared to be crimes against humanity or genocidal acts. According to Estonian Penal Code, the definition of the crime of genocide includes the “a group resisting occupation or any other social group”:

“A person who, with the intention to destroy, in whole or in part, a national, ethnic, racial or religious group, a group resisting occupation or any other social group, kills or tortures

members of the group, causes health damage to members of the group, imposes coercive measures preventing childbirth within the group or forcibly transfers children of the group, or subjects members of such group to living conditions which have caused danger for the total or partial physical destruction of the group, shall be punished by 10 to 20 years’ imprisonment or life imprisonment.”¹⁹

On 21 October 1991, Estonia joined the UN Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity of 1968.²⁰ In the mid 1990s a special department was established at the Estonian Internal Security Service with the task of investigating living persons who had participated in crimes against humanity, war crimes, and genocide in Estonia, and subsequently send them to the court. The task was complicated, because most of the archives of the Soviet State Security offices active in Estonia were brought to the Soviet Union before Estonian independence was re-established.

Beginning in 1995, 12 criminal cases have been prosecuted in Estonian courts under the section of crime against humanity and 11 persons have been convicted, including eight participants of the deportation operation in March 1949, and three who had murdered the Forest Brothers. No person prosecuted for crimes against humanity has been acquitted.²¹ Some convictions were appealed at the European Court of Human Rights (ECHR), but the appeals were rejected by the ECHR.²²

Living perpetrators was only a part of the problem Estonia faced. By virtue of the character of the Soviet regime, there were a large number of former official and unofficial collaborators of different Soviet security services in Estonia. These individuals could have been re-recruited by the secret services of other countries, or simply pressured by persons who knew of their former connections. Collaboration with the Soviet secret services,

16 Supreme Court in the case of Ülo Holm, who was sentenced to the prison camp for 15 years on 13 April 1950 by the Military Tribunal of the Internal Forces in the ESSR – see Kohtuotsus Eesti Vabariigi nimel, III-1/3-19/95, 20. 6. 1995, <http://www.nc.ee/?id=11&tekst=RK/III-1%2F3-19%2F95> (cited on 24 May 2017).

17 Supreme Court in the case of Julius Linamets, who was sentenced to the prison camp for 20 years on 16 April 1945 by the Military Tribunal of Tallinn Garrison – see Kohtuotsus Eesti Vabariigi nimel, III-1/3-2/95, 24. 1. 1995, <http://www.nc.ee/?id=11&tekst=RK/III-1%2F3-2%2F95> (cited on 24 May 2017).

18 Supreme Court in the case of Elmar Sari, who was sentenced to the prison camp for 25 years on 12 November 1948 by the Military Tribunal of the Internal Forces in the ESSR – see Kohtuotsus Eesti Vabariigi nimel, III-1/3-29, 29. 3. 1994, <http://www.nc.ee/?id=11&tekst=RK/III-1%2F3-29%2F94> (cited on 24 May 2017); see also English summary of an article of Herbert Lindmäe, who himself was a Justice of the Criminal Chamber of the Supreme Court during the time when these decisions were passed: “Nõukogude okupatsioonirežiimi ohvrite rehabiliteerimisest Riigikohtus = Rehabilitation of Victims of the Soviet Occupation Regime by the Supreme Court,” *Juridica* 10 (1995): 430–434, https://www.juridica.ee/juridica_en.php?document=en/articles/1995/10/23934.SUM.php (cited on 24 May 2017).

19 See Penal Code § 90, translation into English, <https://www.riigiteataja.ee/en/eli/511032014001/consolide>.

20 See <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-6.en.pdf> (cited on 24 May 2017).

21 See Judicial decisions / International crimes not subject to statutory limitations, <https://www.kapo.ee/en/content/judicial-decisions.html> (cited on 24 May 2017).

22 See for example FOURTH SECTION DECISION AS TO THE ADMISSIBILITY OF Application no. 23052/04 by August KOLK Application no. 24018/04 by Petr KISLYIY against Estonia, <http://hudoc.echr.coe.int/eng?i=001-72404> (cited on 24 May 2017).

as such, was not a crime. However, “a solution [was] needed to arrange the relationship between the Republic of Estonia and the individuals who had collaborated with intelligence, counter-intelligence, or state security organisations of states which had occupied Estonia.”²³

On 6 February 1995, Estonian Parliament adopted the Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Intelligence or Counter-intelligence Organisations of Security Organisations or Military Forces of States which Have Occupied Estonia Act.²⁴ The service in, or cooperation with, security or intelligence organisations was defined as follows:

- 1/ [...] serving in security or intelligence organisations is employment as a staff employee of a security or intelligence organisation;
- 2/ [...] co-operating with security or intelligence organisations is being an agent, a resident, a keeper of a conspiratorial flat or being a trustee of security or intelligence organisations or knowingly and voluntarily co-operating in any other manner with such organisations. A person who co-operated or granted consent for co-operation with security or intelligence organisations without having had employment relationships with the latter shall be deemed to be an agent, a resident, a keeper of a conspiratorial flat or a trustee. A person's co-operation with security or intelligence organisations is deemed to be proved by signing a corresponding obligation (consent) or a report expressing co-operation addressed to such organisation by him or her or receipt of monetary or other compensation for co-operation, and other evidence evaluated pursuant to the procedure prescribed by law.²⁵

According to the act, the persons, who were in the service of security or intelligence organisations, or co-operated therewith had to be registered by the Estonian Internal Security Service. The registration included “a personal confession submitted to the Security Police Board²⁶ within one year after the entry into force of this act concerning service in security, intelligence organisations, or co-operation therewith”. The names of the persons, who did not register, but whom the Security Police Board had the information, were published in the Appendix of Estonian State Gazette (official Journal). A couple of hundreds of names were published during last 20 years.²⁷ However, in 2015 the European Court of Human Rights found the publishing of the name of a former KGB driver and the information about his employment by KGB in the Estonian State Gazette as a violation of the right to respect for private life.²⁸

Another issue was the need to avoid the election, or nomination, of individuals to public service positions who had had contacts with Soviet security institutions earlier. As the archives of the Soviet security offices were brought to the Russian Federation, this was not always possible. The problem was partly regulated by the Act on Procedure for Taking Oath, adopted on 8 July 1992, that stated in its first paragraph:²⁹

“[...] a candidate standing in an election of the President, of the Riigikogu or of the council of a local authority, or a person who seeks the position of Prime Minister, minister, Chief Justice of the Supreme Court, Justice of the Supreme Court, judge, Chancellor of Justice, Auditor General, President of the Bank of Estonia, Commander or Commander-in-Chief of the Defence Forces, or any other elected or appointed position in an agency of the national government or a local authority, is required to take the following written oath of conscience: [...] I swear that I

have not been in the service or an operative of a security service, or of an intelligence or counterintelligence service of the armed forces, of a state which has occupied Estonia, or participated in the persecution or repression of citizens because of their disloyalty or the political beliefs or social class that they represented or because they had been part of the civil service or defence forces of the Republic of Estonia.”

The act was amended in November 1994 with detailed description of participation in the persecution:

- “1/ persons who planned or gave orders for extra-judicial mass repressions (including deportation) or who supervised or gave orders for the preparation thereof;
- 2/ persons who commanded the preparation of deportation lists and persons who had the right to decide the preparation of such lists or organise and monitor the preparation of such lists;
- 3/ persons who knowingly and of their free will, although without relevant authority, collected and forwarded information which resulted in other people being included in deportation lists or deported;
- 4/ persons who directly organised or carried out deportation or commanded it and who had the relevant authority or who had the power to decide or were responsible for it or who did it knowingly and of their free will, although without relevant authority;
- 5/ persons who belonged to the People's Self-defence or defence battalions or destruction battalions and who knowingly gave or followed criminal commands or orders to persecute or repress citizens;
- 6/ persons who acted as an investigator, expert, specialist, judge, lay judge or prosecutor in the pre-trial or court proceedings preceding the conviction of persons who were unfoundedly convicted and who have been rehabilitated by the date of entry into force of this act, if it has been proved in court that the intentional activity of such persons lead to the unfounded conviction of a person.”³⁰

23 Enn Tarto (chairman of the provisional parliamentary committee), *Seletuskiri seaduseelnõu “Eestit okupeerinud riikide julgeolekuorganite või relvajõudude luure- või vastuluureorganite teenistuses olnud või nendega koostööd teinud isikute arvelevõtmise ja avalikustamise korra seadus”* (744 SE) juurde (Explanatory report to the draft of Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Security Organisations or Intelligence or Counterintelligence Organisations of Armed Forces of States which Have Occupied Estonia Act), 5 December 1994.

24 See in English: <https://www.riigiteataja.ee/en/eli/524042014001/consolide> (cited on 24 May 2017).

25 Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Security Organisations or Intelligence or Counterintelligence Organisations of Armed Forces of States which Have Occupied Estonia Act, § 4.

26 Earlier official translation of the Estonian Internal Security Service (*Kaitsepolitsei* in Estonian).

27 See for example one of publications only in Estonian: Riigi Teataja Lisas avalikustamisele kuuluvate endise NSV Liidu luure- või vastuluureorganite teenistuses olnud isikute kohta koostatud Kaitsepolitsei ameti teadaannete ära kirjad, <https://www.riigiteataja.ee/akt/12906970> (cited on 24 May 2017).

28 See the ECHR judgment in *Sõro v. Estonia* (no. 22588/08), 3 September 2015, <http://hudoc.echr.coe.int/eng?i=001-156518> (cited on 15 June 2017). I am thankful to Mr. Peeter Roosma for remembering this fact.

29 Act on Procedure for Taking Oath, passed 8.7.1992, <https://www.riigiteataja.ee/en/eli/520052014002/consolide> (cited on 24 May 2017).

30 Ibid.

PERSONS REPRESSED BY OCCUPYING POWERS ACT (2003)

In the parliamentary elections of March 2003, a new conservative political party, Res Publica, was very successful and formed a government coalition. The program of the coalition paid special attention to the support of the victims of political repressions by the occupying states. These concerns previously belonged to the Pro Patria Union, another national conservative party. Res Publica succeeded in capturing part of Pro Patria Union's supporters during the elections, stressing the need of better support for the people repressed by the Soviet authorities. The Persons Repressed by Occupying Powers Act, initiated by the members of Res Publica, was adopted on 17 December 2003 and enforced on 1 January 2004.³¹ The act consolidated most legal provisions connected to the support of the repressed persons.

The act defined the term "unlawfully repressed person". The act limited the individuals covered by this term to citizens of the Republic of Estonia and permanent residents as of 16 June 1940, excepting persons "who were brought or who came to Estonia on the basis of the agreement entered into by the Republic of Estonia and the Soviet Union on 28 September 1939 [...] or acts arising therefrom". The issue is that after 1944 several hundred thousand Soviet citizens were brought or immigrated voluntarily to Estonia. Among them there might have been individuals who had been repressed in the Soviet Union; but supporting them was, and is, the task of the legal successor of the Soviet Union. From 28 September 1939 to 16 June 1940 Estonia continued to be an independent country, but during this period about 25,000 soldiers, sailors and officers of the Red Army and the Soviet Baltic Fleet were stationed to Estonia according to the mutual assistance treaty between the Soviet Union and Estonia that Estonian government was forced to sign under the threat of the Soviet military invasion, and there might have been individuals among them who were repressed before September 1939 in the Soviet Union, or later, and who lived in Estonia in the beginning of 21st century.

The term "unlawfully repressed person" included the following categories: victims of genocide, those imprisoned or sent into exile (i.e. deported) due to beliefs, property status, origin or religion, those who were imprisoned or sent into exile due to failure to comply with special obligations established by an occupying state for its own citizens (such as military service, loyalty oaths), freedom fighters and prisoners of conscience punished by occupation regimes, deportees, people sent to forced labour in a Soviet Union labour battalion, people sent to forced labour outside Estonia during the German occupation, people who were prohibited to live in Estonia, children who were born while in exile or in a place of detention, where the parent was a victim of unlawful repression.

In addition to these individuals, two additional categories deserve special attention. Persons "who were subjected to radiation, as a test subject, in connection with the explosion of a nuclear device", were men who had served as conscripts to the Soviet Army in service units of nuclear bomb tests, but also men and women, who were deported in 1949 to locations of forced settlement in the neighbourhood of the nuclear test site of Semipalatinsk. Persons "who were forcibly sent to a nuclear disaster area for the elimination of the effects of the disaster" were the several thousand men, who were mobilised from Estonia in the Spring of 1986 for several months, as reservists of the Soviet Army

for extraordinary training, but in the reality for the liquidation of the consequences of the explosion at the Chernobyl nuclear plant near Kyiv.

Individuals who had served in institutions which carried out the repressions and individuals who joined the Communist Party of the Soviet Union earlier than the 1st of January 1954, were not considered unlawfully repressed persons. Their case could explain some complications of determination of who was an unlawfully repressed person. Namely, from the second half of 1940s until the death of Joseph Stalin in 1953 many communist activists who participated in the Sovietisation during 1940–1941 and since 1944, were arrested and sent to the GULAG. They were not included in the category of unlawfully repressed persons by the act because of their participation in the establishment of the occupation regime. Also the individuals who were mobilised to the Red Army as members of the Communist Party or Communist Youth League (Komsomol), persons who had belonged to different paramilitary units, organised by the Soviet State Security for securing the rear area or fighting the Forest Brothers, individuals who were mobilised to the German Armed Forces as members or member candidates of the NSDAP were not considered unlawfully repressed persons. On the other hand, a number of persons who returned from the GULAG or from the forced settlement during the second half of 1950s and were later accepted as members of the Communist Party (the motivation of joining the party despite having been victims of the Soviet Terror needs a separate article), were considered unlawfully repressed persons. For example, there were thousands of children among the deportees or children who had been born to the deported parents in forced settlement. Joining the Communist Party after the 1st of January 1954 is not an obstacle for receiving benefits as a former repressed person.

OFFICIAL STATEMENTS

The Estonian Parliament (Riigikogu) has adopted three statements addressing the occupation of Estonia, crimes against humanity committed by the occupation powers against the Estonian nation, and lastly, a statement honoring and supporting the victims who survived political repressions.

In June 2001, when the victims of the June Deportation of 1941 were remembered, the Estonian Parliament did not succeed in drawing up a respective statement despite active preparations. Under discussion was, in what way exactly to condemn the communist regime, taking into account that some members of the parliament had been the members of the Communist Party before 1990. The President of Estonia during 1992–2001, Lennart Meri, who himself was deported 60 years earlier with his parents, published a Statement of the President of the Republic

31 See English translation of 2014 without the last amendments: Persons Repressed by Occupying Powers Act, <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/529052014007/consolidate> (cited on 24 May 2017). See also Marek Tamm, "In search of lost time: memory politics in Estonia, 1991–2011", in Alexander C. Diener and Joshua Hagen, eds., *From Socialist to Post-Socialist Cities: Cultural Politics of Architecture, Urban Planning, and Identity in Eurasia*, London, New York: Routledge, 2015, 165–187, and a short overview "Benefits for the victims of persecution by totalitarian regimes," compiled by Social Insurance Board at Eesti.ee – Gateway to eEstonia, https://www.eesti.ee/eng/toetused_ja_sotsiaalabi/toetused_ja_huvitised/toetused_represeeritutele (cited on 24 May 2017).

that stated: “[...] I welcome the wish of the Estonian parliament to draw up a statement that would pronounce the communist regime, which had so many victims, to be equally criminal with the Nazi regime. In World War II, which broke out of the Hitler-Stalin pact, and in the resistance movement, the Republic of Estonia lost one tenth of her citizens. For a people of one million, the execution of the country’s political leaders, officers, local government officials and intellectuals, the deportation of their families and the confiscation of their property by the occupying powers meant a criminal method for the elimination of the nation as a whole.” [...] ³² His second term in office ended in October 2001. In June of that year, he made a farewell tour through all 15 Estonian counties. He held a speech in each county and to these open air meetings, all survived victims of the Communist and Nazi terror of respective county were invited. Lennart Meri shook hands with every one of them and handed over the badges of “Broken Cornflower” as a symbol of respect by the state. The badge was initiated by himself shortly before.

The Parliament adopted its statement a year later, on 18 June 2002, ³³ declaring the communist regime of the Soviet Union and the organs that implemented its policies by force as criminal. The parliament stated that the Communist Party of the Soviet Union and its Estonian branch were responsible for those crimes. But the statement did not call for collective responsibility of the members of these organizations. The responsibility of each individual person is determined by his or her former actions. Parliament stated that while the crimes of the national socialist regime have been condemned at the international level, similar crimes committed by the Soviet Union have not been condemned.

A controversial issue, parallel to the debate of the consequences of the occupations was the status of Estonian men who were mobilised or joined voluntarily the German armed forces to fight against the Soviet Union. Various NGOs, unions and associations of freedomfighters, demanded the recognition of them by the government as freedomfighters and were cautiously supported by the conservative parties. The majority of them were subject to the legislation supporting the repressed persons, ³⁴ because most of them, who had remained in Estonia in 1944 or taken prisoner by the Red Army in Eastern Europe from Autumn 1944 to May 1945, ³⁵ were sentenced later by the Soviet authorities. They supported their demand with the fact that in February 1944, when the Red Army reached the Eastern borders of German-occupied Estonia, the occupation authorities proclaimed a general mobilisation, that was publicly supported (though under pressure of Germans) by the last Prime Minister of Estonia in 1940, Jüri Uluots, and hence was a legal mobilisation from the viewpoint of Estonian legal continuity. The debate lasted more than ten years. The unavoidable negative impact on the international level of such declaration was taken in account. The Parliament passed its statement “Paying tribute to the Estonian citizens” on 14 February 2012, ³⁶ which was not very enthusiastically received by the NGOs of the former victims and freedomfighters:

“On the basis of the Constitution of the Republic of Estonia and proceeding from the fact that according to international law, the legal continuity of the Republic of Estonia, that was occupied in World War II, was not interrupted,

The Riigikogu pays tribute to the citizens of the Republic of Estonia who, in the years of Soviet or Nazi German occupation, acted in the name of de facto restoration of the Republic of Estonia.

The Riigikogu condemns the repressive politics of the Soviet Union and National Socialist Germany and the activities of the persons who, in the service of these regimes, have committed crimes against humanity, irrespective of their citizenship and location of commitment of these crimes.”

A statement of the Parliament was adopted on 14 June 2016 to commemorate the victims of the June deportation 75 years later. ³⁷ The Estonian Riigikogu stated that “it is our moral duty to commemorate the victims of totalitarian regimes and pass the knowledge about those events on to the coming generations.”

LESSONS LEARNT AND RECOMMENDATIONS

The Estonian experience has shown that the rehabilitation of the victims of political terror is very important. Besides the fighters for the freedom of their homeland against occupying regimes there were a lot of victims of political mass repressions who actually needed a declaration from the highest level of public authorities to say they were not criminals and were innocent victims. One has to keep in mind the influence persistent communist propaganda which had tried to convince the public that the respective individuals were or had been the enemies of the nation. The surviving victims needed real financial support to compensate for their direct material losses and indirect losses that were caused by the loss of opportunity to study in the universities or to use their professional skills. Former political prisoners were not entitled to apply for many positions. People who were not allowed to return to their homes after the release from prison camps or forced settlement had to begin from zero again. Health problems, mental problems among them, were directly or indirectly caused by long years in inhuman conditions in prison camps or sites of forced settlement in miserable villages of Siberian hinterland with harsh, or at least unfamiliar climate. Keeping in mind that the most these individuals had suffered simply for being good citizens of their homeland, the advantages of health care were unavoidable.

32 See full text in English: The President of the Republic on the Crimes of Totalitarianism on June 14, 2001, <https://vp1992-2001.president.ee/eng/ateated/AmetlikTeade.asp?ID=4870> (cited on 24 May 2017).

33 Okupatsioonirežiimi kuritegudest Eestis, 18 June 2002, <https://www.riigiteataja.ee/akt/174385> (cited on 24 May 2017); English summary: Estonian parliament adopted statement on occupations, see Estonian Review: June 17–23, 2002, <http://vm.ee/et/node/35688> (cited on 24 May 2017).

34 After the re-establishment of Estonian independence the most of Estonians, who had served in German or Finnish Armed Forces during the World War II, got one-time or yearly payments by respective countries depending on the length of their service, injuries etc. through social benefit system for foreign veterans of these countries. In addition to that a number of healthcare services were provided for them.

35 German Supreme Command ordered to take all Estonian units of the German armed forces to Germany at the end of September 1944. Thousands of the members of these units stayed in Estonia intentionally or did not succeed to retreat.

36 Tunnustuse avaldamine Eesti kodanikele, 14 February 2012, <https://www.riigiteataja.ee/akt/315022012002>; unofficial English translation in a press release of the Parliament: <https://m.riigikogu.ee/en/press-releases/statement-of-the-riigikogu-paying-tribute-to-the-estonian-citizens> (both cited on 24 May 2017).

37 75 aastat juuniküüditamisest, 14 June 2016, <https://www.riigiteataja.ee/akt/315062016001>; English translation see the Riigikogu press release The Riigikogu adopted the Statement on the June Deportation, 14. 6. 2016, <https://www.riigikogu.ee/en/press-releases/plenary-assembly/riigikogu-adopted-statement-june-deportation/> (both cited on 24 May 2017).

Both the Soviet and Nazi regimes tried to find and found individuals, who collaborated with them willingly or unwillingly. The situation was extraordinarily complicated because the regimes changed during a short time; in 1940, 1941 and 1944. There were a number of cases when the perpetrators in the service of one regime became the victims of another. Therefore the precise definition of victim groups was extremely important simply to avoid the creation of a new injustice.

Another important issue is the persecution of former perpetrators who were guilty of crimes against humanity, war crimes, and genocide. It was important for justice to overcome the unfounded, and sometimes even founded fears in the society.

The Republic of Estonia has the responsibility for its own citizens and residents, but it is not responsible for injustices and crimes committed by the occupying regimes in the name of their political and economic objectives. Therefore, claims for compensation by individuals determined to be of non-Estonian citizens, meaning mainly the Soviet citizens prior to 1939/1940, who would have been repressed before their arrival to Estonia,

must be the responsibility of the legal successors of the occupying regimes, despite of the expectancies of the claim.

The experiences of one country do not fit the different historical conditions of another country. Therefore the recommendations are general ones. Firstly, the highest authority has to publish a declaration honouring the resistance fighters for resisting the terror and dictatorship or occupation, but also the innocent victims, and condemning the perpetrators. Secondly, the victims should be supported financially, according to the abilities of the current country and its legal system. The supporting system has to be fair and transparent in order to avoid the continuation of the tensions between the different victim groups. In the case of an occupation, the claim should be asserted to the state, which had occupied the country, or to the legal successor of the former. Finally, perpetrators should be prosecuted and their cases sent to the court. Overcoming the legacy of the terror and dictatorship or occupation is an essential part of democratization, and has to be carried out as soon as possible to prevent the continuation of injustice and the influence of actors of the former regime.

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EDUCATION AND PRESERVATION OF SITES OF CONSCIENCE

MEELIS MARIPUU

INTRODUCTION

After the reign of totalitarian and criminal regimes, education and the perpetuation of memories have an extremely important role. The thorough legal study of the past period, the punishment of the offenders guilty of crimes, and the rehabilitation of victims makes it possible to restore the legal status of aggrieved individuals. The commemoration of sites of conscience and the appraisal by society of what has taken place at those sites are particularly important for restoring the moral dignity of the victims and for society to cope with its history. The field of education has to bear the brunt of educating the new generation. There is no direct experience from the prior regime, and for this reason, there is also no understanding of the dangers connected to such criminal regimes and of their operational mechanisms that seem absurd today. The field of education and commemoration faces a particularly complex task, of great responsibility, in societies that have lived under more than one criminal regime, which have also been hostile towards each other. In Estonia, the Soviet Union's communist regime and the German national socialist regime alternately dominated. By virtue of the end results of the Second World War, where the Soviet Union belonged to the coalition of victors, the receptions of the communist and national socialist regimes are extremely varied and at times outright diametrically opposite. This leads to situations where bringing the crimes of communist regimes to light is labelled as an attempt to diminish the importance of Nazi crimes.

DESCRIPTION OF THE DEFAULT SITUATION

During the last decades of its existence, the Soviet regime softened somewhat and at the same time stagnated. Active political terror against its inhabitants ended with the death of the Soviet dictator Jossif Stalin in 1953, and in 1956, Nikita Khrushchev, the new leader of the Communist Party of the Soviet Union, denounced the preceding terror. This was admittedly followed by the staggered release of prisoners and deportees from penal institutions, but not by the explicit condemnation of the preceding political terror or the punishment of those who participated in it. The regime's new leaders, who had already risen through the ranks during Stalin's reign, washed the blood off their hands and turned the deceased dictator into a scapegoat. They attempted to continue developing society on the basis of communist dogma and the same applied to their depiction of the past. The official history of Soviet society was the history of class struggle, the writing of which was regulated by the state. Depiction of the Soviet regime in a negative light was an absolute taboo. Even after Stalin's death, the regime simply kept silent about the condemned dictator, he was "written out of history".

The regime attempted to consolidate a society that had suffered for decades under harsh domestic political terror by

modelling the image of a foreign enemy, whose imagined activity was supposed to justify domestic terror and the extensive restriction of human rights until the end of the 1980s. Hitlerite Germany who had lost the Second World War was placed in this role, and when the Cold War broke out, the role was transferred to the entire "imperialist Western world" headed by the Soviet regime's recent ally, the USA. This scheme functioned successfully in regions of the Soviet Union that had fallen under communist rule immediately after the fall of the Russian Empire in 1917. In the case of Estonian and other nations that had managed to fight their way out of the grasp of the communists upon the collapse of the tsarist empire and to gain independence, fell under Soviet occupation after the signing of the Molotov-Ribbentrop pact, such an approach did not work. In addition to being a taboo topic, the geographical remoteness of the sites of terror and conscience hindered the ascertainment, under the conditions of Soviet rule, of the fate of tens of thousands of compatriots who had lost their lives or freedom in the course of political terror. Most of the punishment camps and sites where deportees were forced to settle, which have symbolic value were situated in distant eastern and northern regions of the Soviet Union, access to which was complicated or altogether forbidden. The memory of victims of terror could be preserved and passed on only in the narrow circle of the family and close friends. A few people had secretly drawn up and preserved their own lists of fellow sufferers. All of the pertinent archival documents were in the administrative field of the Soviet Union's Ministry of Internal Affairs, and only a few researchers who were loyal to the regime and whose writings were used for propaganda purposes had access to them.

DESCRIPTION OF THE TRANSITION

The political changes of the latter half of the 1980s in the Soviet Union enabled social activists and the first historians on their own personal initiative to start eliminating history's so-called blank patches during the last years of the Soviet regime. These referred to formerly taboo topics that obscured the communist regime's domestic political terror and political murders that had continued for decades. As long as the state authorities completely controlled access to the archives, this type of knowledge was primarily based on people's memories and indirectly relevant documents that access was possible to gain. Heritage conservation associations that set about actively gathering the memories of victims of repression played an important role in the transitional period. The fact that throughout the exposure, remembrance and making sense of the communist regime's crimes in Estonia, society has consensually proceeded from the principle of the legal continuance of the Republic of Estonia, must be pointed out as an important point of departure in this entire process. In the given context, this means that neither researchers nor society at large consider the Estonian Soviet Socialist Republic, formed by

the Soviet Union and which existed *de facto* as the power structure in occupied Estonia in 1940/1941 and 1944–1991, as their “own country”, but rather as a foreign state that was part of the invading country’s administrative structure. This gave researchers unrestricted access to the archival materials of Soviet institutions that had been left in Estonian archives and made the moral assessment of their actions considerably easier.

During the final years of the Soviet Union’s existence, as the regime sought a way out of its impasse, it started admitting its earlier domestic political terror step by step and rehabilitating its victims. This new policy made it possible for former victims of political terror to organise legally and founded the Eesti Õigusvastaselt Represseeritute Liit “Memento” (Estonian Memento Association of Unlawfully Repressed Persons) in Estonia in 1989, two years before Estonia regained its independence from its forcible annexation by the Soviet Union. The Eesti Memento Liit (Estonian Memento Association), an umbrella organisation for the non-profit associations and societies united persons who had fought for Estonia’s independence, persons who were repressed during the Soviet era and members of their families, operates as the legal successor of that association since 1999. Typically of associations uniting victims, standing for their rights, the preservation of the memory of what has happened, and drawing up lists of victims and ascertaining their fates have been at the centre of their activity from the very start. The centre for ascertaining victims has been the Memento working group known as the Eesti Represseeritute Registri Büroo (Registry Bureau of Estonian Repressed Persons), which was created in 1990.¹ By 2017, data concerning several hundred thousand persons, who have suffered under the communist regime in various ways, has been gathered from archival documents and other sources, and published as the result of their work. Of this total, over 25,000 persons lost their lives in the course of this terror.²

The political regime in contemporary Russia does not support the treatment of former penal institutions and other sites connected to political repressions, all of which are tied to the fates of millions of people, as memorial sites. Victims of political terror and their supporters from Estonia and other countries that were captured by the Soviet Union have both separately and jointly organised expeditions to former penal institutions in Russia’s northern and eastern regions, and have tried to commemorate the victims in those places in a low-key manner. These opportunities, to a great extent, depended on the disposition of Russia’s local organs of power, which can be more favourable than that of the central government. Due to political obstacles and their geographical remoteness, these sites of conscience do not play a direct role in the shaping of today’s culture of memory in Estonia, although they are important to the victims of terror themselves.

The thorough study and use of the heritage of criminal regimes from the aspects of education and the culture of memory requires the scholarly treatment of the whole subject matter in addition to ascertaining the victims. After independence was regained in 1991, the opportunity emerged for society to coordinate important subject matter research. In 1992, the Okupatsioonide Repressiivpoliitika Uurimise Riiklik Komisjon (Estonian State Commission on Examination of the Policies of Repression) was formed to operate under the jurisdiction of parliament. A whole series of very different studies emerged as the result of their work, and the book *Valge raamat. Eesti rahva kaotustest okupatsioonide läbi 1940–1991* was published as the summary of their work in 2005.³

The Estonian International Commission for the Investigation of Crimes against Humanity was founded with a narrower scope of investigation at the initiative of President Lennart Meri in 1998. The Commission set as its objective the investigation of crimes against humanity committed in Estonia and/or against citizens of the Republic of Estonia, which were committed from the occupation of Estonia in June of 1940 onward. The Commission proceeded in its work from the definitions of crimes against humanity, war crimes and genocide in the Rome Statute of the International Criminal Court passed in 1998. The objective of the Commission’s historical investigation work was to ascertain what crimes have been committed and their historical background.⁴ The research studies that formed the basis for the Commission’s reports have been published in the form of two books.⁵ The Estonian International Commission for the Investigation of Crimes against Humanity completed its work in 2008.

The Estonian Institute of Historical Memory, founded at the initiative of President Toomas-Hendrik Ilves in 2008, has adopted the UN General Declaration of Human Rights as the basis of its work and continues the work of the previous Commission in researching the Soviet era in Estonian history.⁶

Universities as institutions have not developed into leading centres in this field of research in Estonia. At the University of Tartu, which is Estonia’s leading university in the field of history, 76 doctoral dissertations in history have been defended after the restoration of independence and only 6 of them are connected to this subject field to a greater or lesser extent.⁷ This is the case in a situation where the examination of the criminal Soviet regime has been the theme that has aroused the greatest interest in society as a whole during those years. Historians working at universities have been involved in researching this theme within the framework of other projects or scientific grants. The Estonian Literary Museum and the Estonian Life Stories Association, that operates as part of the museum has played the leading role in gathering and publishing memories.⁸

Within Estonia, primarily a few isolated buildings connected to Soviet repressive institutions, where victims of political terror were interrogated or imprisoned, can be viewed as sites of conscience. A KGB prison cells museum was opened in Tartu,

1 Eesti Memento Liit, <http://www.memento.ee/> (5 June 2017)

2 Memento books, <http://www.memento.ee/trukised/memento-raamatud/> (5 June 2017)

3 Valge raamat. Eesti rahva kaotustest okupatsioonide läbi 1940–1991. Okupatsioonide Repressiivpoliitika Uurimise Riiklik Komisjon, Justiitsministeerium, Eesti Entsüklopeediakirjastus, Tallinn 2005. The English version of the book was published the following year. The White Book. Losses Inflicted on the Estonian Nation by Occupation Regimes 1940–1991, Estonian State Commission on Examination of the Policies of Repression, Republic of Estonia, Estonian Encyclopaedia Publishers, Tallinn 2005. <https://www.riigikogu.ee/wp-content/uploads/2015/02/TheWhiteBook.pdf> (5 June 2017)

4 International Commission for the Investigation of Crimes against Humanity <http://www.mnemosyne.ee/hc.ee/> (5 June 2017)

5 Estonia 1940–1945. Reports of the Estonian International Commission for the Investigation of Crimes against Humanity (Tallinn 2006); Estonia since 1944. Reports of the Estonian International Commission for the Investigation of Crimes against Humanity (Tallinn 2009)

6 Estonian Institute of Historical Memory, <http://www.mnemosyne.ee/> (5 June 2017)

7 Doctoral dissertations defended at the University of Tartu. <http://www.ut.ee/et/oppimine/doktoriope/doktoritood> (5 June 2017)

8 Estonian Life Stories Association. <http://www2.kirmus.ee/elulood/index.html> (5 June 2017)

Estonia's second largest city in terms of population, in 2001, as a branch of the local municipal museum. It is located in a building where the Estonian SSR Ministry of State Security Tartu Department operated in the 1940s and 1950s. An exhibition is open to interested visitors in the preliminary investigation prison cells located in the building's cellar. A small exhibit will be opened in the summer of 2017 on Pagari Street in Tallinn in the cellars of the Estonian SSR Ministry of State Security internal prison. The most monumental site of conscience associated with the fates of thousands of Estonia's people is the prison situated in Tallinn that became known under the name of Patarei (Battery), where victims of terror were held in custody during their preliminary investigations and after their penalties had been imposed, until they were sent to the Soviet Union's penal institutions. The Patarei complex is currently the most important site of memory in Estonia on an emotional level, yet the government has not had the means for fixing it up. Patarei operated as a provisional museum over the course of several years, where the preserved prison atmosphere was demonstrated for visitors, but since the building is in such poor condition, it is in danger of collapse; it is now closed to visitors. Europe's leading heritage conservation organisation Europa Nostra and the European Investment Bank Institute have added the Patarei complex to the list of 14 monuments that are considered to be the most endangered in Europe.

In addition to the above-mentioned buildings, as sites of memory connected to the crimes of the Soviet regime, large numbers of memorial plaques and other such reminders have been mounted in local communities throughout Estonia in memory of local people who fell victim to political terror. There is hitherto no central memorial in memory of the victims of communism with national status in Estonia. Popular initiative has already launched the erection of a heap of stones in memory of the victims in Pilistvere at the centre of Estonia in 1988 at the end of the Soviet regime. The heap of stones has grown considerably over the intervening decades. Memorial stones in memory of victims from different counties of Estonia have been erected there. Furthermore, everyone has the opportunity to add a stone to it in memory of those who were close to him or her. As such, the heap of stones at Pilistvere is thus far the only site of memory that unites all of Estonia. Similarly to the lack of a memorial, a central national museum or exposition for perpetuating the memory of the victims of communism and for organising educational work has not been created in Estonia. The Museum of Occupations founded in 1998 through private initiative has filled this gap. This museum's permanent exhibition and films provide an overview of the occupation era, repressions, the nationalist resistance struggle and the Singing Revolution in Estonia in 1940–1991, when Estonia was occupied, alternately by the Soviet Union, Germany, and once again by the Soviet Union. After the opening of this museum, the government has supported it by covering its fixed costs as a contribution from the Estonian state.

Changes have already begun in the treatment of this topic in general education in the final years of the Soviet regime, when strict ideological control of the content of the teaching of history disappeared and preparations began for developing an entirely new concept and new course syllabuses for teaching history. This process took place through productive cooperation between progressively-minded officials in education, working teachers, lecturers from schools of higher education, and others. The transitional period of 1989–1992 coincided with stages

in the restoration of national independence. The establishment of new course syllabuses was nevertheless only the beginning of the journey; liberation had been achieved from the Soviet regime's ideological pressure and control, but new content had yet to be created. For years, the content of the teaching of history in schools depended on the personal views of the teachers and their wish and capability for gathering and systematising information. Lecture courses given by university historians on the most topical themes played a very important role in the in-service training of teachers. The more active teachers gathered substantial additional material on an ongoing basis from the media as such material was publicly disclosed. This was especially connected to the recent history of Estonia itself, the research of which had been impossible from a non-communist point of view until the last few years of the Soviet period due to the inaccessibility of the archives. The cycle of the completion of new academic treatments of history and of textbooks corresponding to such treatments was a process that lasted many years.⁹

CURRENT STATUS

Compared to the 1990s, the situation concerning speaking about the political terror and violation of human rights perpetrated by the communist regime, and the preservation of the memory of its victims, has changed in various ways. The changing of generations affects this as an inevitable factor. The new generation that is now already becoming actively involved in shaping society, and the young people currently in schools have no direct experience of the Soviet regime. Society's general interest in this theme has decreased along with the retirement of the preceding generation that has directly experienced the most virulent political terror. Thematic educational work has to a great extent been left as the responsibility of the school system, yet contemporary educational policy favours more exact sciences and language learning. The position and scope in terms of hours allotted in school to history and social studies, as the primary subjects that introduce the heritage of the past and society's values, have declined considerably. Since 2014, these subjects are no longer among the national exams required for graduating from secondary school.

Tying education to political objectives has never been popular in Estonia. Thus German-type political foundations for operating in the sphere of civic, political or historical education, for instance, have not emerged in Estonia.¹⁰ The annual public commemoration of remembrance days on 25 March and 14 June marking the mass deportations carried out by the Soviet regime in 1941 and 1949 has acquired a certain positive role in trans-generational involvement in dealing with the heritage of the communist regime. Young people are included in organising remembrance events through organisations and student governments at secondary schools and universities. One of the few non-student organisations that has organised work in this field

9 Oja, Mare. Muutused üldhariduskooli ajalooõpetuses alates 1987. aastast – nõukogulikust tänapäevaseks (Changes in History Teaching in General Education since 1987 – from Soviet to Modern). Tallinn University, Dissertations on Humanities, 2016. <http://www.etera.ee/zoom/22811/view?page=466&p=separate&view=0,0,1932,2834> (5 June 2017)

10 The larger German political foundations (primarily the Konrad-Adenauer-Stiftung e. V. and the Friedrich-Ebert-Stiftung) admittedly operate in Estonia at varying levels of activity, but do so in order to fulfil their own aims.

among young people is the Unitas Foundation, which has successfully involved young people in various projects.¹¹ The initiative *Kogu me lugu*¹² can be highlighted as a distinctive project, in the course of which the stories of Estonian families through the years of Soviet and German occupation are gathered as video clips, studied and shared. Young people are carrying out this project and at the same time, young people can also be found among the people telling their stories, telling about how the stories of their families have reached them and how they make sense of these stories.¹³

This year in 2017, Estonia is preparing to erect a national memorial to the victims of communism in its capital Tallinn, which is to be completed in the country's centenary year of 2018.¹⁴ In the course of these preparations, accessible archival sources will once more be thoroughly examined in order to ascertain the victims of political terror by name, and the public will be involved to perpetuate the memory of the victims in the memorial that is to be built. The completion of a national memorial is, on the one hand, in honour of the tens of thousands of victims and the hundreds of thousands who have suffered, yet at the same time it has to bear a message for subsequent generations.

The new era needs an educational and memory political approach to the heritage of the communist regime that differs from previous approaches in order to put the message concealed in that heritage into words for current generations, and to find a way to convey this message to its recipients.

Regardless of the fact thirty years will soon have passed since the collapse of the Soviet Union, there are still blank gaps in the research of the activity of the communist regime in Estonia. This refers to the internal operational mechanisms of the occupying regime as well as the social mechanics manipulated by governmental agencies to force people to obey, adapt and collaborate. The research of these themes requires the active continuation of both local and international comparative studies.

LESSONS LEARNT

POSITIVE EXAMPLES

Estonia has by way of shaping its national policy and social attitudes clearly and unambiguously uncoupled itself from the legacy of its communist regime. This has provided historians with unrestricted access to archival documents so that academic studies and the memories of contemporaries of the events in question, together, would form as broad a base as possible for the people's culture of memory and for the clear-cut historical treatment of this theme in school. With the financial support of public funds, the Eesti Represseeritute Registri Büroo has succeeded in documenting by name the lion's share of the victims of the communist regime and those who suffered under it. Work on further ascertainment of their fates will also continue in the future.

Very large numbers of the memories of those who suffered under the regime have been published as books. Massive collections of memories have additionally been deposited at the Estonian Literary Museum, the Museum of Occupations, and other

institutions. The greater part of the population has an overview of the extent of the political terror that has taken place. There were few families that it did not affect at all. This fact is surely one factor that has not allowed political nostalgia for communist ideology to emerge in Estonia, regardless of political crises and the squabbling between the political parties. After the restoration of Estonia's independence, the legal successor to the Communist Party (under the name of the Eestimaa Ühendatud Vasakpartei (United Left-wing Party of Estonia)) has managed to exceed the election threshold in parliamentary elections only once, in 1999.¹⁵ Currently, the party has become utterly marginalised.

NEGATIVE EXAMPLES

A large Russian-speaking community remained in the country after Estonia regained its independence in 1991. The overwhelming majority of the members of this community, either they themselves or their parents, had come to live in Estonia during the Soviet era. Their relative proportion of the population had risen to about one third; today it has declined to about one fourth. The Russian-speaking community continues, to a great extent, to function in society as a detached segment of the population that is in the information field of neighbouring Russia on a daily basis by way of the mass media. Russia's media channels transmit an image of history that for the most part been approved by the Russian state and in its assessments is more often in the position of trying to justify the previous communist regime and its crimes. Thus the treatment of the heritage of the communist regime in school, and as a theme in society as a whole, is often complicated and generates contradictions. Through the effect of Russia's propaganda, nostalgia is noticeable in the Russian-speaking community, especially among its more elderly members.

RECOMMENDATIONS

In the case of Estonia, we are reaching the time where due to the temporal factor, the possible judicial punishment of the offenders from the criminal regime is becoming unlikely. The interpretation of the heritage of the past criminal regime for the new generation that has no direct contact with it, therefore becomes all the more important. It is unlikely that this task will be accomplished only on the strength of victims' associations or civil society activists. This requires the existence of an apolitical institution with guaranteed long-term financing that is capable of coordinating undertakings relevant to this theme in different fields: the organisation of research work, the support of educational activity, the conduct of remembrance events, etc.

11 Unitas Foundation. <http://mnemosyne.ee/en/about-us/> (5 June 2017)

12 Kogu Me Lugu (translates as Collect our Story, We're Collecting the Story, also Our Entire Story).

13 Kogu me lugu. <https://kogumelugu.ee/en> (5 June 2017)

14 Memorial to the victims of communism and the monument to officers <https://ajaveeb.just.ee/kommunismiohvitrememoriaal/> (5 June 2017)

15 National Electoral Committee, Riigikogu (Estonian parliament) election of 1999. <http://vvk.ee/varasemad/?v=r99> (5 June 2017).

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TIMELINE OF THE MAJOR EVENTS

November 7, 1917	Bolshevist Revolution in Russia
February 24, 1918	Estonian independence proclamation
February–November 1918	Estonia is occupied by the German Imperial Army
November 1918 – February 1920	Estonian War of Independence against the Soviet Russia
February 2, 1920	Tartu Peace Treaty between Estonia and the Soviet Russia
June 15, 1920	Adoption of the first Constitution
September 1921	Three Baltic States join the League of Nations
October 14–16, 1933	Adoption of the second Constitution
March 12, 1934	Coup d'état by Prime Minister Konstantin Päts
1934–1940	Authoritarian rule in Estonia
July 28, 1937	Adoption of the third Constitution
August 23, 1939	Hitler–Stalin Pact. According to the secret protocol of the pact, Estonia was included in the Soviet sphere of interest
September–October 1939	Soviet Union threatens the Baltic states with military power. Mutual assistance treaties are signed between the Soviet Union and each Baltic state. Soviet military bases are stationed in the territories of the Baltic States
October 1939 – May 1940	Resettlement of the German population (Baltic Germans) from the Baltic states to Germany
June 14–17, 1940	The Soviet Union occupies the Baltic states
July 21, 1940	Estonian, Latvian, and Lithuanian puppet parliaments established under the control of Soviet legations and special representatives, ask to join the Soviet Union
July 23, 1940	The United States' acting Secretary of State Sumner Welles condemns the occupation by the Soviet Union of the three Baltic states of Estonia, Latvia, and Lithuania. The beginning of the non-recognition policy of the Western powers
August 2–6, 1940	Lithuania, Latvia, and Estonia are incorporated into the Soviet Union as Soviet Union republics
Summer 1940 – Summer 1941	Forced Sovietisation and political terror against bearers of statehood and others
June 14, 1941	Deportation of tens of thousands of men, women and children from the Baltic states
July–October 1941	Battles between the Soviet and German armies on Estonian territory
1941–1944	German occupation
September–November 1944	The Soviets return, the Red Army occupies the country
September 18, 1944	Restoration of the Republic of Estonia proclaimed and the government established, but most government ministers were arrested soon after by Soviet State Security
1944–1953	Continuation of forced Sovietisation and political terror. About 35,000 Estonians are sent to Gulag camps, more than 20,000 deported
1948–1950	Stalinist purges in Estonia; former Estonian underground communists and their later fellow travellers in Estonian leadership are replaced by cadres, brought from the Soviet Union
March 25, 1949	Mass deportation of mostly rural population from Estonia and Latvia
Beginning of 1950s	Ceasation of armed resistance (actions of so-called Forest Brothers) against the Soviets
March 5, 1953	The death of Joseph Stalin
1954–1960	Most of the surviving political prisoners and deportees are released and return to Estonia
1956	Suppression of the Hungarian revolution by the Soviets together with the indifference of the West wipes out hope for the termination of the Soviet occupation in Estonia

1968	Suppression of the Prague Spring wipes out the hopes of the younger generation for the human-faced socialism
August 23, 1979	The Baltic Appeal of 45 Lithuanian, Latvian and Estonian citizens to the general secretary of the United Nations, Soviet Union, East and West Germany, and signatories of the Atlantic Charter demanding public disclosure of the Hitler-Stalin pact of 1939 and its secret protocols
September–October 1980	Youth riots in Tallinn, followed by a public letter of 40 Estonian intellectuals defending the Estonian language and protesting against the recklessness of the government in dealing with youth protests
1985	Mikhail Gorbachov is nominated to secretary general of the Communist Party of the Soviet Union and soon begins his reforms under the slogans of perestroika, uskorenie and glasnost
Spring 1987	Mass public protests, especially of the student youth, against the plans of the Soviet central authorities to begin with stripe-mining of phosphates in Estonia; the plans are cancelled
August 23, 1987	The victims of the Hitler-Stalin pact were publicly commemorated in Tallinn and restoration of Estonian independence was demanded
December 1987	Estonian National Heritage Society is founded
1988	A countrywide independence movement, the “Singing revolution” begins
Since Spring 1988	Prohibited blue-black-white national colours are publicly hoisted despite of the ban
April 1988	Establishment of the Popular Front
Summer 1988	Establishment of the pro-Soviet International Movement of Workers in the Estonian Soviet Socialist Republic
August 1988	Establishment of the Party of Estonian National Independence
November 16, 1988	The Estonian Sovereignty Declaration is issued by the ESSR Supreme Soviet, asserting Estonia’s sovereignty
December 7, 1988	The ESSR Act on Nonjudicial Mass Repressions in the Soviet Union during the 1940–1950s
February 24, 1989	The blue-black-white Estonian flag is hoisted on the parliament building instead of the ESSR flag on the 71st anniversary of the Republic of Estonia
August 23, 1989	The Baltic Way (Baltic Chain) begins, with approximately two million people from Tallinn to Vilnius, remembering the victims of the Hitler-Stalin pact signed 50 years earlier
November 1989	Fall of the Berlin Wall
February 19, 1990	The ESSR enactment on the rehabilitation of unjudicially repressed and groundlessly sentenced persons
March 11–12, 1990	First session of the Estonian Congress, elected by the persons, who were Estonian citizens on 16 June 1940 and their children
March 18, 1990	Free elections to the Estonian SSR Supreme Soviet with success of the supporters of independence
March 1990 – October 1992	Transitional period
March 23–25, 1990	The Congress of the Estonian branch of the Communist Party of the Soviet Union. Party splits into Estonian and Soviet-minded wings. Soon the Estonian members leave the party completely
May 8, 1990	The name of the ESSR is changed to the Republic of Estonia and the national symbols are put into use
March 3, 1991	Independence referendum
April 15, 1991	Pension Act with special provisions for rehabilitated persons
June 13, 1991	Republic of Estonia Principles of Ownership Reform Act
August 19–21, 1991	Unsuccessful coup d’état in Moscow
August 20, 1991	Supreme Council of the Republic of Estonia proclaims the restoration of the Republic of Estonia and establishes the Constituent Assembly with 30 members in the Supreme Council and 30 members in the Estonian Congress
September 1991	Baltic states joining the United Nations

October 21, 1991	Estonia joins the UN Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity of 1968
December 1991	Dissolution of the Soviet Union
February 19, 1992	Rehabilitation of Unjudicially Repressed and Groundlessly Sentenced Persons Act
February 26, 1992	The Citizenship Act of 1938 is reinstated
June 20, 1992	Currency reform: the Estonian kroon with a fixed exchange rate to German Mark is introduced
June 28, 1992	New Constitution is approved by referendum
July 8, 1992	Act on the Procedures for Taking Oath with provisions for disqualification for public service of former collaborators of the security services of states that had occupied Estonia
September 20, 1992	Parliamentary Elections (7th composition of Riigikogu)
October 1992	Lennart Meri is elected to President of the Republic; the last acting President of the exile government symbolically hands over powers
August 31, 1994	Last Soviet (Russian) troops leave Estonia according to an agreement between Lennart Meri and Boris Yeltsin
February 6, 1995	Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Intelligence or Counter-intelligence Organisations of Security Organisations or Military Forces of States which Have Occupied Estonia Act
June 14, 2001	Statement of the President of the Republic remembering the victims of the Soviet deportation of June 1941
June 18, 2002	Parliament's statement of the crimes committed by the occupation regimes in Estonia
December 17, 2003	Persons Repressed by Occupying Powers Act
2004	Estonia joins the European Union and the NATO
January 1, 2011	Estonia joins the Eurozone
February 14, 2012	Parliament's statement "Paying tribute to the Estonian citizens"
June 14, 2016	Parliament's statement commemorating the victims of the June deportation 75 years earlier
July 1, 2017	Estonian Chairmanship in the EU begins

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MEMORY OF NATIONS

Democratic Transition Guide

[The Georgian Experience]



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AUTHORS

LEVAN AVALISHVILI

Historian and Programs Director and Co-founder of the Institute for Development of Freedom of Information (IDFI), Tbilisi. Researcher of Soviet Studies and author of several research papers on Soviet history.

DAVID JISHKARIANI

Historian and Co-Founder, Member of the Board, and Researcher of the Soviet Past Research Laboratory (SovLab), Tbilisi. Visiting Lecturer at the School of Humanities and Social Sciences, Caucasus University, Tbilisi.

IRAKLI KHVADAGIANI

Historian, Researcher and Member of the Board of the Soviet Past Research Laboratory (SovLab), Tbilisi. Author of a number of publications on Soviet totalitarian past in Georgia.

GIORGI KLDIASHVILI

Historian, Founding Member, and Executive Director of the Institute for Development of Freedom of Information (IDFI), Tbilisi. Professional Archive Researcher working in the history archives of Georgia and abroad.

GHIA NODIA

Professor of Politics, and Director of the International School of Caucasus Studies in Ilia State University, Tbilisi. Founder and Chairman of the Caucasus Institute for Peace, Democracy and Development (CIPDD), an independent public policy think tank in Tbilisi. Former Minister for Education and Science of Georgia (2008).

ANTON VACHARADZE

Historian, Archives and Soviet Studies Direction Head at the Institute for Development of Freedom of Information (IDFI), Tbilisi. Lecturer at the Caucasus University, Tbilisi. Former Director of the Central Historical Archive at the National Archives of Georgia (2012–2017).

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TRANSFORMATION OF THE POLITICAL SYSTEM

Ghia Nodia

INTRODUCTION / THE DEFAULT POSITION

During 1989–95, Georgia underwent a transition from a Soviet-style autocracy (or totalitarianism) to a hybrid, semi-democratic (or semi-authoritarian) regime. Notably, though, at the starting point of political transformation, Georgia was not an independent polity: it was one of the fifteen member-states within a quasi-federal structure of the Soviet Union. The two processes of creating an independent nation and of transformation of the political system ran parallel to each other, with one often complicating the other.

The Soviet structure should be called *quasi-federal*, rather than a genuine federation, because of the discrepancy between the formal institutional set-up and actual functioning of power. The Soviet Constitution suggested a model of a parliamentary republic, whereby an elected legislature (the Supreme Soviet) created an executive branch (Council of Ministers). This structure was replicated in each of fifteen union republics that supposedly had quite broad rights of self-rule, including a right to secession not qualified by any preconditions (Article 72 of the 1977 Constitution).¹

In practice, however, the monopoly of power belonged to the Communist Party with no other party allowed to function. The Party was built on the principles of “democratic centralism” implying full control exercised by its Central Committee, and a small Politburo on its top, over all regional branches. The party (represented by its vast bureaucracy) was the principal policy-making body responsible for hiring and firing personnel for all important offices. The General Secretary of the Communist Party was the effective political leader of the country. The cabinet of ministers including the military and the security apparatus, was only responsible for technical implementation of decisions made by the Communist Party. Elections to the Supreme Soviets of every level were a formality, because only candidates approved by the Communist Party could run, and there was a single candidate in each constituency.

The list of important offices where appointments were to be made by the Communist Party bodies were called “nomenklatura”; party ruling bodies of every level had its own such lists. Therefore, the power elite of the communist societies was informally called “nomenklatura”.

The Communist Party of Georgia was a regional branch of the Soviet Communist Party, responsible for implementing its decisions on Georgia’s territory. However, within the Soviet “nationality policy”, local nomenklatura almost exclusively consisted of ethnic Georgians (as was the case in all other union republics). Conversely, ethnic Georgian party leaders had only miniscule chances to pursue their careers on the all-Union level. Moreover, there was a universal system of education in the Georgian language, which most of the ethnic Georgian population used, as well as mass media in the Georgian language. This contributed to the creation of a national elite that came to consider its own and its country’s interests somewhat separate from that of the all-Union identity and interests.

Soviet nationality policies also implied existence of ethnically-defined autonomous regions for some (though not all) ethnic minorities residing within Union Republics. Georgia, thirty per cent of whose population was comprised of ethnic minorities (according to the 1989 census²), had three such units: the Abkhazian and Adjarian autonomous republics, and the South Ossetian autonomous Oblast (*oblast* had somewhat lower rank than *republic*). This was the second largest number of autonomous units within a union republic after the Russian Federation; it is also notable that Adjara was the only region in the Soviet Union that had autonomous status based on religion rather than ethnicity; Adjarians consider themselves ethnic Georgians, but many of them are Muslims, therefore a minority within a traditionally Orthodox Christian country.

THE PROCESS OF CHANGE

The process was initiated by a gradual liberalization of the Soviet communist regime launched by Mikhail Gorbachev, known as *Perestroika* (restructuring) and *Glasnost* (openness). This implied loosening control rather than substantive institutional change: political prisoners were released, censorship of the media gradually weakened, criticism of the government tolerated, etc.

In Georgia, this led to the creation of independent political and civic movements and groups that were referred to as *arapornalebi* (“the informals”). These groups had nationalist agenda, guided by the idea that Georgia had to restore its independence that it had lost after the Russian Bolshevik invasion in 1921. It was also presumed that independent Georgia would be a European-style democracy. Between 1987 and 1989, this developed into a large-scale pro-independence movement. However, in parallel to these developments, similar movements also developed in Abkhazia and South Ossetia that looked either for further strengthening of autonomous rights, or, preferably, secession from Georgia and joining the Russian Federation (in Abkhazia’s case, full independence was also considered as an option).

The violent crackdown of the Soviet army against pro-independence demonstration on April 9, 1989 (21 people were killed, mostly teenage girls) led to a radical discrediting of the communist regime. The nationalist movement gained the moral high ground and got nearly full freedom of action without any changes to the institutional structure of power. The Abkhazian and South Ossetian nationalist movements became more active in their demands as well, which led to some skirmishes, and the creation of armed militias on all sides, which the weak and demoralized regime did not try to disarm. Moreover, there were sharp divisions and occasional violence between different

1 Constitution of the Soviet Union (1977, Unamended), Article 72, [https://en.wikisource.org/wiki/Constitution_of_the_Soviet_Union_\(1977,_Unamended\)#Chapter_1._The_Political_System](https://en.wikisource.org/wiki/Constitution_of_the_Soviet_Union_(1977,_Unamended)#Chapter_1._The_Political_System)

2 “Ethnic Groups of Georgia: Census 1989”, European Centre for Minority Issues, <http://www.ecmcaucasus.org/upload/stats/Census%201989.pdf>

Georgian nationalist groups that could not agree on issues of tactics and leadership.³

In October and November 1990, the first multi-party elections were held in Georgia based on a mixed proportional and majoritarian system. The Round Table coalition, led by Zviad Gamsakhurdia, a veteran dissident and the most charismatic of the nationalist leaders, carried the election getting 124 mandates out of 250 (with 54 percent of the vote in the proportional system), with the Communist Party coming second with 61 MPs. No other party cleared the five percent threshold.⁴

At this moment, Georgia was still formally part of the Soviet Union, even though the center had largely lost control over its domestic political life. The new government abstained from proclaiming independence outright, opting instead for declaring a transitional period towards independence. It also did not go for substantive institutional transformation and made only a handful of changes to the Constitution, such as removing provisions regarding the leading role of the Communist Party, taking out the words “Soviet” and “Socialist” from the name of the country, etc. Zviad Gamsakhurdia was elected the chairman of Parliament (Supreme Council), but it was understood that he was the leader of the country, with the prime minister being the technical executive. The new law on local government was adopted that provided for locally elected municipal councils, but also centrally appointed prefects that held the most important powers on the municipal level.

In December 1990, the Supreme Council abolished the autonomy of South Ossetia in response to the latter’s Supreme Council declaring sovereignty.⁵ This led to armed hostilities for actual control of the region that continued until July 1993.

In March 1991, a referendum was carried out on Georgia’s independence, followed by the Supreme Council proclaiming independence of April 9 the same year.⁶ A new position of a strong executive president was introduced, and on May 26, Zviad Gamsakhurdia won the elections with 86 percent of the vote, setting a precedent for overwhelming majorities for popular leaders.⁷

However, the new system did not prove stable. In September the same year, a group of Gamsakhurdia’s chief lieutenants defected from him and joined vocal opposition. Part of the newly created National Guard followed Tengiz Kitovani, its creator and leader, to the opposition. In the end of December (this coincided with formal break-up of the Soviet Union), a military stand-off between the insurgents and the government forces ensued, which led to Gamsakhurdia fleeing the country in January 1992. A two member Military Council took responsibility for the governance and soon invited Eduard Shevardnadze, a veteran communist leader who had earlier served as the foreign minister of the Soviet Union.

A period of turmoil and virtual implosion of state institutions ensued. A provisional State Council proclaimed restoration of the 1921 Constitution (that of the short-lived independent Georgian Republic that existed in 1918–21), but this was a symbolic gesture, which did not have any relevance for the actual distribution of power that effectively depended on resources of different warlords and power clans. In October 1992, a multi-party parliamentary election led to the creation of a fragmented Parliament; in a separate vote, Eduard Shevardnadze was elected the chairman of Parliament and Head of State (with 96 percent of the vote). However, the actual powers of these bodies were rather limited. The country was immersed in ethnic wars for separation in Abkhazia and South Ossetia, and a standoff between the new

government and supporters of Zviad Gamsakhurdia who controlled part of western Georgia. Adjara, while not having ambitions for full separation, demonstrated its effective independence from central power as well.

Through a series of Machiavellian moves, Shevardnadze gradually consolidated power. Both territorial conflicts were lost and ceasefire agreements signed that became the ground for a lengthy period of the so-called “frozen conflicts”. The pro-Gamsakhurdia insurgents, on the other hand, were defeated. Later, major warlords were neutralized and put in jail, and their followers disarmed. The status of Adjara, ruled by a local strongman, Aslan Abashidze, remained ambiguous.

The process of consolidation of a new system came to completion in 1995: in August, a new Constitution was enacted and in November, Eduard Shevardnadze was elected the president with 74.3 percent of the vote. His party, Citizens Union of Georgia, gained effective majority in Parliament.⁸

GENERAL CHARACTER OF THE NEW SYSTEM

The newly consolidated system, however, cannot be considered democratic; it is usually referred to as a hybrid regime that combines features of democracy and autocracy. Despite changes in power and of the Constitutional design since, this general assessment has been quite stable throughout the period of 1995–2017. For instance, during this period Georgia’s scores in the *Freedom of the World* ratings have been oscillating between 3 and 4, with 1 standing for a fully free or fully democratic regime, and 7 – for a fully autocratic one.⁹ The discrepancy between recognition of liberal democratic values and norms in the formal Constitutional system, and the semi-autocratic character of established political practices, may be the most important characteristic of such a regime.¹⁰

Apart from assessing Georgia’s political system along the scale of democracy-autocracy, there is an important dimension of stability and efficacy of the system. Being born out of ethnic and political conflict, throughout the 1990s Georgia was often described as a “failing” or “failed” state, unable to ensure territorial control, enforce monopoly of the legitimate use of power, collect public revenues and provide for public goods. Despite ending armed conflicts and getting rid of illegal militias, under Eduard Shevardnadze’s rule Georgia was an especially corrupt country unable to pay anything close to reasonable salaries to its public servants

3 Stephen F. Jones, *Georgia: A Political History Since Independence*, London: I.B. Tauris, 2012.

4 The elections were conducted according to a mixed, proportional and majoritarian system. See “Georgia – History of Elections 1990–2010s”, http://infocenter.gov.ge/elections2017/history_en.pdf

5 Law of the Republic of Georgia on Abolition of the Autonomous Oblast of the South Ossetia, http://www.parliament.ge/files/426_5649_580559_10.pdf

6 “Secession Decreed by Soviet Georgia”, in *New York Times*, 10 April 1991.

7 “Georgia – History of Elections 1990–2010s”, http://infocenter.gov.ge/elections2017/history_en.pdf

8 Ibid.

9 See “About Freedom in the World: An annual study of political rights and civil liberties”, Freedom House, <https://freedomhouse.org/report-types/freedom-world>

10 David Aprasidze, 25 Years of Georgia’s Democratization: Still Work in Progress, in Ghia Nodia (ed.), *25 Years of Independent Georgia: Achievements and Unfinished Projects*, Tbilisi: Ilia State University, 2016, 91–129.

and provide for most basic public services or social benefits.¹¹ The government of the United National Movement (UNM) that came to power after the so-called “Rose Revolution” achieved a breakthrough in that regard: Georgia became the least corrupt country in its neighborhood, and the effectiveness of public services increased manifold.¹² This period of reforms, carried out mostly in 2004–2007, may be called a second transition in Georgia; however, their success in establishing modern public institutions in Georgia did not bring about genuine democratization of the political system.

CHANGING LEGAL FRAMEWORK

Starting from 1995, Georgia’s Constitutional framework changed several times. However, these changes did not lead to substantive changes in the nature of the political system. Frequent changes, however, indicate the disaffection of the political elites with the functioning of the political system. The division of power between the legislative and executive, national and local governments, and the electoral system, constituted the principal dividing issues. When it came to defining civil and political rights and freedoms, the Constitutional provisions were generally deemed corresponding to accepted international standards and usually did not become a point of contention.

The 1995 Constitution¹³ was loosely based on an American system: It provided for relatively strict separation between the legislative and executive powers, and this allowed parliament to be a relatively independent political actor. The electoral system was mixed, with 150 out of 234 MPs elected through a proportional system of national party lists, and the rest through single-mandate constituencies. However, the Constitution left open the issue of territorial arrangement of the country due to political sensitivity of the problem and a failure to achieve consensus in Parliament. The system as defined by a separate law was rather centralized, with leaders on the municipal and regional level (*gamgebelis* and *governors*) being directly appointed by the president; weak locally elected municipal councils (*sakrebulo*s) could not balance the power of central appointees.¹⁴

In 2004, the Constitutional system was switched to a mixed one whereby a position of prime minister was introduced, nominated by the president and confirmed by a parliamentary majority; the president could dissolve Parliament in the case of disagreement on the composition of the Cabinet, or the budget. This was done in the name of increased flexibility and effectiveness of the executive, but in practice further increased the power of the presidency and weakened the legislative. The issues of sub-national power were still left out of the Constitution, but a new local government legislation provided for local *gamgebelis* and mayors elected by municipal *sakrebulo*s rather than centrally appointed.¹⁵ Based on a referendum decision, the number of MPs was reduced to 150 with a balance between MPs elected through proportional rather than majoritarian system changed in favor of the latter (73 MPs were elected through single-mandate constituencies).

In 2010, still another overhaul made the system closer to parliamentary one, with the president’s powers significantly reduced and these powers moved to the cabinet, and the prime minister turning into the principal political leader (this and most other provisions were supposed to come into force after the next presidential elections in 2013). This was done in response to

the criticism of too strong a presidency encouraging autocratic tendencies, but suspicions were widely spread that this was a way for then president Mikheil Saakashvili to remain in power after the end of his last term. For the first time, the issue of territorial distribution of power came to be spelt out in the Constitution, though without changing the existent system (with the exception of local mayors and *gamgebelis* now elected directly).

In 2017, the Georgian Dream majority in parliament carried out one more overhaul of the Constitutional system. The President’s powers were further curtailed making this a ceremonial position, and direct elections of the president abolished (the 2018 presidential elections are supposed to be the last direct elections of the president). Georgia thus moved to a fully parliamentary model. The electoral system was changed to fully proportional, but it will not be enacted until after the next parliamentary elections; this means that if the current and next parliament serve their full terms, the new system will only come into force in 2024.

GEORGIA’S DOMINANT POWER SYSTEM

As said, however, thus far these series of constitutional changes did not affect the basics of the hybrid political system that had been consolidated in the middle of 1990s. Its nature can be defined, using a term proposed by Thomas Carothers, as a dominant power system.¹⁶ This means that while at most times there exists an opposition that genuinely challenges the government, truly independent and critical media, vibrant and combative civil society, there is no level playing field between the party in government and the opposition. The former fully dominates all branches of power: It has a strong (often constitutional) majority in parliament, controls all (or almost all) municipal governments, has an influence over most popular media, as well as most powerful business organizations, etc. The opposition is typically weak, divided, irresponsible, and fully focused on discrediting powers that be instead of proposing alternative policies.

Moreover, in the Georgian case the dominant political powers have not been represented by institutionalized political parties, but by organizations existing around strong political personalities, such as Zviad Gamsakhurdia, Eduard Shevardnadze, Mikheil Saakashvili, and Bidzina Ivanishvili. In the latter case, between October 2013 and May 2018, Bidzina Ivanishvili did not even hold any political position at all, but he was widely recognized to be the real guiding force behind the power of the Georgian Dream party. In May 2018, Ivanishvili took the formal position of the party chairman.

11 Ghia Nodia, Trying to Build (Democratic) State Institutions in Independent Georgia, in Gerhard Mangott (Hrsg.), *Brennpunkt Südkaukasus: Aufbruch trotz Krieg, Vertreibung und Willkürherrschaft*, Wien: Braumüller, 1999.

12 *Fighting Corruption in Public Services: Chronicling Georgia’s Reforms*, Washington: The World Bank, 2012.

13 For 1995 Constitution and different amendments to it see Legislative Herald of Georgia, Constitution of Georgia, <https://matsne.gov.ge/en/document/view/30346>

14 *Adgilobrivi tvitmartveloba sakartveloshi 1991–2014* (in Georgian; “Local Self-Government in Georgia 1991–2014”), Tbilisi: International Center for Civic Culture, 2015.

15 Ibid.

16 Thomas Carothers, “The End of Transition Paradigm”, in *Journal of Democracy*, 13 (1), 2002, 5–21.

In the absence of internal party democracy, the domination of the party in power translated into an exceedingly centralized system. Therefore, some increase in the formal powers of municipal authorities described in the previous section did not have any effect because the overcentralized nature of the dominant party ensured full compliance of municipal bodies to national authorities.

Despite such unipolarity, the system allows for occasional changes of power: since 1990, there have been four different governments in Georgia; such rate of rotation of power may in itself be acceptable for a fully consolidated democracy as well. However, in two cases (1992 and 2003) the power changed hands through unconstitutional means. Each of the mentioned changes was celebrated as a democratic opening supposed to replace the hitherto existent autocratic system with a more democratic one. However, in each of the cases, the dominant power system soon fully reproduced itself.

This allows to speak of an essentially cyclical character or the Georgian political system: a democratic opening with radical opposition replacing the incumbent power (October 1990, January 1992, November 2003, October 2012) led to genuine public enthusiasm translating itself into extremely high electoral scores for the incoming leader and his party. This then led to a consolidation of a new dominant power system, followed by a gradual process of public disaffection with it. The period of political apathy continued for several years until popular discontent reached a critical point and a new popular leader emerged that could mobilize the masses towards a non-constitutional or electoral change of power. This cannot be understood as a prediction for the future development of the Georgian political development, but summarizes its nature and path of development so far.

LESSONS LEARNT, PROSPECTS AND RECOMMENDATIONS

Why was it that so many democratic openings based on genuine expressions of people's power all ended up in repeated frustrations? Can we pin down some typical mistakes of democratic reformers and the democracy-promoting community?

One such mistake may be overestimating the importance of formal institutional reforms. Over years, Georgia has made a lot of progress in this direction. While legislation is always open to debate, it can be argued that the Georgian Constitution and other legislation generally conform to recognized international standards. However, different legislative changes promoted by

pro-democracy activists, such as moving to parliamentary system from the presidential one, disconnecting politicians from the process of appointment of judges, introducing full formal independence of local government, adopting extremely liberal media law, and many others, have failed to substantively democratize the system. This does not imply saying that the mentioned institutional reforms were not worth the effort; but other factors may be more important.

The second is exaggerated reliance on specific political players. At different times, international democratic community, as well as a large part of domestic actors, obviously overestimated the capacity and commitment of specific new leaders and parties to advance democratic norms: Eduard Shevardnadze (due to his role in Mikhail Gorbachev's government, and his readiness to invite young reformers to his government), Mikheil Saakashvili (who was a western-educated reformer and appointed leading NGO activists to key government positions), and Bidzina Ivanishvili (who included into his initial coalition political parties that had most consistently promoted democratic norms before). Conversely, failures of democratic consolidation were later blamed on alleged defects of the same personalities, who in different ways displayed propensity for monopolizing power instead of sharing it.

Having said that, the same experience may be summarized from the positive angle as well: Georgia is by far the most successful democratic reformer in its region, which is an important achievement in its own right. While all its governments have displayed leanings to fully monopolize power and marginalize its opponents, none of them fully succeeded in these efforts. This may be explained by two main factors: (1) resistance of the Georgian civil society – including opposition parties, media, NGOs, as well as different informal groups, and Georgian public at large; (2) strong leverage and linkage of/to the western democratic community¹⁷ that in its own turn may be explained by the centrality of the objective of European and Euro-Atlantic integration in the country's policies.

The last two factors are the most important grounds for optimism in the future: If Georgia is going to succeed on its way to democratic consolidation, the way to this lies in the empowerment of its civil society, and close involvement of the democratic international community. Political society represented by political parties has probably been the weakest link so far and are in an especially great need of further development.

17 Stephen S. Levitsky, Lucan A. Way, "Linkage versus Leverage. Rethinking the International Dimension of Regime Change", in *Comparative Politics*, 2006, 38 (4), 379–400.

SOURCES USED AND FURTHER READING

Literature on the period of Georgia's post-Communist transformation in 1989–95, as opposed to later developments, such as Rose Revolution, is fairly scarce. Some sources used for this chapter are indicated in footnotes. The following may be recommended for further reading:

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DISMANTLING THE STATE SECURITY APPARATUS

IRAKLI KHVADAGIANI

INTRODUCTION

After the collapse of Soviet rule in Georgia and along the way of several phases of failed transitions, breakdowns, stagnation, revolutions and regime changes, there was never any call for civil initiatives for the investigation of the crimes of the communist state security, scientific research of the structure, or the everyday activities and history of the special operations of the KGB of the Georgian SSR.¹ Due to a lack of information of the history of the communist state security organs in Georgia, their behavior during last years of Soviet regime, and short transition time, the history is still totally forgotten. During last year of Soviet rule, there were attempts from protest movement representatives and political parties to block KGB buildings and compel them to break away from the central organs, at the same time the Georgian KGB had internal fragmentation towards the nationalistic agenda of the protest movement and separating from the central organs. All of this was behind the walls of KGB and was staying private, in the same way, the final step of the transformation from the Georgian SSR KGB to state security of independent Georgian state was also private.

Since 1991, especially after 2004–2005, when the former archive of Georgian SSR KGB began to be accessible to society and researchers, state officials have always claimed that all the documents and funds, related to operative activities of the KGB, personal cases, and the database of secret informers were destroyed² during fire in KGB building in December of 1991. At the same time, after the 1990's Central archives of the former KGB of USSR was closed to Georgian researchers as well as for Russians. As a result, due to the lack of information, it is impossible to understand the situation based on the few, unverified sources from Russian media-platforms and research papers.

POSITION AND STRUCTURE OF THE STATE SECURITY APPARATUS PRIOR TO THE TRANSFORMATION

After “Perestroika”, the structure of the Georgian KGB seemed like the standard Republican KGB in the USSR:

- Directorate – Chief of staff, Deputy of chief, Head of party committee
- Secretariat
- I division – Foreign intelligence
- II division – Counterintelligence
- IV division – Counterintelligence responsible for transport and communications
- VI division – Economic counterintelligence
- VII division – Surveillance
- VII division – Coding and encoding
- IX division – Security of Party and state leaders

- X division – Archive
- Division Z – Security of constitutional order (former V division – against “ideological diversions”)
- Division OP – Organized crime issues (former III division – counterintelligence assistance of MVD)
- Operative-technical division
- Investigative division
- Inspection division
- HR
- Division of mobilisation
- Assistance division³

Besides the Central organs of the KGB in the Georgian SSR, there was the KGB of Autonomous republics of Abkhazia and Adjara, and the Division of the KGB of South-Ossetian autonomous district.

As far as we know⁴ all the republican systems of the Georgian KGB was structured like this:

- Regional (“Raion”) divisions:
 - “Gareubani” (suburban, Tbilisi)
 - Gardabani
 - Mtskheta
 - Signaghi
 - Lagodekhi
 - Kvareli
 - Tianeti
 - Akhmeta
 - Tetrtskaro
 - Tsalka
 - Gori
 - Aspindza
 - Tskhakaia (Khoni)
 - Samtredia
 - Tsageri
 - Mestia
 - Makharadze (Ozurgeti)
- City “Apparatus”:
 - Zugdidi
 - Poti
- City Divisions:
 - Rustavi
 - Chiatura
 - Kutaisi (?)
- “Special representative”:
 - Akhalkalaki
- Railway station office:
 - Khashuri

1 Committee for State Security of the Georgian Soviet Socialist Republic

2 See a list of funds of the Georgian KGB archive at the old official web-page of the MIA archive, http://archive.security.gov.ge/OLD_SITE_TEMP/saarqivo_fondebi.php

3 See the structure and personnel of the KGB of the Georgian SSR, http://shieldandsword.mozohin.ru/kgb5491/terr_org/respublik/georgia.htm.

4 Based on sources of the Georgian MIA archive; according to analyses of the KGB party organizations’ structures.

■ In the capital – Tbilisi, as far as we know, there were two city district divisions:

- Stalin Raion division
- Kalinin Raion division

As official version claims, all the sources on personnel of the Georgian SSR KGB central and their regional structures were destroyed. According to this disposition, we can't calculate the number of official members of Soviet Georgians state security system. Also, it is almost impossible to determine the number of secret informers in central and regional levels. As some secondary sources claim, in the 1980's, the number of secret informers was around 22,000 persons.

Between 1953–1955, which were the most crucial times of the internal war in the Communist Party of USSR, and after the death of Stalin, when Lavrenti Beria lost his positions, and life, the state security apparatus was cleaned up. In the Georgian SSR the state security system lived in peace and prosperity under the rule of the former military officer, Aleks Iauri, who was the chief of the Georgian KGB until 1988. The Georgian SSR was a border country with NATO (Turkey) and a strategic area for the Soviet Union's Near East policy, the everyday life of the Georgian KGB was not stressful, and the routine of special operations was hunting citizens trying to escape over Turkey's border, hunting "contrabandists" and underground businessman (so-called "Delets"), surveillance of foreign state officials and tourists. There were very few (generally known) facts when a situation went out of control and citizens were witnesses of "excesses": for example, terrorist attacks (Vladimer Zhvania's case), split and robbery in Georgian orthodox church (Kerashvili's case), torture and humiliation in prison (Tsirekidze's case), countermeasures for blocking Jews repatriation in Israel (Goldstein brothers' case), the famous hijacking of a plane (so-called Airplane boys' case).

In the internal battles in Georgian Communist Party, during 1970–1980's, the KGB was not active and until 1988–1990, it was strictly loyal to the center apparatus and their directors. There are some stories remaining on the level of folktales of how the Georgian KGB chief was keeping its power based on holding incriminating evidence over Georgian Communist Party leaders, and at the same time staying neutral in the political battles of the Georgian SSR.

At the same time, the majority of citizens did not feel the "Iron hand" of the KGB in everyday life, and they were loyal and peaceful Soviet citizens. The Georgian KGB, as all Soviet state security systems, strictly observed the "Dissident movement", but in Georgian's case, the number of such groups and individuals was not high enough to create a wide sense of oppression in society.

TRANSITION PERIOD

The changes in Georgian SSR KGB began in 1989. On April 9, 1989, Soviet internal troops and Special Forces suppressed an Anti-Soviet demonstration in Tbilisi.⁵ 21 citizens were killed, hundreds were injured, and there were a variety of physical traumas by chemical gas. This tragedy deeply affected society and initiated the radical change and the rise of loathing against Soviet rule. Many citizens demonstratively left the Communist Party. Accompanied by the general crisis in Soviet Union and the liberalization of the media, due to Gorbachev's "Perestroika" and "glasnost" (publicity), during 1989 and at the beginning of 1990 the first cracks started to be visible in Georgian KGB system. The first stage, at the beginning of 1990, a hint of upcoming changes was

noticed in an open appeal to the Georgian KGB in the communist press about consultations and the strategic planning in the KGB around the difficult political challenges in the republic. KGB officials were announcing that they understood the Communist Party agenda, and the peaceful coexistence of different nationalities in Georgia, ensuring them the sovereignty of the Georgian republic. At the same time the KGB was promising to be very sensitive and was responding to ethnic tensions in regions. It also expressed a deep concern that some groups of society were slandering the KGB and promised to have direct contact with society and be open to honest dialogue.⁶

At a later time, anonymous officers of the KGB were claiming, that in reality, in late 1988 there were protest in central apparatus of Georgian KGB, demanding liberation from the dictate of the center (Moscow central KGB), de-politicization, and liberation from the Communist Party dictate, and transformation of the KGB to a standard state security service. The same kinds of petitions were made internally in April and May of 1989, but with no success. At the same time, after 9 of April 1989, some officers of the KGB left the system as a sign of protest. Some KGB officers expressed indignation regarding the suppression of the demonstration, Georgian KGB involvement in the "disinformation" of the central authority, leading them to use extreme measures against the demonstrators and stopping the Georgian KGB from acting before the 9th of April demonstration became a tragedy, and finally, their wish not to be involved in the operations of suppression against the demonstrations, which was perceived as a sign of mistrust from political center.

In September 1990, close to the first multiparty elections of the supreme council of the Georgian SSR, a group of KGB employees openly expressed their protest against Soviet rule, sending a declaration to the opposition press edition,⁷ blaming the center KGB of a destructive agenda, insisting on depoliticization and asking the support of the future supreme council of Georgia for a peaceful transition of the Georgian KGB to the state security service of an independent republic of Georgia. This action was based on the common sense of the upcoming changes, and at the same time it was a signal from the center government for the depoliticization of the state defense and internal security organs;⁸ the editor of the newspaper preferred not to publish the names of protester officers' group.

At the same time, in September, during demonstrations on Rustaveli avenue (in front of governments house), close to KGB headquarter, a group of protesters rushed into the KGB building trying to occupy it. The KGB guards quickly neutralized the action. As former officers claimed, this fact was used by high-ranking KGB officials to illustrate the danger against the security of the KGB information bases and began evacuation of the archive sources to the Smolensk repository of the KGB.⁹

5 The demonstrations started as a protest against movement for separation from the Georgian SSR in Abkhazian ASSR, but very soon it transformed into an anti-Soviet protest, demanding the independence of the Georgian state.

6 "In Georgian KGB", in *Communist* #20 (20657), 13. 1. 1990, 2.

7 "Declaration of One Group of Employees of the KGB of the Georgian SSR", in *Tbilisi* #217 (11336), 22. 9. 1990, 4.

8 Order of President of USSR, about reforming of political organs of armed forces of USSR, armed forces of KGB of USSR, armed forces of MVD of USSR and armed forces of railway, Moscow, Kremlin, 3. 9. 1990. M. Gorbachev, in *Communist* #205 (20951), 6. 9. 1990.

9 Documentary "Lost History" [*Dakarguli Istoria*], 2014, <https://www.youtube.com/watch?v=5vYIBOxhBj4>

Before the election and after, when the main opposition alliance won election and the new supreme council declared a transitional process leading to the restoration of independence, such changes naturally reflected the situation in the KGB. Officers who were neutralized as pro-nationalists came back into leading positions. The Georgian KGB started a media campaign to demonstrate the nature of the changes and opened communication with society,¹⁰ promising transparency of the historical KGB archives. High-ranking officials started discussions with journalists for the future plans of the transformation. According to the content-analysis of the interviews, we can see obvious tension between the Georgian KGB and the Central USSR KGB around subordination; Georgian officers, were trying to persuade society that a strong state security system was necessary for any kind of state, and at the same time were trying to split from the central USSR KGB, and that Georgian state security would be able to be successful in the foreign intelligence field.

After the 9th of April 1991, re-establishing independence in Georgia, in the short difficult failed transition was marred by the radicalization of political life and open confrontation between the radical opposition and the Government of Zviad Gamsakhurdia. Reform of state security system was forgotten. Furthermore, during escalation of conflict, the newborn Georgian Ministry of State Security (based on the Georgian KGB) started to be a self-isolated and out of control body, refusing to give information to the president of republic about secret informers of the KGB and blocking lustration attempts. Later, former high rank officials were proudly remembering this experience, as sign of professional ethic.¹¹

After the coup d'état in Tbilisi (December 1991, January 1992), in May 1992, the Ministry of State Security of Georgia (formally renamed KGB) was formally abandoned, and the new state security office, "Informative-intelligence service" was founded, but, very soon, in October 1993 the Ministry of State Security was re-established.

It is an interesting fact that until 1998–1999 there was not any law, regulating the activities of state security and establishing basic principles of its work.¹²

CURRENT STATUS AND LESSONS LEARNT

After the 2003 "Rose revolution", until now, the Georgian state security system has experienced several restructurations and revitalizations, but it has always stayed non-transparent and an immune from strong civil and parliamentary control.¹³

Looking back to the crucial times of the changes in Soviet Georgia – 1990–1991, the analyses of how the state security system tried to react to political transformation, how society considered the importance of the transformation of the state security service, and the responsibility of the KGB, as a guard of the communist regime, it gives us a chance to see bitter lessons, which shows a real degree of readiness for changes in our society.

Non-transparency – In the transition time, the KGB system was a "black box" for society. The lack of information about the activism of officers who were trying to transform the KGB from inside, the fragmented focus of the media on KGB transformation challenges, the one-side communication (the media was covering KGB life, when they were invited by the system to talk, not asking painful questions from the outside), and the absolute unprofessional attitude of journalists around state security issues,

all gave the KGB apparatus the opportunity to be a leading actor, giving input to media, not having their structure in the spotlight, and not responding painful questions.

Empty rhetoric in society – In the late 1980's, and especially in 1990–1991, being a member of the KGB was a stigma in society, and worst kind of ostracism was to be accused of being a "spy of KGB". However, open questions and demonization of the KGB and its crimes always stayed at the level of rhetoric. There was no real incentive, during the mass protest movement against Soviet rule, to be focused on blocking the KGB network, occupying their archive infrastructure, and the reconfiguration of the personnel of KGB. The complex political and social crises in 1990–1991 always distracted the focus of society from essential, but very specific issues such as dismantling of the communist type state security system and rise of questions of responsibilities of officers.

Nationalistic sentiments – As in 1989–1990 the Communist Party realized that one of the main engines of the protest movement in Georgia was the nationalistic agenda, they started to try to implement its own surrogate of a nationalist project, talking about "national sovereignty" etc. Based on the problem of non-transparency, there is a strong suspicion that the Georgian KGB started to use the same tactic, trying to transform tension in society against them, from a system level to a nationalistic level, blaming the Russian deputy chief of the KGB and his group of being "governors from center" and designing responsibilities of the Georgian KGB as a problem of the Center-Republic conflict, and domination of Moscow rule. Later, after a short peaceful transition time, 1990–1991, after being transformed to the Ministry of State Security of Georgia, former high-ranking officials of the KGB were positioning themselves as "Georgian patriots" trying to argue against lustration based on "national stability", and protecting the prestige of national heroes and famous historical figures of XX century Georgian history.

Now, after 27 years since the end of Soviet rule in Georgia, society is informed about the everyday life and actions of state security service, almost as it was in Soviet times; there is absolute zero knowledge and memory about the processes which took place in the Georgian KGB system during the transition time of 1989–1991. Question about legal responsibilities regarding Soviet crimes against KGB officers has never risen up, attempts of lustration has been blocked several times during the 1990–2000's, and it is always focused on "KGB spies". Officers of Soviet state security were always in the background. Moreover, the last surrogate of lustration the "Freedom Charter", adopted in 2011, was strictly against those employees of the KGB, who had not continued to working in system after the re-establishment of Georgian independence on the 9th of April 1991. Because of the non-transparency of the former KGB archive, and the current state security

10 Kote Gurgenidze, "Georgian KGB is changing its agenda; is KGB anyway - KGB?!", Interview with Tamaz Adamia, in *Republic* #31, 11. 12. 1990, 4.

11 Sandro Aleksidze, "Those, what happened secretly", in *Sakartvelos Respublika* #163 (7808), 2. 9. 2015, 7.

12 Georgian law on Operative-Investigative Activities, #1933, 30. 04. 1999. Order of President of Georgia #14 - Status of Ministry of State Security of Georgia, 12. 1. 2002. Blocking order #660, 25. 11. 1998, www.matsne.gov.ge

13 Vakhtang Menabde, Tamar Papashvili, Nino Kashakashvili, Giorgi Kekenadze, Ana Beridze, *Twenty years without parliamentary control, supervision from side of supreme representative power to services of state security, internal affairs and foreign intelligence of Georgia*, Tbilisi: OSGE, 2017.

service archives, there is no chance to identify all personnel of the Georgian KGB system and no one has a chance to even think about the possibilities, how currently former officers of Soviet KGB are still defining state security issues.

RECOMMENDATIONS

Based on best experience of Central and Eastern Europe mixed with the local character of events in the Georgian SSR in 1990–1991, we can make several recommendations about the transition period in state security system of totalitarian states:

Sustainable focus of media on state security apparatus – Active input from different kinds of media, asking essential and painful question about the system of security and individuals, around the responsibilities for crimes of the regime, the fortune of the victims, and the transparency of sources, should be part of main agenda of a protest movement and society should always be the initiator of communication, and not depend on a reverence about the state security's side.

Mobilization of speakers familiar with issues of state security institution – It's absolutely necessary to have a resource of people who are familiar of behind the scene activity of the state security organs of everyday life, who have fundamental knowledge about structure, attitudes and the personnel of state security institutions, and can be a generator of the main questions and accents to the media, who can identify counter-propaganda and disinformation from state security or actors planning policies for infiltration from state security officers, ensuring that they be

more active and transparent and an ally to changes in structures of power.

Transparency – It's crucial to keep all processes completely transparent, and not to give representatives of the state security institution the power, or the chance, to plan a long-term manipulative agenda, and play the card of loyalty, and of positioning themselves as patriots and internal oppositionists.

Blocking archives – As the history of Georgia proves, in transitional time, state security officers try to destroy archive documents, which illustrate their crimes against political parties and the movement in order to win the battle for power and ensure the safety of their positions, and avoid legal responsibilities.¹⁴ It's strategically important to block any activities of the state security service to either destroy, or hide documents, or using disinformation to society about the amount and meaning of the archive data, and as soon as it is possible to hand the processing and administration of the former security archives to a civil, representative body.

Complex agenda towards responsibility of state security institutions of totalitarian state – And finally, it's necessary to include all important activities to a general, wide political agenda towards the transition of a political system, and to strengthen the line of reform and restructuration of the state security service, with a clear political will for change, and combine these activities with the process of lustration, and a real legal framework of the investigation of crimes of the totalitarian state.

14 For example, in the 1917 February revolution in the Russian empire, the Tsarist state security - "Okhranka's and Gendarmerie officers started to burn archive files in Kutaisi and Tbilisi.

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REGIME ARCHIVES

ANTON VACHARADZE

INTRODUCTION

Access to the Soviet archives and archival documents remains a contentious topic among many post-Soviet countries. The transition to democracy, de-sovietisation and rethinking of the Soviet past proceeded at a different pace and took various paths in the former Soviet republics. These differences determined state policies toward archives. In many countries, Soviet era documents remain classified, and archives are not accessible to scholars and historians; other countries, only partially. On a legislative level Georgia, together with the Baltic States, may seem like a good example of a post-Soviet country with an open, available, and accessible Soviet archive for researchers and visitors. However, on a practical level, there are problems in transparency and free access that some researchers have faced during their work at the reading rooms of the National Archive.

During the 70 years of the Soviet rule, history was used as an ideological weapon devoid of any real facts; truth was full of falsifications, misinterpretations, communist postulates and clichés. The only space where communists were truthful and honest was with “Secret” and “Top Secret” documents that Soviet bureaucrats circulated among the top level of government and ruling elite. Without archival work, no genuine and accurate scientific and historical research is possible regarding the Soviet era.

Modern day progressive society has agreed that totalitarian regimes, with its political repressions and prosecutions, must not be repeated. In order to ensure this core value, a crucial task and necessity is a proper analysis and study of history. In particular, the study of archival documents, which are often the only accurate sources of information about the tragic events of the past. The democratization of the intelligence agencies and polices can't occur properly if they continue to guard the archives containing information on mass human rights violations and continue to use the same methods of their predecessors. It is possible to construct new state institutes, including, breaking off the continuity chain with the organs of the retaliatory body, which had implemented the repressive actions. Open access to the archives of the totalitarian intelligence agencies, not only gives the chance to restore the violated rights, but also shows that information on all crimes will become known to the public, sooner or later. In order to avoid repeating the totalitarian practices of the past, it is important to inform society how the repressive modes had worked.

Only a full opening of the archives of the intelligence and security agencies can give answers, both to private matters of citizens, as well questions that have enormous value for the entire society. It is impossible to have a valid written history of the 20th century of any former Soviet country without studying these archives. The issue is also important in regards to freedom of information, as access to such documents is one of the components of an open government, especially in post-Soviet states, where openness should start from the archives. Moreover, the issue is relevant in terms of transitional justice as well. Soviet repressions remain one of the main traumatic points in the collective memory of post-Soviet countries. Publishing authentic documented data

on the repressed, as well as the individual stories, will support the process of the rehabilitation of the victims, deliver the truth to the families of the victims, and help restore justice and promote reconciliation within the entire society.

DESCRIPTION OF THE DEFAULT SITUATION

The most important communist secret service archive in Georgian SSR was the archive of the Georgian territorial organ of the Committee for the State Security (KGB) in Tbilisi.

According to official information of the Ministry of Internal Affairs (MIA) of Georgia, the history of the KGB archive follows: in March of 1921, according to a resolution passed by the Presidium of the Special Emergency Committee, or “Cheka”, the registration archive department was formed. Its task was to gather and preserve incriminating materials about numerous “enemies” and “dangerous elements” of the state that the Cheka had identified. Thirty staff units were selected for the registration archive department.

Between 1921 and 1992, 230,000 archival files were created. In the beginning of the 1990's the files were stored in the cellar of the 10th department of the Committee for State Security (KGB) of the former Georgian SSR. In 1990, mass anti-Soviet demonstrations took place in the center of Tbilisi, on Rustaveli Avenue right next to the MIA-KGB building. The demonstrators broke into the building and tried to seize the secret documents. The guards quickly dispersed the protesters. Shortly thereafter, the former KGB's central building caught fire in the Tbilisi Civil War of 1991–1992. As a result, 210,000 archival files were destroyed – about 80 % of the entire collection. The Documents that survived were soggy; most of them suffered water damage from the efforts to put out the fire. War and fire affected MIA archives and a large portion of the collection was destroyed as well. The remaining archival files from the former archives (approximately 20,000 units), most of them in poor condition, were provisionally stored in the cellar of the building of the state Archive. The files suffered even more damage from being stored in the cellar, and their rescue became an urgent matter.¹

Naturally, one can suppose that the complete content and capacity of this archive will remain unclear and the actual number of documents may differ from the official number. In general, this archive is subject to speculations and mystifications. According to the alleged witnesses and participants of the process: some of the important documents from the archive were transferred to a special KGB depository in Smolensk, Russia. A group of Georgian KGB employees escorted the documents, probably in order to sort and then to destroy them. The above sources claim they were the documents about intelligence developments, accounts and reports.² Some of the documents that were not destroyed,

1 The Archival Bulletin, N1, 2008, 6–8.

2 Documentary “Lost History” [*Dakarguli Istoria*], 2014, <https://www.youtube.com/watch?v=5vYlBOxhBj4>

were sent back, but the condition and legal environment of the remaining part of the documents in the Smolensk archive are unclear. Since 2003, there have been talks about the return of the documents (originals or scanned), but without any consequences. After the 2008 war, Georgia broke diplomatic relations with Russia and the archival institutions no longer have any contact.

Besides the KGB archives, the Ministry of Internal Affairs of Georgia is also a repository of the archive of Central Committee of the Communist Party of the Georgian SSR: a resolution passed by the presidium of the Central Committee of the Communist Party (Bolshevik) of Georgia on June 24, 1922, created the *IstPart Commission* (Commission on Party History). *IstPart's* primary mission was to collect, academically process and publish materials on the history of Georgia's Communist organs. In late 1929, under the instructions of the Lenin Institute, the Party History Institute established the Party Archive. On the basis of a resolution passed by the Central Committee of the Communist Party of Georgia on February 23, 1932, the Historical-Revolutionary and Scientific-Research Institute of Stalin was formed in Tbilisi. In June 1934, the Institute became a branch of the Marx-Engels-Lenin Institute of the All-Union Central Committee of the Communist Party, and later, the two merged completely. The *IstPart* archive, as well as the documents from the Central Committee local divisions, was transferred there. Between 1933 and 1937, the so-called IMELI (*IstPart Marx-Engels-Lenin Institute*) building was constructed on Rustaveli Avenue, Tbilisi, where the Party Archive was placed, and where it functioned until 2007.

The predecessor of the modern National Archives of Georgia was established in April 23, 1920, according to the law "About the establishment of Republic's Central Scientific Archive", issued by the Democratic Republic of Georgia. On July 1, 1921 the Revolutionary Committee of Georgia issued a decree "About the reorganization of the Archival Affair". After this, the archival field of the Georgian SSR was ruled according to Soviet legislation almost for seven decades.³ After Georgia regained independence, the National Archives was a subdivision of the Ministry of the Justice. The 29th December, 2006 law, "On the National Archival Fund and the national Archives" was adopted and the National Archives gained the status of a legal entity of public law, still supervised by the Ministry of Justice.⁴ During the Soviet Era, the predecessor of the National Archives had secret materials that were regulated differently and annually only a few people with the permission of the higher Party and KGB organs were granted access to the reading room of the secret materials.⁵ Lack of a suitable finding aid was an obstacle for getting the necessary document too: many titles in the finding aid, books and catalogues, were censored and hidden because of their not very "desired" historical background.⁶ Today the National Archives of Georgia doesn't contain any secret documents, and all their records are available for everyone, if it does not contradict with the state law on personally identifiable information.

Some of the researchers noted, that in order to restrict access to documents the archives tend to find loopholes in current legislation. One such loophole is the concept of "personal information". The National Archive network refer to the Law on the National Archives and Archive Fund, which prohibits third parties accessing documents containing "personal information" without the consent of the person or his/her heirs before the expiration of the 75-year period from their issuing. Referring to this clause, the archive arbitrary blocks all information after 1943,

often making it difficult to access materials from earlier years as well. The law does not consider that the legal concept of "personal information" implies any information that allows identifying the person (including the name and surname). As a rule, that part of the information that requires special control is often called "sensitive" or "personal", as it covers information about the private life, finances and health of an individual. The law does not consider these differences in terms and concepts, and blocks access to all information about all persons, regardless of who the person is – an individual or a civil servant. The situation is even aggravated by the indifferent attitude of the supreme authority towards the problems of collective memory, Soviet totalitarianism legacy and problems in the archival space.⁷

DESCRIPTION OF THE TRANSITION AND CURRENT STATUS

To preserve the remaining part of the KGB Archive from the repeated danger of fire, in April and May of 1995 the governing body of the Ministry of State Security provided space for the materials in the so-called "Moduli" scientific technical center. Preparation work for accommodating the archive materials was carried out in this emergency situation. After the "Rose Revolution" in 2003, attention to the KGB archives in Georgia increased again. As mentioned in the official statement of MIA, after 2004, the conditions of the archive depository started to improve. The merging of the Archive Department with the Ministry of Internal Affairs in 2005, and the combining of the archival materials was especially important. After this, the restoration and systematization of the documents began according to the archival rules and regulations. As it was stated in the "Archival Bulletin", the MIA official magazine, one of the priorities conducted by the Archive Department of the MIA, is searching for key information, and providing certificates for persons, who were subject to unjustified repression. These certificates help in getting court decisions, which assign the victims or their heirs some small pensions and other benefits.⁸

In 2002, the future winning, politicians raised the issue of lustration in their pre-election promises and wanted to implement the so-called "10 steps to freedom" – a project offered by several NGO's, but later, when they got into the Government, they quit all discussions about the issue. Their decision, not to develop the idea, was later criticized several times by the Georgian media.⁹ After time, discussions about the issue faded away from Georgian discourse, and no wider discussions took place, only few mentions in media. After the 2008 war between Georgia and Russia, the authorities began a new policy in the field of collective

3 See National Archives of Georgia, "Historical Background of National Archives of Georgia", <http://archives.gov.ge/en/history>

4 Law "On the National Archival Fund and the National Archives", Date of issue: 29. 12. 2006, <https://matsne.gov.ge/ka/document/view/22420>

5 Interview with the Deputy Director of the Central Historical Archive, Ketevan Kobiashvili, 2015.

6 Anton Vacharadze, "Problems of Archival Descriptions in Post-Soviet Countries", Case study according to the Central Historical Archive of Georgia, International Conference Proceedings, Radenci, 2016, 46.

7 Irakli Khvadagiani, "Guide-book – Open Access to the KGB Archives in the Eastern Partnership ('Georgia')", Kyiv, 2017, 29.

8 The Archival Bulletin, N1, 2008, 8–10.

9 See Tea Gularidze, "Deficiences of ruling Party were visable from day one", in *Civil.ge*, 28 February, 2004, http://www.civil.ge/geo/_print.php?id=6139

memory; the Soviet past, terror, and political repressions became a central issue for this project. The authorities decided to restructure and modernize the former Georgian SSR KGB archive. Resolution no. 150, passed by the President of Georgia on April 5, 2007, moved the collection to the KGB Archive Administration of the Ministry of Internal Affairs of Georgia.¹⁰

Noteworthy documents still preserved in the KGB Archive include those on the 1922–1924 Anti-Soviet uprising, the Civil War, the dissident movement, the events of March 9, 1956 in Tbilisi, the so-called “Mingrelian Case” and many others. After the inventory and digitalization of the KGB Archive, it became possible to tell the actual number of documents. According to the official guide-book issued by the archive management, the situation is as follows:

Fonds no. 1 Normative acts – consists of 1,134 the former “Top Secret”, “Secret” and “Non-Secret” volumes, which range in date from 1920 to 1990 (excluding normative acts from 1921). The following themes appear in the acts: personnel; operations against espionage, “hooliganism”, robbery, speculation, smuggling and hard drinking; secret services; transportation; weapons storage and security; internal affairs; internal discipline; the implementation of orders and resolutions; cases brought before the military tribunal; confiscations and requisitions; border security; censorship in state and private theatres; travel abroad; diplomatic property and mail; courier service; secret business correspondence; published journals; employment; association with foreigners; activities of the State Political Directorate (GPU); issuance of credit; secret correspondence; application reviews; prisoners statistics; issuance of diplomatic and transit visas; the organization of sport institutions; concentration/labour camps; rules against photographing/filming military units; military service law; literature storage and security; the rights of consulate representatives; regulation of sanitary inspections; sale of horses; storage of special construction materials; regulations concerning arrival and departure of foreigners to/from the USSR; dactylography (fingerprinting) of criminals; rules concerning human filtration; keeping of state secrets; operations execution; etc.

Fonds no. 6 Criminal Cases – The Archive of the State Security Committee of the Georgian SSR (KGB Archive) combines criminal cases of the Special Committee (Cheka), State Political Directorate (GPU), Joint State Political Directorate (OGPU), People’s Commissariat for Internal Affairs (NKVD), State Security Committee (KGB) and Ministry of Internal Affairs (MVD). These documents range in date from 1919 to 1989. The Archive holds 20,000 criminal cases, most of which are of persons tried under the articles on political crimes: Article 58-10 (anti-Soviet agitation/propaganda) and 58-11 (organizing anti-Soviet activities). The remaining cases are of persons tried under the articles on treason, espionage, terrorist acts, border violation, smuggling, illegal currency operations, drawing up illegal files, organizing mass disturbances, speculation and ordinary crimes under various articles of the criminal code.

These fonds also hold the criminal cases of the 9th and 11th Red Army in pre-Soviet Georgia. These unique cases include photographs, documents and personal correspondence. This fond also contains exclusive materials about the 1924 Anti-Soviet Uprising. These materials (4,100 cases) are dispersed throughout the files from 1925 up to 1927.

Fonds no. 6 contains 4,180 criminal cases of the 1937–1938 Great Purge.

Fonds no. 6 also includes criminal cases from the World War II and after (1939–1950). These cases were built on the basis of Article 58-1 (treason), and those convicted were sentenced to 25 years in prison. Family members of the “traitors” were also tried.

From the later decades, cases of note include those of the 1970s dissident movement in Georgia and Helsinki Group, and the twenty-two volume Hijackers Case (no. 8309) of the 1980s.

Fonds no. 8 Meeting Protocols – combines protocols of the board, presidium, special advisory and so-called “Troika” of the Special Committee (Cheka), State Political Directorate (GPU), Joint State Political Directorate (OGPU), People’s Commissariat for Internal Affairs (NKVD) and Ministry of Internal Affairs (MVD). This fonds consists of 491 cases created between 1921 and 1955.

Fonds no. 9 Filtration Materials – this fond collects state checking and filtration control materials from 1946–1951. After World War II, many combatants were checked and sent to the so called “Filtration Camps”, where they were subject to forced labour. They were charged with cooperation with the German Army.

A considerable part of this 45,000-case fonds was destroyed during the 1991–1992 Tbilisi Civil War. Only 1,300 cases remain.

Fonds no. 12 Executions – holds documents concerning death-penalty sentences from the Special Committee (Cheka), State Political Directorate (GPU) People’s Commissariat for Internal Affairs (NKVD) and Ministry of Internal Affairs (MVD) between 1921 and 1952. This fonds consists of 92 cases; 16,693 persons were executed.

Fonds no. 13 Special Exiles – this fonds collects the “Echelon Lists” of exiled persons and cases of “special exile” from 1941 to 1951.

The “Echelon Lists” provide the following information: number of family members exiled; names of adult exiles; number of underage persons; echelon numbers and railcars used for transport. People sent to exile from Georgian SSR included émigrés, so called “traitors of homeland and people”, former prisoners of the German army (prisoners of the WW II and civilians deported to Germany for forced labour), citizens and families suspected of cooperating with the Turkish secret services, and people of Greek, Iranian, Turkish, German, Kurdish and Armenian, Assyrian nationality / ethnicity. Minors and disabled people were also subject to exile.

On the basis of Resolution no. 744, passed by the USSR Defense Committee on October 8th, 1941, all ethnic Germans were sent to exile.

On the basis of Resolution no. 6279, passed by the USSR Defense Committee on July 31st, 1944, Meskhetian Turks, Azerbaijanis, Kurds, Iezids, Khemshil Armenians,¹¹ Adjarans, Lazs, Iranians and Turks were re-settled.

On the basis of Resolution no. 2214-856, passed by the USSR Council of Ministers on May 29th, 1949, Armenian, Greek, Assyrian and Turkish families were exiled from Georgia.

On the basis of Resolution no. 4893-21136, passed by the USSR Council of Ministers on November 29th, 1951, Georgians

10 Ministry of Internal Affairs of Georgia, “MIA Archive. History”, <http://police.ge/en/useful-information/mia-archive?sub=428>

11 *Meskhetian Turks and Khemshil Armenians* – Sunni Muslim population of Georgian and Armenian ethnicity from Meskhet-Javakheti and Adjara region of Georgia.

(primarily from the Adjara region), Azerbaijanis (primarily relatives of émigrés) and former prisoners of war and their families were sent to exile.

Fonds no. 14 Missing in Action – This fond collects lists of those missing in action, captured or killed during World War II. There are 105 volumes, preserving information on 120,000 persons. Each volume deals with approximately 1,200–1,800 individuals.

These lists include valuable information including soldiers' military ranks, the names of persons injured, captured or killed, and the whereabouts of the deceased.

Example: Grigol Grigorevich Avalishvili, date of birth – 1902; place of birth – Poti region; summoned by the Poti Regional Commissariat; title – Red Army Soldier; position – rifleman; military unit – 800th Rifle Regiment; mobilized – 5. 7. 1941; cause of death – died of injuries; location of grave – Orel Oblast, Dolgorukov Region, village of Stepanovka.

These documents are preserved in Podolsk, Russian Federation and MIA archives preserve its copies.

Fonds no. 21 Rehabilitations – Lists of people rehabilitated by the Supreme Court Board of Criminal Cases: The Prosecutor's Office of the Georgian SSR issued rehabilitation notices for citizens oppressed by the state political administration and the NKVD.

On January 16th, 1989, the USSR Supreme Council passed a resolution declaring all repressed persons rehabilitated.

The 60-volume fonds provides information on approximately 18,000 victims of repression.

These fonds also hold the lists of those rehabilitated by the Supreme Court Board of Criminal Cases. These lists were transferred from the National Archive.

Between 1955 and 1960, victims of politically-motivated repressions by Soviet authorities were rehabilitated by the Supreme Court Council of the Georgian SSR.

There are six volumes and 10,768 rehabilitations.¹²

The Archive of the Communist Party of Georgian SSR is one of the biggest archives in Georgia, preserving about 8,300 fonds, currently preserved at the MIA Archive. Archival fonds and materials are crucial to the study of the Party history, as well as the history of the Young Communist League (Komsomol). In recent years, interest in the Archive has grown daily and many important projects have been accomplished. An electronic database was created, interesting new data was found and made accessible to society. And over 8,000 photos were digitized. Documentary films, TV programs, publications in newspapers and magazines have incorporated Archive materials. Both Georgian and foreign researchers visit the Archive frequently, and the bilingual magazine *Archival Bulletin* is published on the basis of its holdings.¹³

The National Archives of Georgia is the largest holder of archival materials in the country. It is significant, not only for the local population, but for scholars worldwide, who study the history of Caucasus, Russian Empire, the First Democratic Republic of Georgia, the Establishment of Bolshevik State, the Georgian Soviet Republic, and the Period of transition from Soviet State to Democracy. The Archives registers about 1000 researchers a year, more than 100 of which are from foreign countries.

As I have mentioned, the MIA and the National Archives of Georgia do not keep classified and secret materials. The law "On the National Archival Fund and the National Archives"¹⁴ oversees the openness of the materials of the national archival fonds,

according to the principles declared in the "Law of Georgia on Personal Data Protection";¹⁵ except those materials containing state secret documents, documents that contain personally identifiable information, criminal trial materials, and in some cases, if 75 years from its creation haven't passed, or in other legislative cases that do not extend to it.

According to its official magazine, the Georgian MIA Archive Administration's web site is a perfect model of how the information can be accessed by anyone. Georgia, along with the Baltic States, was a pioneer in opening the archive of special-services. That was a result of the authority's political will. The web site of the Archive Administration was highly praised, as there should be many official documents and data available, which are still secret in neighboring countries. That web site can be, according to the magazine, a model for other countries.¹⁶ However, in criticism of the version that the official magazine offers, we can simply compare the web site with role-model archives, and we'll see that the search tool of the MIA archives web page isn't a successful example of digitization and transparency, and has a minimal degree of digital access.¹⁷ The same may be said of the website of the National Archives: the website is multilingual, with better design, but also has a minimal degree of digital access and more relevant for PR/marketing issues than towards researcher's needs.¹⁸

Also, some questions have emerged about the Archives and some problems are still unresolved. These questions were indicated in the analytical report "Open Access to the KGB Archives in the Eastern Partnership" issued in Kyiv in 2017:

- 1/ What has happened to personal records and personal files of the employees of repressive organs? Whether the archive and the file cabinet of the secret KGB officers were preserved or were burnt?
- 2/ What has happened to the KGB district departments of the Georgian SSR archives?
- 3/ Where is the archive and documentation of the frontier and internal troops?

In the process of writing this article, the author addressed these questions to MIA Archives' officials and received the following answers:

- 1/ The major parts of the records were burnt during the events. The officials suppose that one copy of every created document was sent to Moscow because this was the common practice. After independence, some officials continued to work in Security Service of Georgia and restored their own documents via service record books. Also, according to state law, increased social benefits and pension were provided for officials, who

12 Archive of the State Security Committee of the Georgian SSR, http://archive.security.gov.ge/security_fond.html

13 Ministry of Internal Affairs, "MIA Archive. History", <http://police.ge/en/useful-information/mia-archive?sub=428>

14 Law "On the National Archival Fund and the National Archives", Date of issue: 29. 12. 2006, <https://matsne.gov.ge/ka/document/view/22420>

15 Law of Georgia on Personal Data Protection, Date of issue: 28. 12. 2011, <https://matsne.gov.ge/ka/document/view/1561437>

16 The Archival Bulletin, N5, 2009, 112–114.

17 See The Archive of the Ministry of Internal Affairs of Georgia, <http://archive.security.gov.ge/>

18 See National Archives of Georgia, <http://archives.gov.ge/en/home>

19 Law "On Social Security of Persons Transferred to the Reserve from Military Bodies, Internal Affairs Bodies and the Special State Protection Service, and Their Family Members", Date of issue: 16. 10. 1996.

worked for the Security Service¹⁹ and because of this some of people requested and received the relevant notices from Moscow.

- 2/ All the materials from the district departments of the KGB were sent to Tbilisi for centralized registration and record keeping.
- 3/ These files are not kept in the MIA Archives. They suppose, that these materials were under supervision of the administration of the border district of South Caucasus, and thus were fully under the supervision of Moscow.

The other major problem is that although there is law that regulates the basic principles of archive business and archival institutions – already mentioned “On the National Archival Fund and the National Archives”, the MIA and other state archives, except for the National Archives, led by their own regulations, establish separate regulations or charters of internal order. Therefore, different archives have different working conditions and there is no unified strategy of physically storing documents, keeping records, processing search queries, and the usage of documents on scientific issues. Since 2009, there were no incidents of refusal to provide documents from the MIA archive. Internal order and prices of services are regulated by separate rules:

- 1/ The Decree of the President of Georgia No. 494 from 6. 9. 2011 “On the creation of the Ministry of Internal Affairs Archives” defines the functions and structure of the archives and its offices;
- 2/ The Decree of the Government of Georgia No. 428 from 16. 10. 2012 “On payment for services provided by the Ministry of Internal Affairs Archives”.

Both Georgian and foreign citizens are allowed to access the documents – the law does not provide any restrictions on the basis of nationality. But it also does not give any privileges to scientists, students, etc. Even individuals, who are the subjects of the records themselves, or their heirs, do not have any advantages in accessing documents. They pay very high prices to copy documents that relate personally to them or their family members. Usually the archive issues copies with “watermarks”, which according to scholars, practically excludes the full use of the “product”.²⁰

Currently the MIA Academy Archives is moving to a new building, which gives hope for better working conditions with the documents. Before moving the MIA Archives to a new building, the first MIA Academy Archives department (MIA-KGB Archive) was located in the State Security building, and the second department (Communist Party of Georgian SSR archive) was stored in former communications office building. Working conditions in the reading room are rather uncomfortable. There is not enough space, the hall is located next to the working rooms, and there are no stationary computers or the Internet.

LESSONS LEARNT

The fire in the KGB Archives, the wars and overall chaos in Georgia in the 90's, strongly influenced the public's attention to the comprehension of the Soviet past. There has been several wars in the country and there was no initiatives or discussions about the archives and the sensitive problems of Soviet history.

Only in late 90's, and the beginning of 2000's, did public initiatives about lustration, rehabilitation of victims of Soviet repressions, rethinking the Soviet past and the Red terror, start to

emerge. Even with the new era, and westernization of the country, these questions still remain.

After the Ministry of Internal Affairs Archives was reformed and opened in the late 2000s, the issue of transparency and access to the data became significant, and since then, the Archive and the authorities have always stressed that the Archive be absolutely transparent and provides modern services. Transparency of the MIA Archives is important and, besides the scholars, who work on various topics, the organization itself publishes a scientific popular magazine – *The Archival Bulletin*,²¹ as well as its online version. The topics in the magazine respond to Soviet repressions, the Soviet regime and the overall crimes committed by the state security apparatus.

During the 1990s, there was only one organization from civil society in Georgia – the Georgian “Memorial”, which tried to unite the members of repressed families, systematize information about the victims, collect family archives and disseminate information among general public by publishing them online. The organization still exists, but does not actively work anymore, and the online archive is not available. The Georgian society “Memorial” started one of the public initiatives about KGB Archive materials. It was engaged in the systematization of archival data regarding repressed persons, who were shot in the Georgian SSR in 1924 and 1937–1938. The Georgian society “Memorial” published this data in its own newspaper, but due to lack of resources and other reasons, the process soon stopped.

Since 2010, the non-governmental organization “Soviet Past Research Laboratory – SovLab” has carried out a number of researches and educational projects in the archives aimed at understanding the Soviet past: “Topography of Red Terror” – a historical and educational tour; a map with stories of the sites, places, houses of the old cities and of the people living there. In 2011–2012, the publications “Topography of Red Terror – Old Tbilisi”, “Comprehension of the Soviet Past – a Collection of Discussions”, “Lost History – the Memory of Repressed Women”, were issued. Two documentaries were also produced: “Great Soviet Terror – People's Stories”, “Stories Told Live – the Memory of Repressed Women”. Within the framework of this project, exhibitions were organized in various cities of Georgia. That same year, the organization launched the “Public Archive” project (archive.ge) – it is an open web-archive that collects oral stories and digitized versions of unique historical documents – personal archives of Georgian citizens (including those documents that are stored in the families of the repressed persons). In 2013–2017, the organization carried out such projects as: “Memorial Collection of the Constituent Assembly of the Democratic Republic of Georgia”, “Project on the Identification of Places of Mass Executions in 1920–1940s Years in Tbilisi, Telavi and Gori”, “History of the Political Red Cross of Georgia” and “History of the Local Governments Reform in the First Republic of Georgia in 1918”.²² In addition, “SovLab” initiated a draft bill that implies a possibility for the researcher to access the archives' reading hall with his / her own camera and inadmissibility of interpretation of the Law

20 Irakli Khvadagiani, “Guide-book - Open Access to the KGB Archives in the Eastern Partnership (‘Georgia’); Kyiv, 2017, 29.

21 See The Archive of the Ministry of Internal Affairs of Georgia, “The Archival Bulletin”, http://archive.security.gov.ge/archival_bulletin.html

22 Irakli Khvadagiani, “Guide-book - Open Access to the KGB Archives in the Eastern Partnership (‘Georgia’); Kyiv, 2017, 31–32.

on Personal Data by an archive towards its benefit. This draft bill, being introduced by two members of the Parliament minority, is still in the pending process.²³

Since 2009, the NGO Institute for Development of Freedom of Information (IDFI) launched several ideas with cooperation with the MIA Archives and the National Archives of Georgia. IDFI has valuable experience in collecting, analyzing, digitalizing and publishing archival documents. From 2011–2013, the organization was engaged in the launching of an electronic database of documents related to the events of March 9, 1956 – the massacre of citizens in Tbilisi during a demonstration, by Soviet Militia and troops. The next big project implemented with the MIA Archives was “Stalin Lists from Georgia”. In this database, information about more than 3.600 persons convicted during so-called Great Terror in 1937–1938 was digitized and put online. IDFI has a rich experience of hosting international conferences on archives. IDFI hosted several international conferences in Georgia, in cooperation with the MIA Archive, the National Security Archive at the George Washington University, and the US and International Society “Memorial”. The international conferences are aimed at establishing professional links between high specialist scholars, archivists, archive openness advocates across the post-Soviet space, sharing their experiences working in Soviet Archives, developing archival research, and dealing with state bureaucratic obstacles to information access. For several years, the IDFI has been advocating ideas of openness of archives in political and public circles. One of the steps was advocating for openness of the archives and advocating to the Ministry of Justice of Georgia, and the National Archives of Georgia, to abolish fees for getting original archival document, or digital copies in the reading room. In the framework of the Open Government Partnership (OGP), the IDFI advocated for the digitization of the catalogue of documents of the former KGB Archive of Georgia. The OGP committee positively assessed these novelties and the government officials always note the positive effort towards overall openness of the archives and freedom of information in general. In November 2017, the IDFI launched the project – “Enhancing Openness of State Archives in Former Soviet Republics”. The overarching goal of the project is to ensure the openness of Soviet archives in the post-Soviet era, and to create a network of scholars/NGOs in the post-Soviet era to work on issues of Soviet Archive openness.²⁴ On April 27–28, 2018, the IDFI hosted an international conference titled: Enhancing the Openness of State Archives. The event enabled more than 30 archivists (including directors of state archives, researchers, civil society representatives) from over 20 countries to share their experiences on the accessibility of archival documents to the public.²⁵

Many of these initiatives were supported by the Georgian archives and the organizations were granted free access to the archives. For the creation of the “Stalin’s Lists from Georgia” Project, the MIA Archive gave all the necessary data to the IDFI (several thousands scanned records) to analyse, process, and input into the Archive’s database. The National Parliament Library of Georgia put the database on its website;²⁶ it is now available online. IDFI started litigation proceedings against the National Archives because the institution didn’t provide publicly available information IDFI asked. Sovlab also started similar process because of the misinterpretation of the law about personally identified information. The results of the processes will be clear in the nearest future.

Public initiatives with the support of public institutions are priceless in the overall openness of archives, and have a primary impact on the promotion of archival openness and archival research. Archival openness and research can have a substantial impact on the transition in any post-soviet state. Georgia’s example, and the work done by the IDFI on openness of the KGB Archive, publishing archival catalogs of documents, as well as international research projects on Soviet Studies implemented in Georgia can be taken as one of the best practices, whereby certain type of documents are accessible to any interested individual. Such efforts not only promote openness on matters of the past, but of the present as well.

RECOMMENDATIONS

It is necessary to keep the fonds and documents of the regime archives physically safe: compromising the security and relying only on bureaucracy functionaries is inadmissible. There must be frequent social control mechanisms over archives, especially during the period of transition. Unfortunately, Georgia couldn’t avoid the tragic turnover of the situation during the period of transition and the majority of the archives were destroyed. Allegedly copies of the documents fell into the hands of the successor of the USSR, the Russian Federation, and according to today’s political conjuncture couldn’t be transferred to Georgia in near future.

Concerning the few archival materials that survived: the official standpoint of the MIA Archive is that there are no files that researchers cannot see. Since society cannot independently audit the archive’s repository and does not even undertake such attempts, no one can officially question this statement. The society has to trust the MIA Archive fonds inventory posted on the Archive website. We can clearly say that there is no publicly announced information request that the MIA Archive has rejected to access the records from its fonds.

Also, many independent scholars stress that a fee for using the archival materials, e.g. making copies, is very expensive. The IDFI thinks that allowing researchers to use their own cameras in the reading halls of the archives might solve this problem. But up to this day, neither the National Archives, nor the MIA Archives have made this option available.

For future development, revision and digitalization of documents preserved in the Russian KGB Archives is the most important issue for the Georgian society, but as of now, this task is impossible due to the lack of diplomatic relations between the countries and inaccessibility of the KGB Archive in Smolensk, Russia. Without these archives, there will always be controversy about the activity and history of the Soviet state retaliatory institutions. But this mission seems impossible for now, at least from the year 2018, and because of this, many questions in Georgian society will still remain unanswered.

23 See Soviet Past Research Laboratory, <http://sovlab.ge/en>

24 See “Enhancing Openness of State Archives in Former Soviet Republics, project of the IDFI Georgia”, https://idfi.ge/en/archival_studies_post_soviet_space

25 See “Access to State Archives Discussed by International Researchers in Georgia”, 1 May 2018, https://idfi.ge/en/access_to_state_archives_discussed_by_international_researchers_in_georgia

26 See “Stalins’ lists from Georgia”, 26 March 2018, <http://www.nplg.gov.ge/gwdict/index.php?a=index&d=26>

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LUSTRATION

GIORGI KLDIASHVILI

INTRODUCTION

In the 20th century, the administration of lustration started from the denazification of Germany after World War II by the decision of the Potsdam Conference. Lustration was carried out in the 90s in the states belonging to Central and Eastern Europe after the fall of the Soviet regime. In other words, lustration is carried out in order to make a switch from an antidemocratic regime to a political system with democratic political order and principles of rule-of-law.

Many of the post-communist states of Eastern Europe have chosen to enact a vetting procedure known as lustration to ban former secret police agents and their informants from holding public office. This practice is part of a global trend toward increasing accountability for human rights violations.¹

In some countries different laws on Lustration were adopted immediately or soon after the fall of the Eastern Block (Czech Republic – 1991, Baltic States – 1990–1995, Hungary – 1992); in some of them, this was done only after years of transformational change (Poland – 1997, Georgia – 2010, Ukraine – 2014). And in some countries, lustration was not adopted at all, like in the Russian Federation, Central Asian countries, etc. Lustration, the vetting of public officials in Central Europe for links to the communist-era security services, has been pursued most systematically in the Czech Republic, Hungary and Poland. Prior attempts to explain the pursuit or avoidance of lustration focused on the differing experiences of communist rule or transition to democracy. A closer examination finds that although the three countries in question had very different histories, there were identical demands for lustration in the early 1990s. These demands were translated into legislation at different times and varied considerably in the range of offices affected and the sanctions imposed.²

This article will try to review the lustration policy that was implemented in Georgia and analyze the implications of lustration for democratization and transitional justice.

First of all, the main reasons for lustration according to general principles and practical decisions in various countries similar to Georgia are:

- To disclose information with regard to secret officers, ones who assisted in the communist regime;
- Possibility to establish the principle of individual responsibility (mainly political);
- Removal from holding public posts of employees pertaining to former criminal regime;
- Initiation of criminal cases and criminal prosecution of persons guilty of mass killings and other crimes against humanity;
- To reveal and eliminate fascist/totalitarian symbols;
- Social and information functions.

Secondly, it has to be emphasized that the Parliamentary Assembly of Council of Europe, in its Resolution N1096 (1996) “On Measures to dismantle the heritage of former communist totalitarian systems” dated June, 27, 1996, grants the following:

- Firstly, guilt, being individual, rather than collective, must be proven in each individual case – this emphasizes the need for an individual, and not collective, application of lustration laws;
- Secondly, the right of defense, the presumption of innocence until proven guilty, and the right to appeal to a court of law must be guaranteed;
- Revenge may never be a goal of such measures, nor should political or social misuse of the resulting lustration process be allowed;
- 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.³

Georgia is obligated to fulfill the requirements and resolutions of the above resolution within the scope of the Association Agreement between EU and Georgia.

There are two major challenges in terms of lustration in Georgia. First, the lustration process in Georgia started too late, more than 20 years after the fall of the Soviet Union. Second, relevant documents about the staff, officers and former KGB related persons in Georgia are only partially available, making it difficult to find materials needed to ensure that the lustration process is carried out adequately. Unfortunately, the partial destruction of the former state security archive during the Tbilisi War of 1991–1992, as well as the reasonable suspicion that Moscow has taken the appropriate archival materials from Georgia, makes the full-scale lustration difficult. However, the Law of Georgia on Lustration (Law of Georgia Freedom Charter)⁴ is primarily aimed at dismantling of the totalitarian ideology and the recognition of the Soviet Union as a criminal regime, which is a necessary step towards reevaluating the past and recent history of Georgia.

DESCRIPTION OF THE TRANSITION AND CURRENT STATUS

The transition process varied in different states. The Latvian electoral law from 1992 required from all Parliamentary candidates to issue a written statement on the existence of, or lack of, their ties with the Soviet or other secret services. Since 1995, the law on elections of the Latvian Saeima prohibits the election of persons who were active in the Communist Party as well as a range of its partner organizations. Lithuanians created a special

1 Ryan Moltz, “Dealing with communist legacies: the politics of lustration in Eastern Europe”, University of Minnesota Ph.D. dissertation, 2014, <https://conservancy.umn.edu/handle/11299/162684>

2 Kieran Williams, Brigid Fowler, Aleks Szczerbiak, “Explaining Lustration in Central Europe: a ‘post-communist politics’ approach”, in *Democratization*, 2005, 12 (1), 22–43, https://www.researchgate.net/publication/248950483_Explaining_lustration_in_Central_Europe_A_'post-communist_politics'_approach

3 Paragraphs 12, 13 of the mentioned resolution.

4 Law of Georgia No. 1867, 25. 12. 2013, <https://matsne.gov.ge/ru/document/download/1381526/8/en/pdf>

parliamentary commission. Finally, in both abovementioned states former employees of foreign (Soviet or other) intelligence services may not stand for parliamentary elections.

In Hungary, according to the 1992 so-called “Zétényi-Takács law”, after fairly lengthy proceedings the Constitutional Court of Hungary arrived at a decision, the essence of which was as follows: the list of agents can be opened to society, if there is public interest in disclosing the past of the agents.

In Poland, when power changed from the communists to the opposition – “Solidarity” – the government guaranteed inviolability to former communists. The newly elected government announced that a “Thick Line” would be drawn between the past and present.⁵ But in 1997 the first Law “On Lustration” was adopted in order to check the connection of top executives with the security agencies from the communist period, and a fairly rigid model of lustration procedure has started. Since then, Poland checks all persons entering the civil service in terms of their involvement in the former communist regime in the country. The functions pertaining to such examination are entrusted to the Lustration Office of the Institute of National Memory. The corresponding procedure is applied to everyone starting from the President to the vice-principal of a higher educational establishment.⁶

Georgia was not able to adopt a law on lustration immediately after regaining independence. Although, in late 1980’s, and especially in early 1990’s, being a member of the KGB was a stigma in the society; and being accused of being an “agent of KGB” was the worst kind of insult. Open questions about the KGB and the persecution of its crimes have always stayed only on the level of rhetoric.

On April 9, 1991, after the re-establishment of independence by Georgia, during the short time of peaceful development and failed transition, which was due to the radicalization of political life and open confrontation between the radical opposition and the government of the elected president Zviad Gamsakhurdia, the reform of the state security system was forgotten. Moreover, during the escalation of the conflict, the new Georgian Ministry of State Security (based on the Georgian KGB) became a self-isolated and out of control body, refusing to comply with the President’s requests to provide information about secret informers of the KGB and blocking Lustration attempts, which later former high-ranking officials proudly remembered as a sign of professional ethic.⁷

Furthermore, members of the USSR intelligence service took a considerable part of the Archive of the Former Intelligence Committee to Moscow, and most of the remaining Archive was destroyed by a fire during the Tbilisi War. The former KGB’s central building caught fire during the Tbilisi Civil War of 1991–1992. According to the official version from the MIA, as a result of the fire, 210,000 archival files were destroyed – about 80% of the entire collection. The documents that survived were soggy, most of them suffered water damage from the efforts to put out the fire. War and fire affected MIA archives and a large portion of the collection was destroyed as well.⁸

Naturally, one can suppose that the complete content and capacity of these archives will remain unclear and may exceed official approximate numbers. In general, these archives give many reasons for speculation. According to alleged witnesses and participants of the process, some of the important documents from the archive were transferred to the special KGB depository in Smolensk, Russia. A group of Georgian KGB employees escorted the documents, probably in order to sort and then destroy them.

Witnesses claim that those were the documents on the line of intelligence developments, accounts and reports.⁹

After all of the failed attempts to initiate a law on lustration since Georgia regained independence in the 90s, public discourse about lustration law was relaunched in early 2000,¹⁰ after the country’s westernization process started following the “Rose Revolution” of 2003. Although officially the ruling political party the United National Movement supported the process, the draft law on lustration was presented to the Georgian Parliament on November 30, 2005 by the opposition. According to the draft, those who worked in the former Soviet special services, or held high positions in the Soviet Communist Party, or were serving as KGB agents would be banned from holding key positions in the Government, the President’s Administration, or the Defense and Interior Ministries. The list also included the Chair of the Soviet Georgian Television and Radio Broadcasting Committee.

Those wishing to run for elective office would have to disclose a full record of their past links with the Soviet authorities. Even if a candidate appeared to have collaborated with the ex-Soviet secret services, it would be up to the voters to decide whether to elect them.

But even the authors of the draft law admitted that it would be difficult to enforce this proposal, since documentation about those persons who were KGB agents, or collaborated with the secret services was not available in Georgia.¹¹

Although the law was not enacted in the Parliament, lustration became an active topic in political and public discussions.¹² Finally, a tangible lustration started in Georgia in October 2010, when a law on lustration (Freedom Charter) was initiated by Gia Tortladze, a minority MP, and was unanimously supported by the ruling United National Movement party.¹³ The Georgian Parliament adopted the law – Freedom Charter – in May 31, 2011. The Freedom Charter has three main tenets: strengthening national security, prohibiting Soviet and Fascist ideologies and removing any associated symbols, and creating a special commission to maintain a black-list for anyone suspected of collusion with foreign special forces. The law prohibits persons who were employed within the KGB of the USSR or were at the senior management level in the Communist Party of the Soviet Union from

5 Kieran Williams, Brigid Fowler, Aleks Szczerbiak, “Explaining Lustration in Central Europe: a ‘post-communist politics’ approach”, in *Democratization*, 2005, 12 (1), 22–43, https://www.researchgate.net/publication/248950483_Explaining_lustration_in_Central_Europe_A_'post-communist_politics'_approach

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13 George Topouria, “Georgia’s not so Freedom Charter”, Transparency International Georgia, 12. 7. 2011, <http://www.transparency.ge/en/blog/georgias-not-so-freedom-charter>

holding key positions in the state. The commission on lustration, established in accordance with this law, dealt with the issues of the eradication of communist symbols in Georgia, including the names of streets and squares, as well as the elimination of monuments, symbolizing the totalitarian past.

In 2011, the Parliament of Georgia unanimously adopted a law on lustration, which also forbade totalitarian socialist and Nazi symbols in public places. This law established work-related restrictions for the former employees of the intelligence agencies of the Soviet Union, as well as former public officials of the Communist Party and Komsomol (All-Union Leninist Young Communist League (AULYCL), or Komsomol). These people couldn't work in executive bodies and in judicial authorities. In addition, the above citizens were unable to hold positions as heads of higher education institutions.

According to Article 9 of the Freedom Charter, positional restrictions apply to those persons, who, from April 25, 1921 until April 9, 1991, served as:

- a/** Secret officials of the former Soviet Union's special services, from the day of Georgia's declaration of independence (April 9, 1991):
 - a/** Have refused to cooperate secretly with the special services of independent Georgia;
 - b/** Were dismissed from the office of secret officials for state security reasons;
 - c/** Broke off their relations with the special services of independent Georgia for unidentified reasons;
- b/** Officers of the former USSR State Security Committee, who, since the day of Georgia's declaration of independence (April 9, 1991), have refused to continue working with the special services of independent Georgia or who, for state security reasons, were refused work at the special services of independent Georgia;
- c/** Members of the Communist Party Central Committees of the former USSR and the Georgian SSR, as well as secretaries of district and city committees;
- d/** Members of the former USSR's and the Georgian SSR's Lenin Communist Youth Union Central
- e/** Committee Bureaus;
- f/** Chairman of the Georgian State Committee on Television and Radio Broadcasting.

The Freedom Charter restricts persons, listed in Article 9, from being elected or appointed to the following state positions:

- a/** "Members of the Georgian government, deputy ministers and ministry department heads, members of the National Security Council, members of Emergency Management Agency, members of Central Election Commission, government members of the Autonomous Republics of Abkhazia and Adjara, general auditor of the State Audit Office and his/her deputies, director of the National Archives and his/her deputies (Legal Entity of Public Law (LEPL) under the Ministry of Justice), head and deputy heads of the President's Administration, head and deputy heads of the Government Administration, head of the State Security Service, his/her deputies and department heads, extraordinary and plenipotentiary ambassadors, envoys, consuls, president and vice-president of the Georgian National Bank, representatives of executive authorities in administrative-territorial units (state trustee – governor), members of national regulatory bodies, executive director of LEPL National Statistics Office and his/her deputies.

b/ Operational unit employees of the territorial bodies of Ministries of Defense and Internal Affairs, and the State Security Service.

c/ Judges of the Constitutional and Common Courts of Georgia.

d/ Rectors of higher education institutions, vice-rectors, deans and department managers; General Director of the Georgian Public Broadcaster, his/her deputies and board members."¹⁴

The list is quite long. The legislator tries to cover the entire political and educational field, which could affect the safety of the state and the future generation. This list partly draws from the experience of former socialist countries; however, it can be extended further to cover more unregulated areas, such as the prosecutor's office, public schools, and so forth. For example, Poland's lustration law also applies to prosecutors.

At the same time, the Charter guarantees the privacy of those persons who admit that they have secretly cooperated or had covert ties with the former Soviet special services. A similar approach is used in Lithuania, where, according to the lustration law, special service employees, who admit their connection with secret services, will be guaranteed confidentiality, but be prohibited from holding state positions.¹⁵

The belated adoption of the law was criticized by some scholars: As doctor of law science, Volodymyr Goshovskiy mentions in his article, as of 2010 neither revanche of communist regime nor influence of anti-democratic ideas associated with it constituted a significant threat. Instead, Georgia encountered a problem of direct armed aggression on the part of the Russian Federation. Why there was no focus on the removal from office of individuals who were involved in the promotion of carrying out actions against the territorial integrity and independence of Georgia by intelligent services of aggressor state on the basis of individual punishment and why the interim measures with regard to the removal of persons suspected of such actions were not introduced – is a rhetorical question.¹⁶

The implementation of the law was criticized by a local NGO, the Institute for Development of Freedom of Information (IDFI). In its article – "Failed Lustration Process in Georgia", authors underlined why the process had stayed "on paper".¹⁷ In order to realize the law's objectives, the Charter of Freedom entailed the creation of a special Commission. According to Article 7 of the law, a commission was to be created at the State Security Service of Georgia (which used to be under the Ministry of Internal Affairs at the time of the adoption of the law) that would collect data on people, who secretly collaborated with the special agencies of the Soviet Union, or on people who are believed to have collaborated with the Soviet agencies through information obtained by legal means. The composition of the Commission (except for members proposed by factions represented in the Parliament of Georgia) and its Code of Conduct shall be set out in regulations developed and approved by the head of the State Security Service of Georgia. The Charter promotes the participation of Members

14 Law of Georgia No. 4717, 31. 5. 2017, <https://matsne.gov.ge/en/document/view/1381526>

15 David Kosař, "Lustration and Lapse of Time: 'Dealing with the Past' in Czech Republic", Eric Stein Working paper No. 3/2008.

16 Volodymyr Goshovskiy, "The genesis of lustration in the world and its significance for the development of law-based society", in *Leges Si Viata*, January 2017, 34–45.

17 "Failed Lustration Process in Georgia", Institute for Development of Freedom of Information, 25. 1. 2016, <https://idfi.ge/en/failed-lustration-in-georgia>

of Parliament in the commission. It is not a legally binding provision for Parliament; however, it is clearly noted that MPs (one member per faction) have the opportunity.

Unfortunately, publicly available information suggests that factions in the existing Parliament (elected in 2016) have not used the opportunity to send their representatives to the Commission under the State Security Service. The composition of the Commission was most recently updated on May 25, 2018; new members included high-ranking officials from the State Security Service and the Ministry of Internal Affairs, with no mention of MPs as members.

On December 2, 2015, the IDFI contacted the Ministry of Internal Affairs and requested information about the creation of the commission and its activities prescribed by the Charter of Freedom. The IDFI wanted to collect data about the following: how many meetings the commission conducted, whether or not a register was created on secret collaborators and employees of the Soviet intelligence agencies (the ones who voluntarily revealed themselves), and how many people are registered there, etc. The Ministry of Internal Affairs forwarded the request to the State Security Service. On December 30, 2015, the IDFI received a response from the latter institution. According to the letter, the commission, based upon the demands of Charter of Freedom, has only met once on May 28, 2014, and the meeting discussed the mechanisms of creating the register required by the Charter. According to Order N167 (Adopted on February 28, 2014), Article 3, section 1, the commission was obligated to meet at least once every three months. The letter also noted that Order N167 that orders the creation of a commission and defines its provisions was annulled by Order N561 of the same Ministry on July 30, 2015. Therefore, taking into account the fact that the commission was created approximately 3 years after the Charter of Freedom entered into force, this means that the commission only existed for a year and 5 months and convened only once.

According to the Legislative Herald of Georgia, on December 21, 2015, the Head of the State Security Service adopted a new order (Order N115) on the creation of the Commission. On December 30, 2015, a new order was adopted (N122) that set May 1, 2016 as the date of the beginning of the work for the Commission. The regulation of minimal mandatory commission gatherings was also changed; this regulation no longer exists.

In January 2018, the IDFI received information¹⁸ from the State Security Service of Georgia indicating that in 2016–2017, the Commission had considered an unspecified number of appeals to look into candidates for high-level positions regarding their connection with Soviet authorities; the Commission did not find any violations of the law. In addition, in 2016, the Commission asked two entities to stop displaying communist totalitarian symbols, and provided requested information to three entities in 2017.

In order to conduct a real lustration process in Georgia, as it was conducted in other former Socialist countries, the IDFI believes it is necessary to recruit an effective commission, which will be interested in implementing the principles of the Charter of Freedom. As of today, the commission implemented on the basis of the law is not functioning and the State Security Service as well as the Parliament of Georgia cannot ensure the Charter's translation into practice.¹⁹

As it was indicated above, one of the main goals of the law is “to provide preventive measures against the principles of communist totalitarian and national socialist (Nazi) ideologies;

remove the symbols and names of cult buildings, memorials, monument, bas-reliefs, inscriptions, streets, squares, villages and settlements of the communist totalitarian regime, as well as prohibit the propaganda instruments and other means of communist totalitarian and national socialist (Nazi) ideologies”. Starting from 2013, Stalin monuments were erected in violation of the law in several places in Georgia by local citizens and soon afterwards many of them were vandalized using red paint.²⁰ Because of numerous similar cases and the division of public opinion towards the personality of Stalin, MPs Levan Berdzenishvili and Tamar Kordzaia initiated amendments. According to MP Berdzenishvili, there were several instances of the restoration of Stalin monuments and the need for such a process to be under the regulation of one particular commission.²¹ To make the law more practically effective, in late 2013, the Charter was amended, mainly with the following changes:

1/ Definitions of “Communist Totalitarian Ideology” and “Communist Totalitarian Symbols” were adopted.

2/ The following functions: “to ensure security and democratic development of the country, the secret employees of former USSR special services, registration of officials appointed by this Law, voluntary recognition and registry production, as well as prohibit communist totalitarian and fascist ideologies and propaganda, and other aims defined by the Law” were transferred from the State Security Agency to the Ministry of Internal Affairs.

3/ If, after a warning from the state commission, the provision banning the public display of totalitarian symbols is still violated, the action will carry a financial penalty of GEL 1,000.

In practice, there have been several cases in recent years when the State Security Service of Georgia warned both leftist (Non-commercial Legal Entity – Public Union Socialist Georgia)²² and neo-fascist groups (Georgia's National Unity)²³ in using totalitarian symbols in public places, there is no information if these organizations were fined according to the law.²⁴ One thing is certain; the work of the commission is far from effective. The commission assembled only once, and to this day there are streets in Georgia named, not only after Stalin but also, after numerous communist leaders and public figures that is contrary to the law.

18 Information received by IDFI on January 17, 2018 in response to the FoI request submitted to the State Security Service of Georgia.

19 “Failed Lustration Process in Georgia”, Institute for Development of Freedom of Information, 25. 1. 2016, <https://idfi.ge/en/failed-lustration-in-georgia>

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CONSTITUTIONAL COMPLAINT – GEORGIAN CITIZEN NODAR MUMLAURI AGAINST THE GEORGIAN PARLIAMENT

On July 24, 2013, Georgian citizen Nodar Mumlauri filed a complaint with the Constitutional Court, stating that Article 9, Paragraph 1, Subparagraphs c) and d) of the Freedom Charter were contrary to the rights guaranteed by the Constitution. A Lawyer of the Institute for Development of Freedom of Information (IDFI), Davit Maisuradze, examined the decision and wrote an article in order to better understand the restrictions made by the Freedom Charter and the resolution part of the Constitutional Court ruling.

The Constitutional Court complaint was filed by Nodar Mumlauri against the Parliament of Georgia. In the constitutional claim, the applicant pointed out that on June 17, 2013, he participated in the competition for the vacancy of Governor of Telavi municipality, but was unjustifiably removed from the competition, and told that he would be unable to participate based on the above mentioned Article 1, Paragraph c) and d) of the Freedom Charter. The plaintiff indicated in the constitutional claim that he had been a member of the Central Committee Bureau of the Lenin Communist Youth Union of the Georgian SSR, and later worked as secretary of Telavi district committee of the Communist Party. In his constitutional claim the plaintiff pointed out that:

- The restriction on holding state positions prescribed by the disputed norms constituted an act of political retribution, which could be used repeatedly after any parliamentary elections.
- Persons who were restricted from holding state positions listed in the Freedom Charter held important state positions and made decisions prior to the adoption of the Freedom Charter (May 31, 2015).
- The disputed provisions impose the above restriction on persons based solely on the fact that they lived during the Soviet regime – a one-party state that did not leave individuals any alternatives.
- Instead of an absolute prohibition, persons applying for state positions should be examined in terms of their cooperation with Soviet secret services.
- The Freedom Charter did not specify a limitation period, and introduced a permanent ban on holding state positions.
- The Communist Party has not been banned by independent Georgia.
- The above restrictions could have been justified for a period immediately after the collapse of the Soviet Union.
- The disputed norms are contrary to Article 17, Paragraph 1 of the Constitution (the inviolability of a person's honor and dignity), since they do not differentiate between high and low level positions of Soviet Union secret services. Article 17 of the Constitution guarantees a person's right to be treated ethically and with dignity, which was being violated by the disputed norms.
- The disputed provisions contradict Article 14 of the Constitution (all people are born free and equal before the law regardless of race, color, language, sex, religion, political or other opinion, national, ethnic or social origin, property and title, place of residence) by treating individuals differently based on their political views and place of work, depriving them of the opportunity to hold specific state positions based on

their past political activities and the ability to contribute to the country's development. In other words, the disputed provisions were of a discriminatory nature.

- The disputed provisions created an unjustifiable barrier and violated Article 29, Paragraph 1 of the Constitution, according to which, every Georgian citizen has the right to hold any public office, if they meet the requirements set by the law.

The defendant, a representative of the Georgian Parliament, based their argumentation on Georgia's transition period after Soviet collapse, and stated that former party officials had a strong impact on domestic policy.

The respondent also pointed out that the contested provisions intended to prevent negative consequences rather than hold someone responsible, since state positions mentioned in the Freedom Charter are positions of the highest authority that are responsible for important decisions related to the country's internal and foreign policy.

The respondent argued that the plaintiff and other persons in similar circumstances held positions (described in the disputed provision) during the period of the former USSR and, therefore, were creators or supporters of the communist totalitarian regime. The actions or inactions of such persons made possible a regime that is unacceptable for everyone and deserves to be condemned.

The respondent also indicated that the archive data was artificially changed or destroyed, so there was no accurate list of persons who secretly collaborated with the special services of the Soviet totalitarian regime. Consequently, it was impossible to find out what additional work these people performed. According to the respondent, "in the fight against the Soviet totalitarian regime, it's important to take into consideration the whole system and not just individual".

The respondent noted that the disputed provisions were not contrary to Article 14 of the Constitution, since it differentiated between persons of different status. Persons mentioned by the disputed norms are subjects with a distinctive status that are connected to the communist regime and held state positions in the former Soviet Union. The defendant pointed out that the plaintiff had incorrectly understood the content of the first paragraph of Article 17 of the Constitution, since "the public opinion related to an individual is not protected by Article 17". The respondent pointed out that the disputed provisions are not contrary to Article 29 of the Constitution, since the right to hold a state position is not absolute, and must meet the requirements established by law.

The Constitutional Court ruling states that the defendant also referred to the legislation of the former Socialist Republics, which imposed restrictions on certain state positions.

The Constitutional Court ruled the following:

- 1/ The Constitutional Court was going to rule on whether the disputed provisions indefinitely banning certain individuals from holding state positions contradicted Article 17 of the Constitution.
- 2/ "The standing constitutional and legal order is established on diametrically opposed values of the communist system. The principle of the constitutional state, the rule of law, respect for human rights and equality are fundamental values of the Georgian state and its constitutional system."
- 3/ In view of recent history, the state may have a legitimate interest not to allow the recovery of the totalitarian regime in the country. However, this must be carried out by legal mechanisms that are based on rule of law and human rights.

If such mechanisms do not meet constitutional requirements, “the state itself will become like the regime that it is trying to suppress.”

- 4/ Article 17, Paragraph 1 of the Constitution guarantees basic human honor and dignity as essential attributes of social identity and natural rights. “Respect for human dignity means recognizing each human person, and its deprivation or restrictions is unacceptable.” However, the existence of regulations limiting rights protected by the Constitution does not lead to the violation of this right. In each individual case, the Constitutional Court, establishes the compliance of disputed provisions with rights guaranteed by the Constitution by considering the content, goal and intensity of restriction of a right.
- 5/ According to the plaintiff’s position, banning the ability to hold certain positions is a violation of one’s honor and dignity, since this equates the plaintiff to those Soviet intelligence officials, who refused to work for the security services of independent Georgia.
- 6/ It is possible that not all people holding managerial positions were directly involved in the activities of the Communist Party of the Soviet regime, and could have even fought against it, as was made evident in 1991–1992, when some of these officials fought for Georgian national interests and not for narrow party ideology. However, “the disputed norms restrict such persons’ right to occupy state positions.”
- 7/ “The disputed provisions establish a blanket ban without considering the scope of activities/authority/competence of those persons who set the internal/external ideological policies of the Communist Party, as well as on those individuals, who did not have the authority to change the situation and influence the decision-making process granted to them by law or practice.”
- 8/ The ban was also applied to persons who formally held the positions (for a short period of time) and did not have time to start performing their duties. Also, according to the disputed provisions, the decision to restrict a person from holding a state position does not have to be based on individual reviews of each person’s activities and functions. The restriction to hold state positions automatically applies to all persons who had previously held a party position.
- 9/ As time passes, the risks and challenges that served as the basis for adopting the disputed provisions, lose relevance. The disputed provisions prevent the plaintiff to hold a number of state positions without an assessment of how realistic the above threats are today, and to what extent is the plaintiff still the same threat to state security.
- 10/ The Court also considered it necessary to consider the social consequences of the disputed norms. The court stated that the disputed norms may lead to social exclusion of certain individuals or groups, therefore, the implementation of these regulations holds a risk of stigmatization.
- 11/ The permanent restriction to hold state positions was clearly conceived as a punitive rather than a resocialization measure. In addition, these measures could not serve as an effective means of preventing threats. The Law on Public Service provides for the possibility even for persons that have committed grave crimes to hold public service positions after serving their sentence.
- 12/ For certain individuals who had occupied high positions in the Communist Party, there may be legitimate public interest in prohibiting them to hold high state positions. However,

the risks coming from these few people cannot serve as constitutional-legislative grounds for a blanket ban.

- 13/ Through the disputed provisions the state has used individuals as a means of achieving its specific goal, and treated them as objects rather than subjects of law. “The state is using these people as the means for protecting national security and achieving the objective of overcoming the communist totalitarian ideology. Such treatment is not consistent with the constitutionally guaranteed right to dignity.”
- 14/ On the basis of all of the above, the Constitutional Court ruled that the disputed norms were contrary to Article 17 of the Convention.

The Constitutional Court also examined the compliance of the disputed norms with Paragraph 1 of Article 29 (“Every citizen has the right to hold any public office, if it meets the conditions established by law”) and Article 14 (all people are born free and equal before the law regardless of race, color, language, sex, religion, political or other opinion, national, ethnic or social origin, property and title condition, place of residence) of the Constitution.

Regarding Article 29, Paragraph 1 of the Constitution, the Constitutional Court noted that the article guarantees every Georgian citizen the right to hold an elected as well as appointed position. At the same time, the court pointed out that this right was not absolute, and that the Constitution provided for the possibility of introducing legislative restrictions on the basis of legitimate goals. The legislator may introduce special requirements for state positions. However, when restricting the right to hold state positions, the legislator is obligated to maintain the balance between the legitimate purpose and employed means.

The Constitutional Court noted in its decision that the “primary requirement of Article 29 of the Constitution is to determine reasonable, fair and non-discriminatory terms for holding any state position. At the same time, the legislation may determine different conditions for holding each specific position based on the nature of the position, its functions, and importance, since these positions are of special importance in terms of the country’s independence, stability and security.” Since the Freedom Charter aims to ensure national security and safety by overcoming communist totalitarian ideology, in certain cases, due to increased public interest, it is possible to limit Article 29 of the Constitution, which guarantees the right to hold state positions, and create a legal order, which will be conducive to achieving the legitimate aim by avoiding potential risks.

Due to the above-mentioned circumstances, the Constitutional Court found that the disputed provisions are not in contradiction with the requirements of Article 29 of the Constitution.

The Constitutional Court also reviewed compliance of the disputed norms with Article 14 of the Constitution (all people are born free and equal before the law regardless of race, color, language, sex, religion, political or other opinion, national, ethnic or social origin, property, title condition and birth, place of residence).

In particular, it is noted in the decision of the Constitutional Court that the Constitutional Court considers it important to separate political views and political activity. “Individuals have private political views whether or not they hold positions in a political party and/or are members of political unions. A person may have political views without joining any political organization as well. Political activity is considered to be a person’s involvement

in political unions, and/or agreeing with the ideology/worldview of a political union and being involved in trying to achieve its goals.”

The Constitutional Court noted that the disputed provisions do not provide different treatment on political grounds. The restriction set by the disputed norms applied to holding political leadership positions in the Communist Party mentioned in Article 8 of the Freedom Charter. Therefore, the Constitutional Court stated that the disputed provisions do not contradict Article 29 of the Constitution.

The Constitutional Court ruled invalid Article 8, Paragraph 1, Sub-paragraph c) and d) of the Freedom Charter, which the Court considered as contrary to Article 17, Paragraph 1 of the Constitution.

Therefore, positional restrictions were removed from those persons who were members of the Communist Party Central Committees of the former USSR and the Georgian SSR, secretaries of district and city committees, and members of the Lenin Communist Youth Union Central Committee Bureaus from February 25, 1921 until April 9, 1991.

The Constitutional Court ruling discussed above can have an important impact on contemporary Georgia.²⁵

LESSONS LEARNT

The Constitutional Court judges made the correct decision to impose a permanent restriction of holding state positions on certain individuals (listed in Article 9 of the Freedom Charter) without examining their functions and activities during the Soviet regime. A parallel can be drawn with Poland, where after adopting the lustration law people related to Soviet special services were prohibited from public service for a period of 10 years.

Also, it is important to differentiate working with the Communist Party, and cooperation with special services. All former Soviet Socialist Republics or socialist countries impose stricter regulations for those individuals who collaborated with security services. In several countries (e.g. Czech Republic, Poland, etc.) the list of these people is public and available to any interested person.

It is important that the Court did not consider these provisions incompatible with Article 29 and Article 14 of the Constitution. The court exhibited a positive position that restrictions made under the Charter do not lead to discrimination on political grounds, but rather is based on the activities or inactivity of certain individuals during the totalitarian regime, and that the right to hold state positions listed in the Charter cannot be more important than national security.

The Constitutional Court ruling discussed above also contains important recommendations that should be taken into account by Parliament. Specifically, changes should be made to the Freedom Charter so that persons listed in Article 9 are being examined in terms of their past work activities and functions prior to applying the prohibitions. Even though the Constitutional Court declared invalid Article 9, Sub-paragraphs c) and d) of the Freedom Charter, the basis for the decision was the blanket nature of the ban that prohibits members of the Communist Party Central Committees of the former USSR and the Georgian SSR, secretaries of district and city committees, and members of the Lenin Communist Youth Union Central Committee Bureaus

from February 25, 1921 until April 9, 1991 to hold state positions listed in Article 8 without individual evaluation. Moreover, the above restriction is permanent. Therefore, if the legislator introduces individual examination of the activities of these people, and makes the restriction temporary (e.g., a 10-year term, as it is in Poland), it will be possible to modify the invalidated norms and reintroduce them in the Freedom Charter. The blanket prohibition can still apply to former employees of Soviet special services that meet the requirements of Article 9 (the plaintiff stated that his low level position was being equated to an employee of special services, which was violating his dignity, since he was trying to distance himself from them), however, other officials should be subjected to individual examinations and the limitation period.

The Freedom Charter includes many other regulations that, for example, aim to combat fascist and Soviet symbols. This issue is extremely important due to the increased frequency of recent attempts to return Soviet monuments (e.g., statues of Stalin). There are many places remaining in Georgia that have streets named after totalitarian leaders (e.g., Stalin Street).

In addition, Article 11 of the Charter provides for the openness of information of those persons, who apply to the election commission to be registered as a candidate. If the election commission determines that the candidate is a person who has collaborated with former Soviet special services, it will address the election administration. If the electoral administration registers the candidate anyway, and the person does not withdraw their candidacy, the commission will publish the secret information about this person. The lustration laws of former socialist countries (for example, Hungary) also apply to persons who wish to hold electoral positions.

The Freedom Charter provides for setting up a Commission inside the State Security Service of Georgia, which also includes members nominated by parliamentary factions. Essentially, the charter implements its regulations through this Commission.

Having a fairly rigid model of lustration procedure can harm the interests of certain citizens and it will overshadow the full process of lustration. The process should be fully harmonized with Resolution 1096 (1996) “On Measures to Dismantle the Heritage of Former Communist Totalitarian Systems” of the Parliamentary Assembly of Council of Europe and its principles.

The biggest challenge facing Georgia is that the former KGB archives are still held by a country that is hostile towards it. It is not proven that these documents will be used as part of a political agenda and against Georgian politicians or public figures, but in the future, there is the risk that the Russian KGB, that according to recent research is a state retaliatory body, can use it for its own political reasons.

RECOMMENDATIONS

In case of Georgia, the following progress was made on the principles of lustration:

- To disclose information with regard to secret officers, ones who assisted in the communist regime – isn’t/can’t be fulfilled;

25 Davit Maisuradze, “The Effects of the Constitutional Court Ruling of October 28, 2015 on the Freedom Charter of Georgia”, Institute for Development of Freedom of Information, December 2015, <https://idfi.ge/public/upload/Davit/court-ruling%20ENG.pdf>

- Possibility to establish the principle of individual responsibility (mainly political) – isn't/ can't be fulfilled;
- Removal from holding public posts of employees pertaining to former criminal regime – isn't/ can't be fulfilled;
- Initiation of criminal cases and criminal prosecution of persons guilty of mass killings and other crimes against humanity – isn't/ can't be fulfilled;
- To reveal and eliminate fascist/totalitarian symbols – is fulfilled;
- Social and information functions – is fulfilled partially.

The “Thick Line” policy that failed during the early 90's in Poland will fail in other countries as well because there will always be people who will consider it as a lenient approach towards communist regime and an excuse for state criminals. Despite attempts to “forgive and forget” by the first two Polish governments, the issue of dealing with the communist past did not go away. Even though it was not officially declared, Eduard Shevardnadze's government (1995–2003) in Georgia was following the same principle and the subsequent government delayed the process for 7 years.

Time is crucial in the process of restoring transitional justice. Delays only show the unwillingness of political actors and strengthen rumors that the process is being deliberately postponed.

The best way is to adopt best practices and success stories. Practical guidelines for the implementation of lustration should be implemented and strict principles should be approved.

In our point of view, the establishment of a proper institute for studying this issue is also very important. Examples include the Institute for the Study of Totalitarian Regimes and the Security Service Archives in the Czech Republic and Lustration Office of the Institute of National Memory in Poland.

Widespread access to previously secret documents about secret service agents is the most important point of the lustration process. Even though there was no possibility to adopt a law on lustration and fully examine crimes against citizens in Georgia immediately after regaining independence due to war and the burning of archives, the willingness to declare the Soviet State as a criminal regime is nonetheless crucial for Georgia's road towards westernization democratic values.

The lustration process in Georgia generally failed and there are objective and subjective reasons: the lack of relevant documents, the delay in time, and the lack of a strong political will. Despite this, the law on lustration is still a very important step forward and a statement the country made in favor of eradicating totalitarian values and the recognition of the Soviet Union as a criminal regime. All of this is clearly necessary to re-evaluate modern history and the recent past.

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INVESTIGATION AND PROSECUTION OF THE CRIMES OF THE REGIME

IRAKLI KHVADAGIANI

INTRODUCTION

During the last years of Soviet rule in Georgia and the short painful transition, the crimes of the communist totalitarian rule were always a topic of public discussions (after 1989). However, anti-Soviet rhetoric, questions of responsibility, and the need for prosecution never transformed into any real action, and were never implemented at the legislative level. Symbolic attempts to investigate any concrete “cases” of crimes were not sufficient and were always combined with issues of lustration and the dismantling of the Soviet state security apparatus. Finally, after failing the “projects”, the attempt to persecute Soviet crimes was left without real changes.

SYSTEM CHALLENGES BLOCKING INVESTIGATION AND PROSECUTION IN SOVIET GEORGIA

Today it's difficult to identify the character and the level of sensibility of citizens regarding Soviet crimes at late 1980's. They are perhaps ambivalent about the issue, since the active phase of Soviet mass terror (1920–1950's) has long since passed. There are no documentary sources or new researches attempting to illustrate the real numbers and the horrors of mass terror in Stalin's time. Information about these crimes are based on underground, collective knowledge and personal family experiences. The gaps in memory lead citizens to only imagine the Soviet terror, without concrete personalities and direct responsibilities for crimes.

After the death of Joseph Stalin and Lavrenty Beria in 1953, there was a mass purge of “Beria's guards” in the state security system. As a result of this, in 1955–1956 some former officers of NKVD-MGB¹ faced an open trial for “mass violation of socialistic orders in 1937–1938”. It was a minor prosecution for crimes in 1937, but generally rather symbolic. The trial was organized as part of Nikita Khrushchev's agenda to explain Soviet mass terror in 1937 as the personal crimes of Stalin and Beria and “their” people in state institutions, but not as systemic violence. In 1980's, after many decades, no matter how difficult it is to imagine, people with direct responsibility for the mass terror of 1920–1950 were still alive.

Soviet mass terror of the late 1930s may seem like the deep past, but there have been examples of human rights violations, political terror and mass crimes in the recent past as well. Some have been linked with the suppression of dissident movements, some of them with internal battles in the Georgian Communist Party, and “mafia wars” kinds of reprisals, or with the violations against the protest movement in 1989. In the following text we outline some of them, emphasizing that in transitional times, there were enough “hot” and painful cases in Georgian society, which became part of public discussion. These cases might be examples for new investigation and prosecution:

THE GAIOS KERATISHVILI'S CASE

Gaios Keratishvili was bishop (metropolitan) of the Georgian Orthodox Church in 1970's. In 1977 he was considered for the future patriarch of Georgian Orthodox Church, but another bishop, Ilia Shiolashvili (patriarch Ilia II), was elected. A struggle for power from the Keratishvili side was obvious, and there were also several other scandals in Georgian church during 1977–1978. On 25th May 1978, Keratishvili was arrested, and accused of the robbery of historical icons from the Georgian church and sentenced by the court to 15 years in prison. At the time, there were a variety of versions and conspiracies around his arrest, splitting the church and creating an internal battle in the Communist Party of Georgia as a new secretary of the Georgian Communist Party, Eduard Shevardnadze, was cleaning up the circle of former secretary, Vasil Mzhavanadze, who was deeply involved in corruption, and Keratishvili was considered to be close to him. In spite of plenty of questions and versions surrounding Keratishvili's arrest, there was not any attempt to investigate his case again when he was released from prison after an amnesty in 1989.

THE NAZI SHAMANAURI'S CASE

Nazi Shamanauri was freelancer journalist of the communist newspapers from the Dusheti region (north-north east part of Georgia) in 1970–1980s. She was living in the countryside and witnessed complex problems in the collective farm system resulting from the total corruption of Party structures and state institutions. When she began to print articles in the press about the problems, she was blackmailed and ignored. Later, when she tried to express her protest in a national celebration openly to crowd in 1983, she and her mother were arrested and sent to a psychiatric hospital. There she went on a hunger strike and became the victim of violent pressure and torture. As result of this, Nazi Shamanauri finally died in the hospital. Although her case was widely known in the 1980's as an illustration of the corruption and brutality of the Soviet regime, there was no initiative to investigate and persecute the culprits.

THE “AIRPLANE'S BOYS”

In 1983, a group of young artists hijacked an airplane flying from Tbilisi to Batumi, trying to force the pilots to cross the border with Turkey. The airplane's crew managed to subdue them; however, during the clash there were casualties on both sides as well as among passengers. The airplane returned to Tbilisi airport, where Special Forces confronted it and freed the hostages; during the operation some of the hijackers and passengers were injured. The court sentenced to death a majority of the hijackers,

1 NKVD (НКВД) – Peoples Commissariat of Internal Affairs, MGB (МГБ) – Ministry of State Security

including their friend, the priest Teimuraz Chikhladze, who was not participating in the terrorist attack. He, however, was designated by prosecutors as the “ideological organizer” of the hijacking. This case is well-known and shocked the country, since there were many questions about the necessity of the death penalty and the fate of an innocent priest. Later, after collapse of the Soviet Union, the new Georgian government (with president Zviad Gamsakhurdia) promised to begin a new investigation, but has not been done in any real sense.

THE SOLIKO KHABEISHVILI CASE

Soliko Khabeishvili was a high ranking official of the Georgian Communist Party (member of Central Committee) and close friend of the secretary of the Georgian Communist Party, Eduard Shevardnadze. In 1985, after Shevardnadze left Georgia and became minister of foreign affairs of the Soviet Union, Khabeishvili was considered as his successor in Georgia. However, Jumber Patiashvili was chosen by the “center” (Moscow) as first secretary of the Georgian Communist Party. In an internal battle for power, Patiashvili started to push for arrests of former high rank officials accused of corruption. In the same year (1985), Khabeishvili was released from the Central Committee and was arrested soon after. The court sentenced him to 15 years in prison. He was released in 1989, but until his murder in 1995, there were no attempts to re-investigate his criminal case.

COMMISSION OF INVESTIGATION OF TRAGEDY OF 9 OF APRIL 1989 IN TBILISI

The only precedent for the investigation of Soviet state crimes in Georgia is linked with the investigation of the suppression of an anti-Soviet demonstration in the center of Tbilisi, 9 April of 1989, when 21 people died and hundreds were injured with chemical weapons and variety of physical attacks. After the tragedy, the Communist Party and state tried to hide information about the actual casualties and details of the operation of the dissolution of demonstration. Due to extensive protests, counter reaction in society, and international pressure, a special Commission of Investigation of the Tragedy was created in Supreme Council of USSR (Soviet Union). The Commission published a conclusion on December of 1989. Based on documents, interrogation of representatives of the civil and military authorities (who participated in the suppression of demonstration), eyewitnesses, injured victims etc., the conclusion stated that malfeasant decisions against peaceful demonstration were made by the Communist Party highest officials and heads of Transcaucasian military district. However, despite the conclusion, there was no legal continuity in identifying individuals who were responsible for the tragedy; not even after declaring the independence of Georgia in 1991. The state has never announced any kind of judgment and court decision against the Soviet Communist Party officials (including Georgian Communist Party high ranking officials), military commanders and state security officials, who share responsibility for the tragedy of 9th April 1989.

Besides the Supreme Council Commission, there have been several, official, individual, and journalist investigations of the tragedy of 9 of April, as well as civil initiatives to support a fair investigation.

“COMMISSION OF THE SUPREME COUNCIL OF GEORGIAN SSR FOR RE-ESTABLISHING JUSTICE FOR VICTIMS OF REPRESSIONS WHICH TOOK PLACE IN THE 1930–40 AND 1950’S”

In last phase of its existence, the Georgian Communist Party began to try to coordinate its agenda with the agenda of protest movement against Soviet rule. Specifically, the Party presented its new demands as part of a “new policy” of the communist state and transferred critical political and social demands from a revolutionary street environment into “cabinet” style resolutions on the state bureaucratic level. This was an attempt to reform the Soviet state and Communist Party within Gorbachev’s “Perestroika”.

As in Moscow, in Soviet Georgia, on 29 March of 1989, a special “Commission of the Supreme Council of the Georgian SSR for re-establishing justice for victims of repressions that took place in 1930–40 and 1950’s” was founded to revise cases and to rehabilitate the victims of Soviet repressions, to assist with the social protection of the victims and to work on issues of compensation.

The Commission was comprised of state officials (executive branch, prosecutor office and state security and ministry of internal affairs representatives) and a few representatives of civil (Soviet) organizations.

However, in practice, its work showed that the Commission was focused only on one category of victims, members of the Communist Party. From the very beginning there was a sub-commission of a “Party control group” which showed itself as the main active group between 1989–1990 and most of the revised cases were prepared by the group.

Up to the end of 1990, the Commission revised 1 110 cases concerning 1 391 persons. Demands for the re-investigation of the cases, the so-called Protests, concerning 1 022 persons were sent to the Supreme Court of Georgian SSR and 84 to the Supreme Court of USSR. Generally, until the end of 1990, the Supreme Court of Georgian SSR rehabilitated around 633 persons. 387 persons were rehabilitated towards the Party line. The Georgian SSR KGB investigation division prepared conclusions for 11 203 persons for the rehabilitation process.

The results of re-investigation were published as short summaries – statistics of revised cases and personalities of people who were rehabilitated by the Commission. However, the questions of the criminal dimension of the repressions and of individual responsibilities of people who participated in mass crimes have never been raised at the legal level. There were only a few talks about the inhumanity of the system and a few press-interviews with the head of the Commission.

Besides the Commission, there were no other initiatives attempting to revise the cases of victims of Soviet terror from 1921–1991 who were members of other parties, or non-party people. Also, questions about the prosecution of the participants of the mass violation of human rights have never been raised. Demands for the prosecution of crimes from former dissidents and their supporters did not lead to any general changes in this field.

LESSONS LEARNT

Georgia has mostly a symbolic experience concerning the investigation and prosecution of Soviet state crimes. Therefore, we can make only a few conclusions:

- The Investigation of Soviet crimes for Georgian society is unclear. Decades of Soviet rule marked by mass terror, massive state propaganda and censorship have eliminated collective memory and the understanding of the Soviet-Stalinist time crimes are a current challenge of responsibility. As a result of this, at the end of the 1980's, society considered the Soviet mass terror of 1921–1953 as a very old story, and re-establishing justice could only be imagined through the publishing of information about Soviet repressions and victims.
- Soviet Georgian and independent Georgian judiciary and prosecutors were not successful in prosecuting individuals, and state officials, accused of violations of law and human rights abuses, with legal investigations and trials, even on symbolic level, without the presence of suspects. There simply was not enough continuity in the prosecution of mass crimes of Soviet regime, like the tragedy of 9 April of 1989.
- Because of the complex political and social crisis during the time of transition, questions about the prosecution of the crimes of the regime were not part of the main political (anti-Soviet) agenda. It always stayed at a verbal-symbolic level.

RECOMMENDATIONS

Recommendations based on poor experiences and critical analysis of the Georgian case of investigation and prosecution of crimes of the Soviet regime can only be reviewed on a general level:

- It is necessary to have a protest or resistance movement with a group of individuals, who can collect sources, testimonies and information about the crimes of the regime, emphasizing concrete individuals who have committed violations of laws and human rights, in order to raise questions of responsibility, and to be able to start the legal process at the time of changes and transition.
- On a system level, the real face of the regime should be published based on non-arguable facts and documents. Questions of responsibility and prosecution should be combined with a discussion of the inhumanity of state institutions and state security activities of the totalitarian regime. They should be investigated and described. On a personal level, all individuals, state officials, members of Party organizations, state security systems, informers of state security, officials of the court and state prosecutors' office investigated should draw special attention.

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REHABILITATION OF VICTIMS

LEVAN AVALISHVILI

INTRODUCTION

Soviet repression has become a popular theme of research among scholars, after the fall of the Soviet Union in almost every former Soviet state, including Georgia. The scale of repression and the approximate number of victims is still unclear in Georgia.

There were several stages of Soviet repression in Georgia: In February–March of 1921, Bolshevik Russia invaded the country, overthrew the democratically elected government and took control over whole territory. The members of the government and the parliament of the Democratic Republic of Georgia (1918–21) immediately became victims of repression. Only some members of the government, and people affiliated it, emigrated to Europe and survived.¹

After the occupation of Georgia, the most extensive attempt to restore its independence was the August Uprising of 1924. Members of the Committee for the Independence of Georgia, which was established in Europe, initiated the uprising, but the badly planned operation didn't succeed. This failure caused the imprisonment and mass executions of members of the uprising. Estimates of the numbers of deaths, of both rebels and their opponents (including executions), range from 630 to 4,000. Some members of the Georgian government in exile were among the repressed that had emigrated to Europe in 1921, but had later returned to Georgia to take part in the uprising.²

The years 1937 and 1938, the period of the Great Terror, was the time of the largest repressions in the whole of the Soviet Union, and Georgia, with no exception. In Georgian the SSR convicted more than 29,000 people, almost half executed by the so-called “Troikas”. Among them, 3621 people were convicted by direct order, sent straight from Moscow, with the signature of Joseph Stalin, and other members of Political Bureau (so called “Stalin's Lists”).³

The repression continued between 1941–1951. In this period representatives of various national, ethnic and religious minorities also became subjects to the mass repression.⁴

Two Separate events, which have deeply affected the Georgian memory, and still leave scars for Georgian society, are the events of the 9th of March 1956, and the 9th of April 1989. On both occasions, Soviet authorities rapidly dismantled peaceful demonstrators in the center of the capital city, Tbilisi.⁵

DESCRIPTION OF THE CURRENT SITUATION

The analysis of the dynamics and specifics of the rehabilitation process, of the victims of Soviet repression, in the Georgian SSR is hindered by complex problems in the archival sphere of Georgia. On the one hand, the fragmentation of the archives of the former KGB, and the Ministry of Internal Affairs of the Georgian SSR (now – the first section of the Archive of the Ministry of Internal Affairs of Georgia), is linked with the loss of a significant part of the archival documents during the Tbilisi Civil War of 1991. Due to this, it makes it impossible to determine the number of victims of the repressions in the territory of Georgia from 1921,

up to the collapse of the USSR. Due to the low research activity, there is no information yet on what has become of the documents partially reflecting the activities of the repressive apparatus of the security agencies (annual reports, reports on specific issues, “cases” of anti-Soviet political organizations, correspondence on the issues, communication with subordinate structures), which would restore the overall picture.

On the other hand, the main documentary evidence for studying the rehabilitation process has been preserved in the National Archive in the fonds of the Prosecutor's Office and the Supreme Court. Researchers have access to these documents in cases where 75 years have passed from the moment of their creation. The Laws of Georgia “On the National Archives and Archive Fonds” and “On Personal Data Protection” protect “personal information” does not allow “third parties” to access documents related to criminal cases and containing personal information. The rehabilitation materials of the mid-1950s will be available for study from 2030 (unless fundamental changes occur in legislation). As the researchers note in their analytical reports, currently, it is impossible to obtain some declassified documents, since, according to this law, the researchers are not allowed to get access, with the search aid of the fonds (list of cases), because they contain declassified documents, for which the period of secrecy has not yet expired. Thus, the researchers do not have the ability, either to receive records on rehabilitation of a particular person, or to process a complete list of existing cases to recreate an overall picture.⁶

Today we have more or less clear information about the NKVDs (People's Commissariat of Internal Affairs of the Georgian SSR) operations on the central and regional levels, and how they were managed by Moscow. In 2015, the Ministry of Internal Affairs of Georgia released a two-volume edition “Bolshevik Order in Georgia”, which gives a portrayal of the Bolshevik repression. According to this publication, the NKVD's so-called “Kulak” Operation (order N00447) is one of the most researched, repressive operations in the former Soviet countries. The assumption is that the repressive organs worked only to implement the will of the Centre and only according to orders from Moscow, which has not been confirmed.

1 Saqartvelos Damphudznebeli Kreba – 1919 [Constituent Assembly of Georgia – 1919], SovLab, Tbilisi, 2016.

2 Stephen F. Jones, “The Establishment of Soviet Power in Transcaucasia: The Case of Georgia 1921–1928”, in *Soviet Studies*, October 1988, 40, No. 4 (4), 616–639.

3 Mark Junge, Omar Tushurashvili, Bernd Bonvec, *Bolshevikuri Tsesrigi Saqartveloshi* [Bolshevik Order in Georgia], Tbilisi: Intellect Publishing House, 2015.

4 See Mark Junge, *Ethnosi da Terori Saqartveloshi* [Ethnos and Terror in Georgia], Tbilisi: Intellect Publishing House, 2015.

5 See Levan Avalishvili, The March 1956 Events in Georgia: based on oral history interviews and archival documents and Jesse Paul Lehrke, The Transition to National Armies in the Former Soviet Republics, 1988–2005, in *Georgia After Stalin: Nationalism and Soviet power*, Edited by Timothy K. Blauvelt and Jeremy Smith, Oxfordshire, UK: Routledge, 2013.

6 See Alexander Daniel, Larisa Eremova and others, *Rehabilitation and Memory: Treatment of the Victims of Soviet Political Repression in Former Soviet Union Countries*, Moscow: Memorial, 2016, <https://www.memo.ru/media/uploads/2017/03/02/reabilitacia.pdf>

Moreover, the so-called “limits” for arrests and executions were defined before the mass operations, but only upon offers made by the local party leaders, according demands from the Center. The system worked in a way that the Center had the ability to control the number of operations, but also, according to the archival materials, we can see numerous cases, when the regional “nomenklatura” asked the center to increase the “limits” of repression.⁸

DESCRIPTION OF THE TRANSITION AND CURRENT STATUS

Prior to the collapse of the Soviet state, a significant, and most pertinent part of the archives remained inaccessible for studying the process and scope of Soviet terror, and for the identification of its victims. In addition, most of the interested persons and researchers lacked the competence to determine where the relevant materials could be found. For instance, from 1989 to the end of 1991, only a few researchers succeeded in gaining access to materials of the former KGB Archives, and in December 1991, during the Civil War in Tbilisi, a significant part of the archive that was at the epicenter of the fighting, was destroyed as a result of a fire. Naturally, one can suppose that the complete content and extent of this archive will remain unclear, and may exceed the official estimates. In general, the KGB archives give numerous reasons for speculations and interpretations. Alleged witnesses, and participants, of the process claim that some of the most important documents from the archives were later transferred to the special KGB depository in Smolensk. Some claim that a group of Georgian KGB employees escorted the documents in order to sort and destroy them. The above-mentioned sources claim that the documents concerned intelligence developments, accounts and reports. The numbers of the documents destroyed, or sent back, about the state, and the legal environment of the remaining documents in the Smolensk Archive, are also unclear. Since 2003, there have been talks about the return of the documents (originals or scanned) but without any consequences. In 2008, Georgia broke diplomatic relations with Russia, and the archival institutions no longer have contact with each other.⁹

Only a few non-governmental organizations in Georgia are interested in the matters of Soviet repression and rehabilitation, including the Institute for Development of Freedom of Information (IDFI), the Georgian society “Memorial”, the Soviet Past Research Laboratory (SovLab) and the Georgian Young Lawyers’ Association (GYLA). With the help of the Ministry of Internal Affairs of Georgia, the financial aid from the Heinrich Boell Foundation, and the Embassy of Switzerland in Georgia, the IDFI and “Memorial” implemented the project “Stalin’s Lists from Georgia”. A large database with search tools was created for this project. It contains more than 3600 short biographies of the victims of the “Great Terror” of 1937–1938, who were convicted based on the decisions of Stalin, and the members the Politbureau.¹⁰

The Georgian society “Memorial” has been working on this issue since it was founded in 1992. Since then, the society has advocated for quick enactment and implementation of the laws fostering the repressed persons. Also, they have advocated for fulfilling the compensation nominated by the European Court of Human Rights, as a result of the case against Georgia, and for granting the repressed people at least the same social benefits as was granted to former law enforcement officers. The law of Georgia N430 from 16. 10. 1996 “On Social Security of Persons

Transferred to the Reserve from Military Bodies, Internal Affairs Bodies and the Special State Protection Service, and Their Family Members”,¹¹ granted persons transferred to the reserve from military bodies, internal affairs bodies, and the Special State Protection Service, who have permanent residence in Georgia and Georgian citizenship, with state compensation. As a member of Georgian society “Memorial”, Guram Soselia told us it was an irony of fate that some former KGB and other workers of the system of retaliatory bodies during USSR, who were involved in the executions, were granted much more benefits than the heirs of the executed people themselves.¹²

LAW AND THE PRACTICE OF ACKNOWLEDGEMENT OF CITIZENS OF GEORGIA AS VICTIMS OF POLITICAL REPRESSIONS AND SOCIAL PROTECTION

The first relevant law on rehabilitation was passed in Georgia in 1997; it was titled “On the Acknowledgment of Citizens of Georgia as Victims of Political Repression and Social Protection of Repressed Persons”.¹³ According to the Article 2 of this Law, “different forms of coercion shall be construed as political repression, such as deprivation of life, damage to health, imprisonment, exile, expulsion, deportation from the state, forcible placement in psychiatric institutions, deprivation of citizenship, forced labor, confiscation and destruction of property, illegal dismissal from office or from other work places, movement to special settlements by force, eviction from a dwelling house, as well as other restrictions of human rights and freedoms guaranteed by the legislation of Georgia, which were conducted by the State for political reasons based on the decision of a court or other state authorities, and which were related to false accusations of committing a crime, to a person’s political opinion, or to the acts of contradiction by peaceful means against illegal actions of the current political regime, to social or religious affiliation or a social class status, as well as forms of coercion committed by the State as provided for by the Article 4 of this Law”. Nevertheless, despite the adoption of this Law, the issue of compensation to the victims of repression remained a serious challenge for

7 “The Soviet secret police worked according to quotas. Just as Soviet economic planners set targets for industrial growth, so too did state security organs set their own ‘limits’ for arrests and executions”. Paul R. Gregory, *Terror by Quota: State Security from Lenin to Stalin*, New Haven: Yale University Press, 2009, <https://www.h-net.org/reviews/showrev.php?id=23648>

8 Mark Junge, Omar Tushurashvili, Bernd Bonvec, *Bolshevikuri Tserigri Saqartveloshi* [Bolshevik Order in Georgia], Tbilisi: Intellect Publishing House, 2015.

9 Documentary “Lost History” [*Dakarguli Istoria*], 2014, <https://www.youtube.com/watch?v=5vYlBOxhBj4>

10 See “Stalin’s Lists from Georgia”, e-data base, 26 March 2018, <http://www.nplg.gov.ge/gwdict/index.php?a=index&d=26>

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12 The interview with the Georgian society “Memorial” member – Guram Soselia, 2018.

13 Law of Georgia “On the Acknowledgment of Citizens of Georgia as Victims of Political Repression and Social Protection of Repressed Persons”, (N1160; 11. 12. 1997/ Consolidated Publications, 31. 10. 2014), <https://matsne.gov.ge/en/document/download/31408/11/en/pdf>

Georgia. Although article 8 of the Law mentions a separate law that determine the procedures for the revival of property rights of the rehabilitated person, this law has not been enacted, until now... In 1997, when the Law on recognition of the victims was being passed, the Parliament of Georgia postponed the discussion of this issue. In 2009, the Public Defender of Georgia asked the Government to adopt this law,¹⁴ but his request has not been satisfied. The turning point that changed the situation was the decision of the European Court of Human Rights, against Georgia, which was related to citizens Klaus and Yuri Kiladzes

EUROPEAN COURT OF HUMAN RIGHTS CASE: KLAUS AND YURI KILADZE VS. GEORGIA

A court case about the recognition of two Georgian nationals, who were victims of Soviet repressions, to receive the compensation they were entitled to, become a precedent for the other similar cases in Georgia. The case began when the appeal wasn't satisfied by the Georgian Court system, and the case was sent to the European Court of Human Rights.

This case against Georgia originated from application no. 7975/06, lodged to the ECHR under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms, by two Georgian nationals, Klaus Kiladze and Yuri Kiladze, on the 22nd of February 2006, in order to assert their rights for compensation resulting from their status as victims of political repression. The applicants, two brothers, were born in 1926 and 1928 respectively and live in Tbilisi. Their father was convicted on October 2, 1937 for "sabotage and terrorism" and executed. On November 7, 1938, their mother was condemned to eight years of imprisonment for "propaganda and agitation expressed in a call to the overthrow the Soviet regime" and was sent to the labour camp in the Far North of the USSR. Then aged 12 and 10 respectively, the applicants at first remained alone in their parents' apartment in Tbilisi, with no neighbors, friends or family daring to go near them because of the fear of being arrested. They were then held for one and a half months at a detention center in Tbilisi. They were malnourished, and subsequently contracted typhoid due to unhygienic conditions. They were then sent away from Georgia to the Stavropol region of Russia, and placed in an orphanage, and spent two years there. Both applicants were constantly humiliated and beaten by the staff and by the other orphan children.

Immediately after the arrest of the applicants' mother, the family apartment of 90 m² in Tbilisi was confiscated together with all the furniture and personal and family items.

In 1940, the grandmother of the applicants managed to obtain guardianship over them. After returning to Georgia, while still children, Klaus and Yuri had to work hard in order to earn money to live. Subsequently, they faced strong social and political pressure as the children of a "traitor of the Motherland" their entire life working in the USSR.

In 1945, the applicants' mother was freed. On May 4, 1956, the South Caucasus Military Court annulled the decision of November 7, 1938 that condemned her, due to the absence of an offence, and pronounced her rehabilitation. On 30 August 1957, the Panel on Military affairs of the Supreme Court of the USSR annulled the decision of October 2, 1937, for the same reasons, and pronounced the rehabilitation of their father.

On March 16, 1998, the applicants applied to the court of primary jurisdiction in Tbilisi requesting that their parents, as well as

they themselves, be declared victims of political repressions. On August 19, 1998, their request was granted in full. On the grounds of this decision, the brothers Kiladze applied on March 15, 2005 to the court of primary jurisdiction for compensation for the material and moral damages based on Article 9 of the Law "On the Recognition of Status as a Victim of Political Repression for Georgian Citizens and Social Protection for the Repressed Persons". Emphasizing the killing of their father, the separation from their mother, their conditions of detention, first at the detention center then at the orphanage, the damage caused to their health, the humiliation and repression suffered from the time of their parents' arrest to an elderly age, as well as the confiscation of property after their mother's arrest, the applicants asked to be granted compensation of 515,000 GEL (approximately 208,000 EUR) each for the total material and moral damages they suffered.

The representative of the Georgian President, the defending party, alleged that the applicants' claim should not be admitted, given the fact that their right to compensation had not been recognized prior to 1997, and that the law that was referred to in the Article 8 of the Law of December 11, 1997 had not yet been adopted. On June 9, 2005, the court of primary jurisdiction Tbilisi Regional Court considered the facts related to the applicants' past to be established, save for the confiscation of possessions. On the latter point, the court cited against the applicants on the grounds of the Article 102 § 3 of the Civil Procedure Code – lack of documentary proof attesting to the confiscation, judging that the submitted written statements of eye-witnesses were not sufficient. The court also considered the applicants' claim to be beyond the period of limitation altogether, without indicating what period of limitation they were referring to and when this period had commenced. Finally, the court concluded that the request of the applicants could not be admitted in any event since the laws the Articles 8 and 9 of the law of December 11, 1997 referred to had not yet been adopted.

The applicants brought a cassation appeal asserting that, by virtue of the Order of August 15, 1937, the spouse of any person condemned as a "traitor of the Motherland" would automatically be condemned to a term of imprisonment from five to eight years, that their minor children would then be placed in an orphanage outside of the Georgian territory, and that their movable and immovable property would automatically be confiscated. The conviction of their father obligatorily led to these measures and, given the context in which these events took place, they could not be blamed for the fact that they were unable to present the documentary proof of the confiscation of property. As to the period of limitation, the applicants asserted that their claim for compensation was based on the Law of December 11, 1997, and could not therefore be beyond the period of limitation at the time, when their requests were decided. The applicants also alleged that nearly eight years had already passed since the Law of December 11, 1997 had entered into force, in which the State had not taken the necessary measures in order to legislate and compensate the victims of political repressions, in accordance with the Articles 8 § 3 and 9 of this Law. They maintained that the number of the victims, all elderly, was falling, and in their opinion, the State was waiting for their death to resolve the problem of compensating them. According

14 See "Ombudsman Demands Concrete Steps for the Social Protection of Political Repression Victims", 5 April 2010, <http://www.interpressnews.ge/ge/politika/130412-ombudsmeni-politikuri-represiebis-mskhverplth-socialuri-dacvishvis-konkretuli-nabijebis-gadadgmas-ithkhovs.html?ar=A>

to the explanatory memorandum of the draft of the law submitted (without any results) to the Parliament in 2001 by the Georgian society “Memorial”; to remedy the legal void in question, the number of victims of political repression affected by the abovementioned Article 9 varied, according to the categories, from 600 to 16,000.

The applicants’ appeal was dismissed on November 2, 2005 by the Supreme Court of Georgia, which, upholding the reasoning of the regional court relating to insufficient documentary proof of the confiscation of property, dismissed their request for compensation for material damages.

The applicants continued to seek proof of the confiscation of their parents’ possessions. In a letter of December 4, 2006, the Registry of Real Estate Property informed them that the apartment in question had only appeared in the archives for the first time in 1940, as a property of the State. Since then, no information has become available on the subject.

The applicants alleged that in delaying in giving substance to their rights guaranteed under Articles 8 and 9 of the law of 11 December 1997, the State was keeping them in a tormenting situation of uncertainty and distress which amounted to degrading treatment.

After about 4 years of examination, the ECHR declared by six votes to one, that there has been a violation of the Article 1 of the Protocol no. 1, and by six votes to one, that it is not necessary to also examine the application from the point of view of Article 13 of the European Convention on Human Rights. Also, the ECHR declared that, if the necessary (legislative and other), measures of the judgment are still lacking, the Respondent State will have to pay each of the applicants 4.000 EUR (four thousand euros) in moral damages and the sum of costs and expenses. The ECHR dismissed by six votes to one, the remainder of the demand for just satisfaction.¹⁵

The abovementioned case, arguments provided by the Georgian state, and decision of the European court of Human Rights became a showcase for other similar court appeals. The lack of support for appropriate documents that wasn’t provided to the court and article 8 § 3 of Georgian law “on the Acknowledgment of Citizens of Georgia as Victims of Political Repression and Social Protection of Repressed Persons” where we read – The procedures for the revival of property rights of rehabilitated persons shall be determined by a separate law that was not adopted till nowadays played a major role in the assessment of the court – partial satisfaction of appealing party.

One of the main points was indicated in the Paragraph 85 of the court decision where we read: Under these conditions, the Court believes that general measures at a national level are without doubt called for within the framework of the execution of the present judgment. The necessary legislative, administrative and budgetary measures must therefore be rapidly taken in order for the people envisaged in Article 9 of the law of December 11, 1997 to effectively benefit from the right, which they are guaranteed in this provision.¹⁶

REHABILITATION AND COMPENSATION TO THE VICTIMS OF REPRESSIONS AFTER THE ECHR DECISION

Executing the decision of the ECHR, the Georgian authorities passed a certain amendment to the Law “On the Acknowledgment

of Citizens of Georgia as Victims of Political Repression and Social Protection of Repressed Persons” according to which the repressed person, or his /her first immediate heir, or their representative, should directly apply to Tbilisi City Court in order to get the pecuniary compensation. The total number of victims of Georgia’s political repression and their heirs was about 20,000 people before the amendment, but later, the numbers increased. The number of applicants also increased.

According to the Georgian Young Lawyers Association, more than 2,500 suits were filed in Tbilisi City Court within three months after the legislative amendments took effect. Due to the large number of suits, the court established a compensation limit of minimum 200 GEL (about \$ 100) and a maximum of 500 GEL (about \$ 250). It is noteworthy that these suits could be examined only by Tbilisi City Court, which caused additional expenses for people living in province.

The Georgian Parliament made several changes to the law on 31 October 2014 by. Thus, the definition of a victim of political repressions, and the rules of acknowledgement the victims of political repressions and guarantees of their social protections were elaborated. According to the law, the victims of political repressions are people, who have suffered political repression in the territory of the former USSR from February 1921 until 28 October 1990, from the intervention of the Soviet Red Army until the first free and multi-party elections in the Soviet Socialist Republic of Georgia and later on the territory of independent Georgia. As usual, in all countries, where the similar law exists, not only the persons, who suffered the repressions, but also a spouse, child (adopted child), parent and any other lineal relative, who stayed with such persons in penitentiary establishments, has been in exile and expulsion, and in special settlements with such persons were also acknowledged as the victims of the political repressions. Georgia was not an exception and similar record appears in Georgian law as well.¹⁷

According to the Law, persons, who have been acknowledged as victims of political repression shall have all of their political, civil and other rights and freedoms that have been violated as a consequence of political repression restored, and shall regain all military and special rank and government awards that have been seized as a consequence of political repression, and shall be granted the allowances as provided for by this Law.

According to the changes in the Law made in 2014, victims of repression were granted with an indemnity: no less than GEL 1.000 and no more than GEL 2.000 (approximately 600–1200\$ with regard to the official exchange rates in Georgia). If the person is already dead, the nearest heir can claim the indemnity.¹⁸

In parallel to the adoption of the amendments to the Law on repressed, an amendment was made to the concomitant law – “The Administrative Procedures Code of Georgia”. The repressed person, or his /her first immediate heir or their representative should directly apply to Tbilisi or Kutaisi Court in order to get the pecuniary compensation. The claim had to be submitted by 1st of January 2018. In addition, a person, who had already received compensation, but a sum that was less than

15 See European Court of Human Rights, Second Section, CASE OF KLAUS AND YURI KILADZE V. GEORGIA, (Application no. 7975/06) , Judgment, 2 February 2010, http://ehrc.org.uk/wp-content/uploads/2010/06/Kiladze-v-Georgia_ENG.pdf

16 Ibid., paragraph 85.

17 Ibid.

18 Ibid.

the minimum set by the new amendments, could have applied to the court again.

It is also important to note that the Law applied to Georgian citizens, who suffered political repression in former Soviet Union from the 25th of February 1921 to the 28th of October 1990 and later, on the territory of independent Georgia. But this law does not apply to the persons, who belong to ethnic or religious groups deported from Georgia in the Soviet period; the procedure for their rehabilitation should have been determined separately.

The IDFI requested information from Tbilisi and Kutaisi City Courts about the number of people, who were declared victims of the political repressions. From January 2011 to May 2017, Tbilisi City Court received 13.525 appeals in total, reviewed 11.539, affirmed 11.511 and declined only 28 appeals. Kutaisi City Court from January 2015 to May 2017 received 5.517 appeals and affirmed 4.957 of them. The IDFI requested the information on the total amount of compensation that was granted to people, whose appeals were affirmed, but they received the answer that the Courts did not possess this information. Then, on the 5th of July 2017, the IDFI made a similar request to the Ministry of Finance of Georgia, and asked for the total quantity of compensations (one by one for every year) for the defined list of persons from the national budget. The Ministry of Finance of Georgia answered that the National Bureau of Enforcement satisfied these demands by forced fulfillment, and they have no authority to reveal this information. Thus, the IDFI was unable to get information about the average amount of compensation.¹⁹

ABOUT THE CATEGORY OF VICTIMS

Ethnic or religious groups deported from Georgia in the Soviet period can be analyzed by looking at the issue of “Meskhetian Turks” – the ethnic group deported from Georgian SSR to Uzbek SSR in 1944 an estimated 90,000–120,000 people. Many of the deportees died *en route*, or as an indirect consequence of the resettlement. There is no consensus on the reasons for the deportation. Unlike other deported people, who were rehabilitated in the 1950s and 1960s (or the Crimean Tatars who have been allowed to return since the late 1980s), the Meskhetian Turks have neither been rehabilitated, or allowed to return to their land of origin, nor has their property been returned.²⁰

Programs and attacks on the Meskhetian Turks, in the Ferghana Region of Uzbek SSR, in early June 1989 became the one of the first ethnic conflicts in the disintegrating USSR, and ended with the second forced exile of about 70.000 Meskhetian Turks who were spread through various countries and never reunited.²¹

The efforts to return the Meskhetian Turks to Georgia first emerged in 1970, but southwest Georgia’s special status as a border-region, effectively blocked the start of the process. Since the 1989 events have been noted, repatriation of “Meskhetian Turks” has been on Georgia’s agenda, but during Zviad Gamsakhurdia’s and Eduard Shevardnadze’s presidency, only several hundred Meskhetian Turk families have returned to various regions of Georgia (though not to their historic homeland), mainly with their own initiative and wages. The official number of repatriates by the end of 2001 was 644 persons.²²

After high-level meetings in The Hague and Vienna in 1998–1999, hosted by various organizations²³ with the involvement of governments, Georgia’s delegation pledged to solve the question of citizenship for returnees by the end of 1999 and

announced the establishment of a State Committee, or Repatriation Service, in the near future to address issues relating to the repatriation of Meskhetian Turks.

In 2007, Georgia issued the law – “On the Repatriation of Persons Involuntarily Displaced by the Former USSR from the Georgian SSR (The Soviet Socialist Republic of Georgia) in the 1940’s”. According to the law, the application for obtaining the status of repatriate in accordance with Article 4 of this Law was no later than July 1, 2009.

After the implementations of the law, the official statistics are as follows: a total of 5.841 individuals applied to Georgia for reintegration status over the past few years. Of these, 1.998 have been granted this status, and 494 people have received “conditional citizenship” that implies that Georgian citizenship will take its effect immediately after they renounce the citizenship of another country.

As officials explain, people are usually refused to be granted citizenship due to a lack of relevant documentation. The implementation of the law has been criticized numerous times; being stateless people, they are not eligible for the public healthcare program. “They don’t have social and economic guarantees and property-related issues still remain a problem”, reads the Georgian Public Defender’s report for 2015.²⁴

As we see from the following, the problem still exists; the percentage of people who repatriate is very low and even people who received the status are still waiting for justice to be fully restored.

LESSONS LEARNT AND RECOMMENDATIONS

As the Georgian case shows, there are positive, as well as negative, examples of cases on how Georgia has dealt with the rehabilitation of the victims of Soviet repressions.

The main positive issue is that not only the persons, who suffered the repressions, but also members of their families, close relatives, who were with him/her in the imprisonment and deportation, were acknowledged as the victims of political repression, and if the person is already dead, the nearest heir can claim the indemnity.

The constant conflicts between groups in society, the atmosphere of violence, and the economic crisis, have all distracted society from comprehending the consequences of Soviet terror, and identifying and dismantling the driving mechanisms of the totalitarian system, as well as rehabilitating the victims of repression.

19 Official correspondence of IDFI with Tbilisi and Kutaisi City Courts and Ministry of Finance of Georgia.

20 See Oskari Penttikäinen, Tom Trier, *Between Integration and Resettlement: the Meskhetian Turks*, ECMI Working Paper # 21, September 2004, https://www.files.ethz.ch/isn/19696/working_paper_21b.pdf

21 See Alexander Osipov, “Ferghana Events: 20 years later. History without a lesson?”, in *FerganaNews*, 10 June 2009, <http://enews.fergananews.com/articles/2545>

22 See Oskari Penttikäinen, Tom Trier, *Between Integration and Resettlement: the Meskhetian Turks*, ECMI Working Paper # 21, September 2004, https://www.files.ethz.ch/isn/19696/working_paper_21b.pdf

23 In Hague, OSCE High Commissioner on National Minorities (OSCE-HC-NM), Max van der Stoep, in cooperation with UNHCR and the Forced Migration Projects of the Open Society Institute (FMP-OSI) hosted consultations on issues relating to Meskhetian Turks. The same organizations – OSCE, UNHCR and FMP OSI hosted second meeting in Vienna.

24 See Nino Narimanishvili, Otari Atskureli, “Return from exile: Muslim Meskhetians from Georgia”, in *JamNews*, 21 June 2017, <https://jam-news.net/?p=45365>

The corresponding law on restoring property rights of the rehabilitated persons, which would regulate the process of restoring justice for the victims, has not been elaborated for more than 20 years, which makes the victims, and other stakeholders, think that the state authorities don't have the political will to fulfill it.

Only complete opening of the archives of intelligence agencies and security agencies can give answers, both to the private matters of citizens, as well as to the questions that have enormous value for all society. It is impossible to have a valid written history of the XX century, of any Soviet country, without studying the archives. Soviet repression remains one of the main traumatic points in the collective memory of post-Soviet countries. Publishing authentic documented data on the repressed, as well as individual stories, will support the process of the rehabilitation of the victims, deliver the truth to families of the victims, help to restore justice and promote reconciliation within the entire society.

The tragic events of 1991–1992, when historical documents of the former KGB Archives were lost, and together with them, the chances for rehabilitation of the victims within the country vanished. Thus, the key for restoring the truth through documents only remains in the Russian archives, which are practically

inaccessible at the moment, neither to Georgian historians, nor to ordinary Georgian citizens, due to the absence of the diplomatic relations and contacts between the archival institutions of the two countries. In the regard to the situation, as the member of society “Memorial”, Guram Soselia told us, some retired KGB officers have addressed the corresponding archives in Moscow and received reference letters, but he did not know of any ordinary repressed person from Georgia, who had done the same. In theory, it is unclear, whether a repressed citizen of Georgia can receive any probative approval documents by addressing the Russian archives or not.²⁵

The main recommendations for Georgian authorities are to finalize working on a corresponding law about restoring the property rights of the rehabilitated persons. Also, the prolonged lustration process of former KGB and other workers of the system of retaliatory bodies during USSR is a sensitive topic for Georgian society and needs to be resolved once and for all, as well as repatriation of Persons Involuntarily Displaced from the Georgian SSR.

25 The interview with the Georgian society “Memorial” member – Guram Soselia, 2018.

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EDUCATION AND PRESERVATION OF SITES OF CONSCIENCE

IRAKLI KHVADAGIANI

INTRODUCTION

During the last stage of “Perestroika”, especially after the tragedy of the 9th of April 1989 in Tbilisi, which was due to rise of mass protests and a sense of system crisis, it came time for public discussions on a variety of formerly forbidden issues, including Soviet crimes and mass terror. As communist state censorship was weakened, enough testimonies and memories of the victims of Soviet repressions began to be published and a few formerly forbidden books were published for the first time. The last years of Soviet rule in Georgia were accompanied with the humiliation and the destroying of Soviet symbols – monuments of Soviet leaders and architectural details of Soviet ideology. During the transition time – 1989–1991, there were demands for marking memory about the victims and preserving sites of conscience, but the complex problems of political and social life after the re-establishment of the independence of Georgia created an unfriendly environment for developing such ideas and projects.

THE NEED FOR THE PRESERVATION OF WITNESS MEMORY

The first initiatives concerning identification and preservation of sites of conscience began in Georgia in 1989. In March 1989 the “Commission of Supreme Council of Georgian SSR for the re-establishing of justice for the victims of repressions, which took place in 1930–40 and 1950’s” was founded. One of the aims of the Commission was the identification of mass gravesites of the victims of Soviet repressions. However, the Commission has yet to find such places, and public society started to organize a campaign of identification based on appeals in the press, but without definite success.

At the same time, a movement to create symbolic sites of conscience started to appear; one of the first initiatives was from Tamaz Kvachantiradze’s article published in the “Literaturuli Sakartvelo” (Literary Georgia). The basic idea of the article was to construct a symbolic grave in memory of repressed Georgian public figures on the Mtatsminda Mountain pantheon. This idea gained active resonance and even led to the beginnings of specific projects, but none of them has been realized.¹

The same kind of initiative was expressed by a group of Georgian writers and poets who published an open appeal to the minister of culture of the Georgian SSR in July 1989, asking to order a network of Georgian museums to prepare and open new expositions about the tragedy of 9 of April. The group further demanded the creation of “Museum of National Tragedy”, which should focus on tragic dates of Georgian modern history – 1921, 1924, 1936–37 (*sic*), 1956 and 1989² and should be placed in national art gallery on Rustaveli avenue, the former “Temple of military glory of Russian Empire”. However, the initiative was neglected and only existed on press papers.

Besides a few examples of initiatives by civic activists, who were trying to localize places linked with the Soviet state security apparatus, and preserve them as sites of memory, there was no common understanding of the meaning of such activism, as well as there being a lack of readiness in political circles and society for making the first step. On one hand, topographic dimension of Soviet terror was possible to explore based on the interrogation of eyewitnesses; however, it needed to be linked with the necessity of having a wide network of researchers and modern methodology. Deep historical research based on original documentary sources seemed another solution, however, such research demanded the transparency of KGB archives and was problematic until 1990. Moreover, many of the former offices of state security and prisons were already destroyed, or were still used as state structures.

Consequently, there were no successful examples of identification and preservation of sites of memory in Georgia, neither during the transition time 1989 – 1991, nor during the 1990s.

After the 1990’s, only a few examples of establishing memorial sites linked with 20th centuries mass tragedies exist. Some of them resulted from an alternative public initiative; others were developed with assistance of central or local governments. Here is a list of those examples of symbolic memorials of mass graves of victims of Soviet repressions:

The Kutaisi memorial of the victims of the Anti-Soviet uprising in August of 1924 – A symbolic memorial sign is installed in the Mukhnari forest, South-East of Kutaisi city, at the supposed area of a mass shooting during the August uprising of 1924.

The Telavi memorial of the victims of Anti-Soviet uprising in August of 1924 – A symbolic memorial sign is installed at “Gigos Gora” little hill, South-East of Telavi city, at the supposed area of a mass shooting during August uprising of 1924.

The Shorapani memorial of the victims of the Anti-Soviet uprising in August of 1924 – A symbolic memorial sign is installed in Shorapani village, close to Zestafoni city, at supposed place of mass shooting of victims during August uprising of 1924, the victims were captured in Railway carriages and shot with a machine guns.

The Chiatura memorial of the victims of the Anti-Soviet uprising in August of 1924 – A symbolic memorial sign was installed in the year 2014, in Chiatura city center, where on 28 August 1924 an Anti-Soviet uprising started.

The Zugdidi memorial of the victims of the Anti-Soviet uprising in August of 1924 – A symbolic memorial sign was installed in 2017, in Zugdidi city center, in the Dadiani palace yard, the supposed place where the victims of 1924 August Anti-Soviet uprising were shot.

1 Only a small memorial wall with a few names of repressed writers and artists was constructed there in 2010’s.

2 Occupation of Georgian Democratic Republic by Soviet Russia; Anti-Soviet uprising; Big Soviet terror; Suppression of Stalinist demonstration in Tbilisi – 9 of March; Suppression of Anti-Soviet demonstration in Tbilisi – 9 of April.

Also, only small part of GULAG network in Georgia is marked due to the German prisoner of war's (POW) traces; During 1990–2000's German War Graves Commission (Volksbund Deutsche Kriegsgräberfürsorge in German) memorialized 24 places in Georgia. The majority of the memorial signs are not installed in the correct location of the POWs camps or cemeteries, but generally mark the areas. Here is a list of those memorial places:

- **Tbilisi, Sairme hill**
- **Tbilisi, "Veli"**
- **Rustavi, Zedgenidze Street**
- **Gardabani, close to Gardabani Electrical station**
- **Ksani**
- **Gori**
- **Bulachauri**
- **Khrami Hydroelectric station**
- **Jvari pass**
- **Stepantsminda**
- **Chitakhevi (2)**
- **Kvabiskhevi (2)**
- **Surami**
- **Sagarejo**
- **Telavi**
- **Zugdidi**
- **Bolnisi**
- **Chiatura.**
- **Sairme**
- **Tkibuli**
- **Makhinjauri**
- **Kutaisi**

The Rose revolution in 2003 brought a new perspective to the memory policy in Georgia. Within a few years, the state managed to realize its agenda concerning modern history issues, illustrated by the founding of the Museum of Soviet occupation in Tbilisi, renaming streets with the names of victims of Soviet terror etc. The state became even more active in this field after the Russian–Georgian war in August 2008, as the rethinking of the Soviet legacy was included into the state-lead anti-Russian propaganda campaign. Up until 2012, there were several activities attempting to create memorial signs in public spaces – for example building a memorial wall of repressed writers and artists in Mtatsminda pantheon, founding "Commission of Historical Truth", creating the memorial desk of Kote Abkhazi.³ However, all those efforts were characterized as superficial and slightly propagandistic. For example, in the inscription at the memorial desk of Kote Abkhazi, there is a factual mistake about his rank. Moreover, he is named as a victim of the Russian occupation, not as a victim of the communist regime.

Since 2010, new civil organizations such as the Soviet Past Research Laboratory (SovLab) and the Institute for Development of Freedom of Information (IDFI), started to create an alternative agenda in the culture of remembrance and memory policy, including memorialization of places of conscience.

In 2011, SovLab created a city tour "Topography of Red Terror", about Soviet terror in Tbilisi in 1921–1950's.

In 2015–2016, the IDFI began installing memorial desks in houses of so called "military center" members, who were executed by the Soviet regime in 1923. The IDFI was also advocating for the creation of their memorial, but due to a lack of will and proper understanding of the importance of the installation of memorial, it is still in progress.

Since 2011, SovLab is trying to raise attention and sensibility about the most valuable historical building of the 20th century and place of memory, the house of "Cheka"⁴ of the Georgian SSR, which is still standing in the center of Tbilisi city, on #22 Ingorokva street. There is not any real feedback from the state regarding the form of preservation and memorialization of the building.

In 2014, the Soviet Past Research Laboratory identified another former POWs camp and cemetery in Kutaisi city, near a former auto mechanical plant. Further, with the assistance of the south Caucasus and Turkey office of the DVV international, a cemetery of POWs in Rustavi city was identified in 2016–2017, close to Zedgenidze street (see list of memorials up). In 2017, the first test excavations confirmed the findings. A new stage of excavations is planned in 2018.

In 2017, SovLab participated in the founding of the initiative, the "Last Address – Georgia", which is a partner project of the post-Soviet network of remembrance – "Последний адрес". It aims to install metal memorial signs on houses of victims of Soviet repressions. "Last address – Georgia" is still in the process of getting permission from Tbilisi city hall for installing the first memorial signs.

TYPES AND ROLES OF MEMORY INSTITUTIONS

The last years of Soviet rule in Georgia were a time of an "explosion" of the founding of a variety of civic and political organizations, parties etc. However, similar activities were not observed regarding groups of the victims of Soviet repression and the successors of their families; during the 1990's only two memorial organizations were founded.

The first of them was, **Einung**, the Association of Germans in Georgia was founded in August 1991. The association collected successors of German settlers in Georgia. The association started a variety of activities for the research and preservation of material and the cultural heritage of Germans in Georgia. It aims at understanding the memory of mass deportation of Germans to the Soviet Union in 1941.

Another and very important society was "**Memoriali**", the Georgian society of victims of Soviet repressions. "Memoriali" was established in 1992. The organization was founded by the successors of families of victims of Soviet political repressions. The society began with archival research for the identification of the fates of victims, collecting documentary sources and information from families. During the 1990's the society was publishing its own newspaper "Memoriali". The society organized several public exhibitions about Soviet repressions.

Throughout the 1990's "Memoriali" was actively trying to influence state policies towards guaranteeing social protection to the victims of Soviet terror and the successors of their families. The society started to collect information about the victims of Soviet terror based on sources from the KGB archives and published them in the newspaper. Memoriali led a civic campaign to prompt the government to create a memorial complex on Tbilisi–Rustavi road. The memorial complex was supposed to

³ Former military commander, one of founders of Georgian National Democratic party, member of committee of independence after Soviet occupation in 1922–1923. He was arrested by Cheka and was shot on 20th May 1923.

⁴ ЧК (Чрезвычайная Комиссия) – Extraordinary Commission – Soviet State security service in 1917–1922.

stand on the place of mass graves of the victims of Soviet terror, which was marked⁵ by historian Giorgi Tsitsihvili in 1990. However, the initiative was neglected by state and mobilization of society has also failed.

During the 1990's, as a result of the collapse of economic and social life of the Georgian state, permanent political crisis, and the restoration of the communist political elite in state structures, there was an extremely unfriendly environment for developing strong movements of research into the Soviet totalitarian state's mass crimes, and the memorializing of sites of memory. All groups and institutions founded at beginning of 1990's were facing complex problems and challenges and until 2010's there were no new initiatives for the rethinking of the Soviet past.

LESSONS LEARNT

It can be concluded that the failure of the process of the preservation of sites of conscience in Georgia after the end of Soviet rule, as well as a minimal degree of development of memorial institutions, the low impact on state policy and low mobilization of society can be considered a result of the crisis among historians, who were not ready to give input to society in order to understand the importance of sites of memory. At the same time, a disastrous breakdown of the economy, a political crisis, and war at the beginning of the 1990's almost destroyed the field for

the development of a proper civic activism towards the rethinking of the Soviet past. The state itself began to be passive about the prosecution of Soviet crimes, as it was partly dominated by former communist elite. The deadlock of this combination almost closed the door for any kind of progress in this field until 2010's.

RECOMMENDATIONS

- It is necessary to lead a wide civic campaign, record testimonies of victims and witnesses of mass crimes. Moreover, physical traces of the regime's inhumanity, mass graves of the victims, prisons, offices of state security units should be identified. These places have ethical meaning as places of conscience and memory, and are educational resources guaranteeing the keeping of a collective memory for future generations. This is all necessary for the resolution of the legacy of the totalitarian state and supporting prosecution of its crimes
- Civil society should initiate the preserving of sites of memory as a part of complex agenda towards dealing with the legacy of the former regime. However, at the same time, civil society should actively push state institutions to create a friendly environment for developing such activities and initiatives.

5 Till today there are no evidences about validity of this conclusion.

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TIMELINE OF THE MAJOR EVENTS

DAVID JISHKARIANI

1953	Lavrenti Beria was arrested in Moscow. It was followed by a mass cleaning of the state security system from “Beria’s guard”. In 1955–1956 some former officers of the NKVD-MGB were sent under a partly open trial for “mass violation of socialistic orders in 1937–1938”. Some of these trials were held in Tbilisi
March 1956	Large-scale demonstrations took place in Georgia, following Khrushchev’s criticism of Stalin at the 20th Party Congress. These were the first significant expressions of public protest and civil disobedience in the Soviet Union for decades, and they also bore a clearly nationalistic character
1956	The rehabilitation process started. The party apparatus tries to show the brutality of Beria and his Gung
1983	A group of young artists hijacked an airplane flying from Tbilisi to Batumi, trying to force the pilots cross the border into Turkey. The airplane’s crew managed to stop them and during the clash there were casualties from both sides, also among the passengers. The airplane returned to Tbilisi airport, where Special Forces attacked it and freed the hostages; during the operation some hijackers and passengers were injured
April 1989	Soviet internal troops and Special Forces suppressed an Anti-Soviet demonstration in Tbilisi. The demonstrations started as a protest against a movement for separation from the Georgian SSR in Abkhazian ASSR, but very soon it transformed into an Anti-Soviet protest, demanding the independence of the Georgian state. 21 citizens were killed
September 1990	Close to the first multiparty elections of the supreme council of the Georgian SSR, a group of KGB employees openly expressed their protest against Soviet rule, sending a declaration to the opposition press edition, blaming the center KGB of a destructive agenda, insisting on depoliticization and asking for the support of the future Supreme council of Georgia for a peaceful transition of the Georgian KGB to the State security service of an independent republic of Georgia
March 31, 1991	An independence referendum was held in the Georgian Soviet Socialist Republic. It was approved by 99.5 % of voters
December 1991	A fire in the KGB building destroyed many archival documents, the exact number is still not known
May 1992	The Ministry of State security of Georgia (formally renamed KGB) was formally abandoned, and the new state security office, “Informative-intelligence service” was founded, but, very soon after, in October 1993, the Ministry of State security was re-established
1997	Law “On the Acknowledgment of Citizens of Georgia as Victims of Political Repression and Social Protection of Repressed Persons”
2006	Law “On the National Archival Fund and the National Archives”
2006	The case against Georgia originating from application no. 7975/06 lodged to the ECHR under the Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms by Klaus Kiladze and Yuri Kiladze on the 22nd of February 2006 in order to assert their rights for compensation resulting from their status as victims of political repression
2007	Public discussion about Lustration organized by Heinrich Böll foundation in Tbilisi, key speaker was Joachim Gauck
2011	Freedom Charter adopted
2012	Law of Georgia on Personal Data Protection
2012	Payment for services provided by the Ministry of Internal Affairs Archives’ Prices became extremely expensive; one-page copy costs 3 GEL (approx. 1 EURO)
2013	Definitions of “Communist Totalitarian Ideology” and “Communist Totalitarian Symbols” adopted
2013	Georgian citizen Nodar Mumlauri filed a complaint with the Constitutional Court, stating that Article 9, Paragraph 1, Subparagraphs c) and d) of the Freedom Charter were contrary to the rights guaranteed by the Constitution

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MEMORY OF NATIONS

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AUTHORS

HANS ALTENDORF

Former Executive Director of the Office of the Federal Commissioner for the Records of the State Security Service of the former German Democratic Republic (BStU) (2001–2014).

JOACHIM FÖRSTER

Lawyer, Head of the Department of the Use of Stasi-Documents at the Federal Commissioner for the Records of the State Security Service of the former German Democratic Republic (BStU) (since 2003).

ANNA KAMINSKY

Director of the Federal Foundation for the Study of the Communist Dictatorship in the former German Democratic Republic (GDR) (since 2002).

CHRISTOPH SCHAEFGEN

Former Chief Prosecutor in Berlin responsible for investigating the crimes of the former GDR regime (1994–1999).

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TRANSFORMATION OF THE POLITICAL SYSTEM

HANS ALTENDORF

INTRODUCTION

Meanwhile, the communist dictatorship history within the Soviet Occupation Zone (SOZ) and the German Democratic Republic (GDR), the previous history as well as the Peaceful Revolution of 1989 has become a very profoundly and holistically researched topic of contemporary history, of social and political sciences and is part of a number of popular scientific and journalist works. This both applies for overviews as well as for numerous singular studies on the state and society.

The following political system transformation outline can highlight merely a few of the most significant aspects.

Within the context of profound changes in Europe's political order which took place in 1989–1991, dealing with the Soviet Occupation Zone (SOZ) and the GDR requires one fundamental introductory remark.

- On the one hand, the Peaceful Revolution within the GDR that took place in the autumn of 1989 and paved the way towards the reunification of the two Germanies on October 3rd 1990, is partly a story of how the communist dictatorships in Eastern and Central Europe were overcome. There are many parallels regarding the onset, the regime structures, the secret polices' operational methods etc. with the central and eastern European "fraternal countries" belonging to the Soviet imperium.
- On the other hand, the development within the GDR, its fall and the transformation into a democratic constitutional state are most closely linked with the very specific situation prevalent in the separated Germany following WW2: The Soviet Occupation Zone that became the GDR in 1949, and the Western Allies' Zones that called themselves the Federal Republic of Germany from 1949 and became a stabilized parliamentary democracy, embedded into western pacts and value systems. The whole transformation process that was linked to taking over the rules and structures applicable in the western part of Germany, is influenced by this very specific character in many ways (from the political, economic, administrative and societal point of view). This is why the German transition is substantially different in comparison to that in other states from the formerly Soviet-governed sphere.

SITUATION GIVEN AT THE BEGINNING: THE GDR SYSTEM

The allied victorious powers (USA, USSR, Great Britain, France) divided the land following Nazi-Germany's unconditional surrender in 1945 into four occupation zones, with Berlin being divided in the same way, yet being assigned special status.

Following the allies' victory against the mutual opponent, the contrasts between their systems rapidly became apparent again. Different countries were established: within the western zones, it was the Federal Republic of Germany in May 1949, and in the eastern zone, it was the GDR in autumn 1949.

As far as the development of the GDR (and the SOZ) is concerned, different phases and events can be listed:

- The path to a dictatorship has been eagerly paved already in the Soviet Occupation zone by the USSR.
- The process of "Establishing Socialism" was marked by Stalinism.
- The workers' uprising from 1953 has shattered the system.
- The ongoing refugee movements from the GDR to the FRG: From 1949 until 1961 2.7 million GDR citizens left the country.
- The construction of the Berlin Wall that had started on August 13th 1961 prevented a mass refugee movement to the West to a large extent.
- The 1960s witnessed a cautious opening within the interior accompanied with simultaneous striving for international acclaim, attempts at modernizing the economy; all this being linked with reinforced suppression.
- During the 1970s, there was a "controlled opening" within the interior, the influence of the policy détente became visible and the Helsinki Final Act issued at the Conference on Security and Cooperation in Europe appeared (CSCE).
- The 1980s: economic decline, the Socialist Unity Party of Germany's inability to undergo reforms, the formation of an opposition

The number of GDR inhabitants declined from 19.1m in 1949 down to 16.4 m in 1989. In comparison – the FRG's number of inhabitants was 47.7 m in 1950 and 63 m in 1989.

Summing up, it can be said that the GDR's system was a dictatorship shaped by the Soviet Union and a regime where the Socialist Unity Party of Germany (*Sozialistische Einheitspartei Deutschland*, hence the abbreviation *SED* in German) as the Marxist-Leninist workers' class party, i.e. a communist party in effect, was ascribed the key role. There were neither free elections nor an independent judiciary. Both the division of powers and administrative as well as constitutional law matters were unknown to this system. The Ministry for State Security, the Stasi, operated as a secret and uncontrolled police with comprehensive powers and was used to provide for the maintaining of power and suppressing of the opposition or people having a different opinion. Censorship, a non-existent freedom of press, freedom of expression and freedom to travel as well as the persecution of the political opposition were the characteristic traits of this state system. Yet exerting the domination throughout the GDR's 40 years of existence differed: there was the Stalinist repression during the foundation phase, the violent suppression of the uprising in 1953, internal opening phases, concessions in line with international détente processes (e.g. as a result of the Conference on Security and Cooperation in Europe – Helsinki Final Act) accompanied by an ongoing repression of the opposition within the country. Furthermore, it was important that suppressing the freedom of press and freedom of opinion became an important counterbalance as far as the western media and the east-west travelling were concerned.

THE GDR RULERS PRIOR TO THE PEACEFUL REVOLUTION

The Secretariat of the Central Committee and the Socialist Unity Party of Germany Politburo consisted of approximately 40 persons who formed the power core within the GDR. 500 to 600 people can be regarded as the top power elite. Apart from the already mentioned elite, these people were the members and candidates of the Central Committee, the First Secretaries of the Socialist Unity Party District administrations, the Heads of Department within the Central Committee apparatus as well as the top governing committees of the so-called mass organizations. Ideological and social homogeneity was provided for by a targeted cadre policy including careful control exerted by the Ministry for State Security (MfS).

As a second tier, we can name the administrative service class: members of the State Council, of the Ministerial Council, of the People's Chamber, of the managing committees within the State Control Commission, of the combines, of the Stasi and military units, of the higher Socialist Unity Party of Germany managing level, of the so-called block-parties and mass organizations, of the scientific institutes within the Central Committee and of the Academy of Sciences.

Below this kind of administrative service class, we can detect an operative service class that contained the middle level management within the Socialist Unity Party of Germany and within the state apparatus as well as within the state owned enterprises as well as highly qualified state employees such as professors, doctors, engineers and teachers, furthermore, employees within the administrative bodies and further scientific personnel. Loyalty to the system was a precondition that was mostly documented by membership of the Socialist Unity Party of Germany.

Altogether, there were approximately 250,000 people pertaining to the administrative and operative service class.

GOVERNING AND CONTROL STRUCTURES WITHIN THE GDR

Power was vested in the hands of the Socialist Unity Party of Germany that had a claim for absolute leadership which was also anchored within the constitution and based upon Marxism-Leninism. The organization and leading principle of a "Democratic Centralism" as developed by Lenin was applied. Already from the establishment of the GDR onwards, any decrees, acts, ordinances and decisions taken by the People's Chamber and the Government underwent an approval process by the Politburo or rather the Politburo Secretariat. There were clearly hierarchical order structures within the party. The Nomenclature principle was to provide for the rookies staying on the path that had been shown and that they were willing to obey and subdue. The Socialist Unity Party membership number rose from 1.8m in 1947 (when it was 1.8m) up to 2.4m in 1988.

The SED Politburo General Secretaries were: Walter Ulbricht in the period of 1950–1971 and Erich Honecker within the 1971–1989 period.

The Ministry of State Security, i.e. the Stasi, considered itself to be the "shield and sword" in safeguarding these power structures. It was not a "state within a state" nor the covert, actual power centre (as it had been or is the case in dictatorships elsewhere), but served as a secret police with extensive competences and its

own self-perception of providing for the safety and stability of the party's reign.

Furthermore, other state institutions such as the People's Police or the military performed indispensable governance or control tasks for the SED-dictatorship.

REACTION OF THE OLD SYSTEM TOWARDS THE CHANGE

When the political and societal changes in the other Eastern block countries and especially within the USSR became apparent at the end of the 1980s, the Honecker-led SED stuck to its orthodox hardline policy. It was unable to undergo reforms. It has become clear from the files that the SED-leadership had already been in decay during this phase of the Peaceful Revolution. Yet the citizens were not aware of this at all as the state functions were upheld, including all their flaws. The demonstrating people could not have foreseen the party's and state leadership's reactions towards their protest.

The communal elections in 1989 became the starting point of a broader opposition movement that was supported, as it had been in previous years, by the Evangelic Church to a significant extent. There were many protests and numerous criminal charges brought against the state-organized electoral frauds.

During the summer of 1989, the emigration and refugee movement was manifested and openly perceivable due to the Federal Republic of Germany's embassies in Budapest, Prague and Warsaw being cramped with GDR refugees. Apart from the economic crisis situation, this contributed to destabilizing the SED-regime.

Until September 1989, the GDR reacted with repressions towards demonstrations and activities organized by opposition and church groups, using both the police and Stasi to arrest hundreds of people.

As we know today, the mass demonstration in Leipzig on October 9th 1989 gained historical importance – about 70,000 people went to the streets. The police and special forces were ready to intervene. The people feared to a significant extent that this democratic protest would be suppressed by military power – in a way as a reference to the bloody suppression of the protest on Tiananmen Square in Beijing in June 1989 – i.e. lead to a "Chinese solution". Yet the guards were not finally deployed as the respective order from East Berlin didn't come nor did the local authorities within the Party or the State apparatus order them to do so, following rather the societal power that put a lot of emphasis on dialogue. The fact that Leipzig had remained peaceful on this day had an enormous influence on the subsequent development of the Peaceful Revolution.

In the light of these events, the ongoing refugee movement and the desolate economic situation the SED-leadership was aware of, the dismissal of the SED General Secretary Erich Honecker and the election of Egon Krenz on October 18th was meant to bring about the "turn". Yet certain personnel shifts and corrections within state policy did not calm down the situation. The refugee movement went on. New rules for travelling abroad were intended to enable appropriately organized private journeys abroad. Following a press conference where the question regarding the point of time since when this regulation would come into effect was answered with "Now, immediately.", nothing could stop the development of this situation further. GDR citizens gathered at the checkpoints from East to West Berlin, the passport

control officers finally heaved up the barriers – the Berlin Wall fell in the night from the 9th to the 10th October. The SED including the state leadership were virtually unable to act.

Within a few weeks, the SED rapidly lost its influence. 600,000 members left the party. The managing committees agreed upon dissolving themselves as early as in December 1989, leading members were expelled from the party. There was an attempt at a restart by renaming the SED-party the Party of Democratic Socialism (PDS).

Dissolving the Stasi, the secret police of the collapsing regime, first became apparent on December 4th 1989 when the Stasi offices in Erfurt were occupied; for further information on this issue, see also the following chapter.

Altogether we can say that the old system was significantly weakened during the end phase without the citizens knowing whether the system became less willing to become violent or less dangerous. Yet the regime's attempts to maintain its influence by putting through a modified "reform" course and through the resignation of the old leaders which were also attempts to convince the citizens of the will to bring about changes remained unsuccessful. Also the criminal prosecution of those who had committed electoral fraud that was prohibited even within the GDR didn't change anything about this. Following the first free election in the GDR, the People's Chamber elections in March 1990, the prospect for a reunification with West Germany became clear. Yet this required negotiations and agreements with the allies. The reason for this being Germany's sovereignty that had been limited since the Second World War.

LEGAL FRAMEWORK CONDITIONS FOR THE CHANGE

Following the "self-liberation", a "self-democratization" followed within the GDR. The legal issues regarding the transition towards a democracy are partially those that referred to the GDR's internal rules as this country had opened itself up in autumn 1989 in a peaceful and revolutionary way in order to overcome the SED-dictatorship. A former state party fundamentally deprived of power came across a split opposition that was suppressed within the GDR and didn't really have a solid position.

The amendment made to the GDR constitution on December 1st 1989 was rather symbolic: In Art. 1, the passage saying that the "workers' class and its Marxist-Leninist party" performs the leading role was erased. Thus, the SED lost its dominance also in a formal way.

Although the "Central Round Table" – established according to its Polish model – didn't have any formal parliamentary nor executive function, it played a very significant role from December 1989 until March 1990 during the peaceful transition. It was composed of one half of the representatives of the old system, with the other half being occupied by various opposition powers and the task was to openly declare the ecological, economic and financial situation and present proposals for overcoming the crisis. Many cities and communities witnessed round tables being established according to this model and these round tables served for having a dialogue with the state institutions and controlling them.

On March 18th 1990 the first and only free, democratic People's Chamber elections took place in the GDR. The result was to be understood as a clear vote for a rapid reunification. The opposition

movement, the decisive political powers of the peaceful revolution and the round tables, became only a minor group within the parliament.

It was at the latest at this point when the legal framework conditions were influenced by the contract negotiations with the allies and by the perspective for a reunification of both German countries. It was not the GDR-law adaptation to the new, constitutional law and democratic rules that were of the utmost importance as in the other countries of the former Eastern bloc, but the transition modalities into the state of the FRG which had been existing since 1949 which was to be clarified. As we have already mentioned above in section 1, this was a significant characteristic of the GDR's transition process.

As far as this path of German reunification is concerned, which is a highly complex legal as well as politically creative task, there are certain important key legal issues:

- A treaty on establishing a monetary, economic and social union was concluded on May 18th 1990 between the Federal Republic of Germany and the GDR. Taking into consideration that the East German economic system was virtually dissolved and that an East-West mass movement prevailed (mostly a young and highly qualified workforce), rapid and effective measures for establishing a well-functioning social market economy became necessary. The State Treaty was approved by both the West German Bundestag and the East German Volkskammer with a vast majority. Thus, on July 1st 1990, the economic and social structures were transferred from the Federal Republic of Germany to the GDR and the D-Mark had been agreed upon to become the one and only legal currency.
- The Two-plus-Four-Treaty concluded by the four allied victorious powers and both German states was concluded on September 12th 1990: According to international law, this treaty fulfilled the role of a peace treaty providing the reunited Germany with full sovereignty within the country itself and in foreign relations. This treaty defined, among other issues, the German territory (FRG, GDR and Berlin), acknowledging the Oder Neisse border as Poland's Western border.
- A treaty on Establishing a unified Germany (The Unification Treaty) that became effective on October 3rd 1990: This extensive treaty that was ratified by the West German Bundestag and the East German Volkskammer with more than two thirds of the votes basically regulated and in detail the GDR accession to the Federal Republic of Germany. Adapting the legal and administrative structures from the GDR to those in the Federal Republic of Germany became a norm to a significant extent.

ESTABLISHING THE NEW SYSTEM

Carrying out the basic political and economic decisions as well as the international law and national law conditions outlined in section 6, the foundations for establishing a new order within the former GDR were laid down.

As far as the political and the administrative structures were concerned, this meant that there were five new federal states established on the former GDR territory, federal state parliaments were elected and federal state governments came into office. Jurisdiction was built up according to the Federal Republic of Germany's model, the administration was established, profound restructuring within the health and education sector took place

just as they were put through at universities. East Germany's National People's Army (*Nationale Volksarmee* – NVA in German) was dissolved and integrated into the Bundeswehr at a significantly smaller size. The Ministry for State security had already been dissolved earlier when the GDR had still been in existence. Political as well as administrative support provided for this process came to a significant extent from the western federal states. More than 35,000 West German workers became active in East Germany for this purpose.

Altogether, we can say that the new state structures were established relatively fast and successfully.

In order to build up the economy within the new federal states, the large-scale “Aufbau Ost” program (*i.e. East Germany Rebuilding Program*) was called into life that calculated with enormous financial transfers to support these federal states. Yet, the economic situation in this area deteriorated further, the East German economy was mostly desperately inferior to its Western competitors given the East German products and prices. Mass dismissals followed. Unemployment rose rapidly. The privatization of formerly state owned companies brought much less money than expected. Building up a new powerful economy turned out to be far more complicated than had been expected and this process is one that has not yet been completed even after almost thirty years.

TRANSFORMING THE POLITICAL LEADERSHIP

The very specific situation occurring during the German reunification process enabled the exchange of the elite to a significant extent, some even say that the GDR elite “was wiped out.” The former GDR top leadership was almost entirely exchanged. According to a survey that was carried out in 1995, only 2.7 % of the 410 top positions within the former GDR were occupied by members of the former GDR elite. Thus, the SED-apparatus including its 44,000 functionaries and the 91,000 Stasi staff ceased performing their previous jobs.

Yet the removal of the former political power elite from its positions didn't happen on the higher socialist service level, which means on the functional elite below. This kind of elite managed to maintain its old positions in a profoundly reduced scale or it switched to other functions – often with the support provided by its old network – and these functions were often in the economic sphere.

About 40 % of the East German top positions were occupied by West Germans – the higher the rank was, the higher the Western employee percentage became.

Thus, within the sphere of the judiciary, the heads of the Highest Courts as well as the heads of the Constitutional Courts came from the west; out of 3,000 judges in the GDR, only 1,000 remained in office.

Only approximately 10,000 of the 50,000 professional and temporary professional soldiers in the National People's Army were absorbed into the Bundeswehr.

Within the schools, approximately every sixth teacher was fired.

All in all, we can say that the rebuilding of the new federal states took place to a large extent under West German leadership – with the degree being different in the individual areas of state duties and the economy.

As far as the further exertion of tasks by former functionaries or taking over new tasks was concerned, the processes that served to check whether a person had been collaborating with the Stasi on an employment basis or unofficially within the GDR played an important role. (For this issue, see the Chapter “Lustration and the process of vetting”.)

LESSONS LEARNT AND RECOMMENDATIONS

- A (peaceful) revolution and the subsequent rebuilding process towards a politically and economically new state order mustn't be underestimated as far as their complexity is concerned. Overcoming the old order and depriving it of power – as had been brought about in the autumn of 1989 due to the people's movement – became a necessary precondition for the subsequent development. Yet the revolution participants were not those who had the necessary competence and capacity necessary for rebuilding the new. Finally, within the reunited Germany, these resources – i.e. large numbers of qualified personnel and a lot of money – from the old Bundesrepublik, i.e. the Federal Republic of Germany, were relatively easily accessible. Yet this is a condition that's quite unusual and is normally not given.
- On the one hand, the victims of the old system are the winners of such an overthrow, because the old oppressors are not in power anymore; yet they are not winners in the sense that they would be successful in the new order. These expectations may be disappointed.
- A new constitutional state order sets limits on the criminal prosecution of the actors from the dictatorship that is overcome. These limits are especially vested in the constitutional law principles “Nulla poena sine lege” – no punishment without law – and “In dubio pro reo” – benefit of the doubt. These constitutional state principles were those that led to the old system's victims' disappointment. What's important – as frustrating as it might be in individual cases – is that the criminal law processing is classified realistically.
- It is very important to provide for the dictatorship legacy to be recorded as profoundly as possible. This applies especially to the secret police files. Even if society does not agree upon how to provide access to these files, protecting them against being destroyed or against undergoing an interest-led selection, is important. It is then necessary to carefully clarify what a usage of the files based on constitutional state principles shall look like – taking into consideration the personality and data protection on the one hand and opening the files in order to carry out a reappraisal on the other.
- Overcoming a dictatorship that had lasted for 40 years needs time. Although the basic decisions regarding the main paths for the new legal as well as economic orientation were taken rapidly – as was the case in Germany – the personnel, structural, economic and cultural development steps consume quite a significant time stretch when going into detail. This is something we can also state with respect to Germany and considering a comparison of its highly privileged framework conditions after more than 25 years.
- All this means that: false and unrealistic promises that do not correspond to the challenges of such a complex transition process, are something to be left out. The same applies to promises directed at relieving the suffering that the dictatorship

caused to its subordinates. It is surely necessary to strive for this as far as possible, yet the suffering can only be remedied within limited borders.

- External experts should be welcome in such a rebuilding process with the condition being that they do know the respective subject matter, behave respectfully and sensitively.

Yet it is probably going to turn out that it is indispensable for a country to receive strong support. This should be done in a self-confident way, yet also having in mind that in order to create a transition process and create the new, one also needs the expertise provided by already established constitutional states and that this is then highly valuable.

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DISMANTLING THE STATE SECURITY APPARATUS

HANS ALTENDORF

INTRODUCTION

The process of dismantling the Stasi within the GDR as described within this chapter is to be understood within the context of a preliminary remark that adds up to the preliminary remark from the Chapter “Transformation of the political system”:

On the one hand and due to its structure, the operating methods and its function within the state, the GDR secret police resembled the secret police forces in the other countries under Soviet influence.

On the other hand, the whole post-revolutionary activities, dissolving the Stasi and the transformation into democratic structures is influenced by the very rare framework conditions of German reunification following the date when the GDR entered into the area where the German Grundgesetz (*which is de facto the equivalent to another country's constitution*) applied that was in force within the Federal Republic of Germany. This accession took place on October 3rd 1990. That's why, apart from an attempt which lasted merely a few weeks prior to the accession, there was no Stasi successor organization. The new federal states in the former GDR territory witnessed the establishment of new structures that corresponded to those within the other Federal Republic of Germany's states. In this sense, Germany's transition process differs from that of many other countries that overcame communist dictatorships.

THE STASI'S MEANING AND FUNCTION WITHIN THE GERMAN DEMOCRATIC REPUBLIC PRIOR TO THE PEACEFUL REVOLUTION

The Socialist Unity Party of Germany (*Sozialistische Einheitspartei Deutschlands*, hence the German abbreviation *SED*) governed in the German Democratic Republic. Yet this government had never been legitimated by democratic, free elections. The SED's power had been upheld through a massive security apparatus. The Ministry for State Security (*Ministerium für Staatssicherheit*, hence the German abbreviation *MfS*), the Stasi played a key role in safeguarding these power structures. The Stasi perceived itself as the “Shield and sword” of the Party. It had been constructed according to direct instructions by the Soviet secret service. The accumulation of power was characteristic: The Stasi was a secret police within the country itself, it operated as an intelligence service abroad and was a police investigation authority, it had remand prisons and armed forces. This was one of the most influential institutions within the GDR. This institution was merely controlled by the SED party leadership and within the first years of the Stasi's existence, by the Soviet KGB.

Within the first years of the GDR's existence, the Ministry of State Security went about their business with offensive power and brutality. Physical violence, arbitrary arrests and kidnapping from the West figured among its methods; The Ministry of State Security, furthermore, controlled show trials led against

unwanted political powers and provided for stiff sentences within these trials.

From the 1970s onwards, the Ministry of State Security increasingly relied on “silent” methods. Persecution and repression were to be veiled. At the same time, the interest in preventing unadapted, system-critical, oppositional behavior further prevailed including the monitoring of such behavior. To be able to do so, the Ministry of State Security had access to all areas of life within the GDR. This included monitoring, eavesdropping, spying on, arresting and interrogating. In doing so, it relied on its close cooperation with the Peoples Police (*Volkspolizei*), the customs authorities and other GDR institutions. It was able to gather almost any information and documents.

STASI STRUCTURE AND PERSONNEL

The Ministry for State Security was organized in a military-like and strongly centralized way.

Basically, the territorial structure consisted of (apart from several facility-specific offices) the 209 locally operating district offices. Depending upon the conditions within each region, these were structured differently and mostly had up to 50 employees. Their tasks ranged from controlling state institutions and societal areas, to monitoring certain people and to carrying out security checks.

According to the GDR administration structure, there was a medium level with 14 regional administrations. Their internal structure corresponded to that of the Headquarters: they were organized according to the line principle, they were significantly larger than the district offices and had far more specialization branches. The regional administrations are described as the actual backbone of the Ministry for State Security's operative work.

The headquarters of this ministry were in East Berlin and from 1957 until 1989, Erich Mielke was the Minister for State Security.

The “Feliks Dzierzynski” guard regiment was part of the Ministry for State Security, with its foremost task being to guard the party's and the state's objects as well as to provide for the leading GDR representatives' safety and the safety of its guests

The Ministry of State Security had been continuously growing since its establishment and in 1989, it had 91,000 main employment staff: More than 36,000 within the Berlin headquarters, over 43,000 in the regional and district offices and more than 11,000 in the guard regiment. The Ministry for State Security grew most rapidly during the 1970s: In the light of the détente policy and a rising number of contacts between the West and East, the state leadership feared that it would be massively threatened by “hostile influences”. Monitoring and surveillance measures were highly intensified.

Usually, the Unofficial Collaborators (*Inoffizielle Mitarbeiter* in German, hence the abbreviation *IM*) of the Ministry for State Security committed themselves via a written declaration to cooperate in a conspirative way with the Stasi. They were deployed in all parts of society, the economy, administration and within

the military. They reported from opposition movements, from family circles or from groups of friends or about classmates. They contributed with information of a very varied nature – ranging from moods within cooperatives, to banal issues and up to the most intimate personal details. There were Unofficial Collaborators of various types. A small percentage of the Unofficial Collaborators were abroad, mostly located within the Federal Republic of Germany. In 1989 the Ministry of State Security had 189,000 Unofficial Collaborators on its list.

THE STASI AND THE PEACEFUL REVOLUTION OF 1989 (REACTION TO THE POLITICAL SHIFTS / THE TRANSITION PROCESS UNTIL THE DISSOLUTION)

The Ministry of State Security was already aware of the high level of discontent within the country before the events of autumn 1989. From the domestic policy point of view, the emigration movement and the refugee wave going over to Hungary was regarded as the main problem. The international situation gave rise to worries. The liberalization process in Poland, Hungary and especially within the Soviet Union caused anxiety that similar tendencies might develop within the Socialist Unity Party as well. The civil movement which was perceived as relatively marginal and also believed to be under control caused fewer worries.

On October 7th 1989, the Stasi still reacted towards demonstrations linked to the 40th anniversary of the GDR foundation with repressions, using police batons, water cannons and arrests. The Minister for State Security Erich Mielke's orders of October 8th were directed at preparing sharper conflicts and stronger repressions.

Yet, the development was entirely different than the rulers had expected. Within this context, we can regard the Monday demonstration of Oct. 9th 1989 in Leipzig as the decisive event, when tens of thousands gathered to protest and the state bodies didn't intervene in spite of having carried out the proper preparations. The Stasi, the Volkspolizei and the army, that were prepared for such an intervention would have been able to suppress this civil protest with violence. The fact that there was the threat that a civil war like situation might arise – in combination with a threatened international isolation –, important SED-functionaries on the local level were willing to have a dialogue and an erosion of the top SED leadership level that had already taken place to a significant extent were the most important reasons why repressive intervention against the civil rights movement that had become powerful didn't follow. Furthermore, it was clear that in contrast to 1953, the Soviet Union was not willing to deploy its troops stationed in the GDR – and there were actually approximately 400,000 soldiers – to suppress the protests. The Stasi leadership thought that it was necessary to change the head of the SED and within the following days, it supported the fall of the SED General Secretary Erich Honecker on October 18th, who had been in office for many years, replacing him with Egon Krenz as his successor. Rejecting open repression was intended to regain the political initiative and provide for the Party's power. This in turn was meant to be taken care after by stronger surveillance and an undermining of the opposition movement, also making use of the Unofficial Collaborators.

The newly-elected SED General Secretary promised to carry out the reform steps and explicitly declared that it was possible to solve all societal problems politically. This was to be understood as a no to police-state repressions.

The crisis at the top level of both the Party and the Stasi was mirrored by disorientation, an uncertainty regarding the future development and the role that the Ministry for State Security was to play and that it was actually able to fulfill. A sign of this uncertainty was the Minister of State Security's ordinance of November 6th to move important documents from the Ministry of State Security's District Offices that were regarded as especially endangered to the better protected Regional Administrations. It was at the latest at this point when the document destruction carried out by the Ministry of State Security started. (for further information on the document destruction in relation to the dissolution process, see the Chapter "Regime Archives")

The long-standing head of the Stasi, Erich Mielke resigned with the whole GDR government on November 7th. His last appearance in the Volkskammer parliament on November 13th remained in people's memories due to his last helpless attempt at rescue where he said "he actually loved all people". Within the strongly uncertain Stasi organization, this was regarded as a clear sign of the leadership having failed.

From the end of October onwards, the dissolution of the Stasi became one of the civil movement's key demands; demonstrations in the district and regional capitals were directly focused on the Stasi offices.

On November 18th, Erich Mielke's term of office ended. The Volkskammer renamed the Ministry for State Security (i.e. *Ministerium für Staatssicherheit*) to the Office for National Security (*Amt für Nationale Sicherheit* in German, hence the abbreviation AfNS). According to a government declaration, the new office was to demonstrate "a new way of thinking regarding public order and security" and downscale its apparatus. The details were to be laid down in an act, yet such an act was never adopted.

The new leader informed his employees about the "redefinition of tasks, responsibilities and structures of the Office for National Security"; the renewal process was to be unconditionally supported. A staff reduction of 10 % in the first step and later by 50 % was announced. Many service rules were annulled.

At the beginning of December, the file destruction came into the opposition's focus. It became public that the Ministry of State Security had started to destroy documents on a large scale. From December 4th, the civil rights movement didn't confine itself to merely demonstrating in front of the Stasi offices but actually forced its way into the district and regional offices in order to stop the file destruction. There were so called "Security partnerships" (*Sicherheitspartnerschaften*) consisting of state and civil movement representatives being founded in many places, which was an ambivalent issue that on the one hand contributed to a non-violent process, yet on the other hand, this virtually enabled the Ministry for State Security to go on destroying files.

Within the following days, the AfNS collegium resigned, the heads of most of the central departments and regional offices within the Office for National Security were dismissed.

On December 7th, the Central Round Table (*Zentraler Runder Tisch* in German) demanded the AfNS be dissolved with SED delegate votes also opting for this.

On December 14th, the Ministerial Council decided to dissolve the AfNS. There were meant to be two successor organizations: a GDR foreign intelligence service as a more or less continued

foreign espionage department (the so-called “Hauptverwaltung A”) from the Ministry for State Security with approximately 4,000 employees and a “GDR Constitutional Protection Service” (in German: *Verfassungsschutz der DDR*) with approximately 10,000 employees in charge of internal security issues. There were no former leadership cadres to be absorbed into the “Constitutional Protection Service”.

Yet these resolutions didn’t survive too long. Civil protests were even directed against planning the successor organizations, the Central Round Table rejected this plan following a fierce discussion. Finally, the Ministerial Council decided on January 13th 1990 to abolish the AfNS without any substitution and “in all its aspects.” On January 15th, thousands of people occupied the AfNS headquarters in Berlin-Lichtenberg as part of the regional civil committee’s initiative to add weight to the dissolution. On January 18th, the government decided to put the Stasi dissolution under public control and to create a “State Committee for the Dissolution of the former Office for National Security” (*Staatliches Komitee zur Auflösung des ehemaligen Amtes für Nationale Sicherheit*).

Stasi full time-employees had already started to be dismissed in November 1989. In the middle of January, most of the employees (approximately 60,000) were still in service, yet they were all dismissed by March 31st 1990, with the following exceptions. The exceptions were the approximately 200 employees of the Main Directorate for Intelligence (HVA – i.e. the above-mentioned Hauptverwaltung A), which was allowed to dissolve itself; these people were employed for a further three months. A specific group remaining was the “Officers in special services” (in German: *Offiziere im besonderen Einsatz*) that were actually covertly operating within the state apparatus and in the economic sphere. Here, the dismissals took longer, approximately until autumn 1990. Officially, the Ministry for State Security was declared as entirely dissolved on June 30th 1990.

There hasn’t been any systematic survey regarding the former Ministry for State Security’s former employees in the future Federal Republic of Germany. We know that approximately 1,500 personnel, former full-time employees at the passport control or personal protection were employed by the federal or state police units. Also the office of the so-called special commissioner and the future federal commissioner for Stasi-documents, employed approximately 100 former employees from the Ministry for State Security, predominantly in the building protection service that was responsible for the security of the buildings or they were employed as drivers of the office. A smaller number were entrusted with specialist tasks – which was especially the case in the 1990s. The first Federal Commissioner, Joachim Gauck, who was later elected Federal President, has always described the employment of former full-time employees within the difficult rebuilding process as necessary and defended it against the criticism that had emerged against this situation right from the beginning. Actually, it hasn’t been revealed that these employees neglected their duties – they performed their tasks loyally. Nevertheless, critical voices regarded it as unbearable that an office serving the reappraisal of the Stasi’s activity employs former secret police employees. Meanwhile, only a very small number of these employees are still working in this office – and for a very long time, it’s only been in the building protection service.

From autumn 1989, the Unofficial Collaborators were successively switched off, the last via an order from January 12th 1990. It was as late as on March 8th 1990 that the government decided

to free the Unofficial Collaborators from their commitments to remain discreet that they had agreed upon.

A specific Chapter that is retroactively being regarded as critical with respect to the Ministry of State Security dissolution is the Main Directorate for Intelligence i.e. the foreign espionage department. Following the Round Table’s consent, the HVA was allowed to dissolve itself by June 30th 1990. Yet the Central Round Table had been deceived as far as the character of this department was concerned: The Ministry for State Security declared that the HVA was a normal foreign secret service as is run by any country. Furthermore, it declared that it was necessary to repatriate the agents from abroad, to provide for their protection and proper CV in order not to expose them to threats. At this point, hardly anybody knew that the HVA was also directly participating in persecuting and fighting against political enemies, i.e. that it had been an integral part of the secret police. The result of the consent towards the self-dissolution was that almost all the documents from this department were destroyed.

Although today, there are vast amounts of data regarding the Ministry of State Security’s work stored at the Archive of the Federal Commissioner for Stasi Records (*das Archiv des Bundesbeauftragten für die Stasi-Unterlagen*, hence the abbreviation *BStU-Archiv*) available for the legally defined purposes, we still have to state that the Ministry of State Security itself destroyed large volumes of files in order to conceal its own activities and to protect its full-time employees and Unofficial Collaborators. The approximately 15,000 sacks of torn documents that were seized demonstrate the destruction which hadn’t been completed. There are neither reliable data regarding the overall amount of the destruction nor are there reliable estimates. Furthermore, it’s not merely about the scope but also about the quality of the destroyed documents so that quantitative estimates do say very little about the content.

Again, it was the Central Round Table that approved the special documents be destroyed: All magnetic tapes (10,000), 5,000 discs and 500 removable disc storage devices at the Ministry for State Security were destroyed. The official argument was that these documents were not to be worked with again. The Ministry for State Security declared that these documents were present in writing as well. Later, it actually came out that this declaration was wrong. Later on, people succeeded in reconstructing parts of these electronically stored documents that had been destroyed.

For further details regarding the files and the discussion about their future use, see the Chapter “Regime Archives”.

CITIZENS PARTICIPATING IN THE TRANSITION PROCESS

The citizens participating in the transition process is a broad topic: It ranges from the innumerable demonstrations and manifestations to the cooperation in the newly founded committees and initiatives at a local, regional and central level. Here, we shall outline merely the most significant aspects.

- The Peaceful Revolution within the GDR that took place in autumn 1989 and the subsequent transition process towards democracy would have been unthinkable without a brave and powerful **civil movement**. During the 1980s, a varied opposition emerged. Although it had been rather small-scale at first, mostly linked to the Evangelic Church activities, the number of male and female citizens expressing their protest against

the state and party leadership and in favour of democratization rose enormously throughout the revolutionary year. In autumn 1989 something happened that would have been unthinkable some months before: hundreds of thousands of demonstrators in small and larger cities across the GDR went to the streets in spite of the country's armed forces.

Apart from these dynamics emerging from the population, important framework conditions are to be listed that became important for the Peaceful Revolution and the successful transition process from a dictatorship to a democratic state: the international situation, the dramatic reform processes in the Soviet Union led by Mikhail Gorbachev in the late 1980s, the USSR virtually retreating as far as its troops presence for the GDR's purposes were concerned, the USA's support for a united Germany and on the other hand, the GDR ruling system's visible decay both on the political and economic level.

The East German population's awakening represents a key condition for the success of the revolution autumn of 1989 and the overall successful transformation process. Even an ailing regime would neither have resigned just like that or collapsed, as it had ruled for at least 40 years; the civil movement had been a rather weak and a marginal phenomenon until 1989. In contrast to other Central and Eastern European countries, the emigrations into the Federal Republic of Germany and state-enforced expatriations into this country weakened the opposition's potential or at least reduced the number of discontented citizens remaining in the country. Nevertheless, during the summer and in the autumn of 1989, protests within the population emerged on an unimaginable scale. This development was also reflected in the citizens participating in the Stasi dissolution.

- To be more precise, we can already detect during the autumn **demonstrations** that the Stasi and its operations were being focused on. The demands expressed during demonstrations and manifestations across the country referred to free elections, speaking about the electoral frauds in public, freedom to travel and other democratic rights; and also the Stasi's dissolution or at least its downsizing was the protesting citizens' declared target everywhere. **Occupying** the regional Stasi offices from December 1989 and finally, the seizure of the Ministry of State Security's headquarters on January 15th 1990 clearly express this development. Yet what was being called an "occupation" didn't mean that the civil movement took these offices entirely under its control. This was rather a continuous process of limiting the actual exertion of power and only partially an effective interference into the procedures within the apparatus. Not even the occupations were able to entirely stop the files being destroyed during this phase. Surely, the knowledge about the ruling as well as the apparatus that had hitherto still been working in general was being used – as it had been the case in the subsequent formalized participations of the citizens – in order to monitor the interests of the system that had not yet been changed. During this phase, active citizens were actually also lay people in handling the secret service apparatus.
- Following several local precursors, from December 1989, the **Central Round Table** in Berlin became a location where the rulers negotiated with representatives of the stronger opposition in equal representation about the shape of the transition process. The fact that such a round table had been established clearly demonstrated that the democratization process

was irreversible from now on which thus meant the end for the Socialist Unity of Germany party's reign – it was forced to publicly negotiate with the declared enemies. Dissolving the Stasi was a key issue of these negotiations.

Hundreds of cities and municipalities followed this Central Round Table example, establishing local or regional Round Tables. It was relatively frequent that the Round Tables built thematic work groups that often focused on security issues or on the Stasi dissolution. There were no unified Round Table procedural rules.

The Round Tables manifested that the Socialist Unity Party regime handed over power and the opposition's institutionalization; they may be regarded as an important though not decisive factor contributing to an orderly and non-violent system change. They were important locations where consensus-oriented talks took place. Yet their lacking democratic legitimization as well as the frequent deception within the Round Tables by false information from the state bodies was criticized.

- **Civil committees** were constituted from December 4th onwards in Erfurt in all GDR district capitals and in many regional capitals. These committees occupied the Stasi offices and were primarily focused on halting the Stasi file destruction. Opposition members and active citizens were members of these committees. The civil committee in Berlin was founded, but late on, on January 15th 1990. This came in connection with the mass demonstration that took place in front of the Stasi headquarters and the occupation thereof.

Civil committees were not composed according to any specific rules.

- **The Security partnerships** of state institutions (the People's Police, prosecuting offices) and citizens active in the civil movement occurred in many places in order to prevent escalations and the emergence of violence. As important as this might be for safeguarding the non-violent character of this revolutionary process, it was, on the other hand also the rulers' last opportunity to put through their interests at various levels, albeit with restrictions. As far as the civil movement is concerned, which couldn't have had any insider knowledge, this was the ticket to the spheres of state power that had hitherto been top secret.
- The **State Committee for the Ministry of State Security dissolution** (formal expression: Office for National Security) was established in February 1990 through a GDR government resolution. It was meant to create a civil control for the dissolution process. Three commissioners, with two of them being from the civil movement, were vested with governing power to control this process.
- Further citizen participation phenomena were – to some extent, together with the previously mentioned institutions – work groups, investigation commissions, commissions composed of equal numbers of representatives, consulting groups and dialogue forums.

LESSONS LEARNT

POSITIVE

- Although the political opposition within the GDR in the 1980s was relatively weak and internally split, it was able to get a response from a vast group of inhabitants during 1989 in relation

to the democratization process. This large-scale participation of citizens in cities and within rural areas can be regarded as one of the key conditions for the success of the revolution process.

- It was neither Germany's unity that became effective on October 3rd 1990, nor was it the decision taken by the first and only freely elected GDR parliament in March 1990: the decision to dissolve the State Security without any substitution had already been taken in December 1989/January 1990. Given all the problems linked with the transition, the rulers didn't even manage to establish small successor organizations. This clear step was surely linked to the reunification that was already on the horizon, yet due to the significant pressure from the civil movement, it already occurred during a phase when these perspectives hadn't yet become clear and when the decision powers hadn't yet been redistributed.
- The different forms in which opposition citizens participated in the change process (especially the Round Tables and the Civil Committees) can be regarded as an important precondition for the revolution's peaceful course. The fact that a transition process which was shaped this way left time for the old rulers to put through their interests (e.g. wiping out any traces by destroying files) is not a counterargument serving against a peaceful transformation which prefers talks and political negotiations.
- People managed to prevent large-scale file destruction. The Archive of the Federal Commissioner for the Records of the State Security Service with its large stock bears witness to this. It is the civil movement's achievement that the destruction was detected and made public and that powerful attempts were made to counterbalance the destruction or to limit it.
- It is to be positively valued that parts of the old system (albeit only small ones) supported the transition process by providing the civil movement, and later the democratically legitimized institutions, with their insider knowledge about the apparatus' mode of operation. Until today, this has remained a controversially discussed issue. For sure, it's a very sensitive one. Yet as far as the highly complex transition processes of this kind are concerned, it hardly appears to be dispensable relying on constructive and expert powers from the old system, albeit for a limited period of time. Within this context, clarifying the preconditions and conditions for such participation is important (honestly meant breakup with the past, indispensability of the expertise, transparent participation, close following/control of the activity, fixed-term activity within sensitive areas).

NEGATIVE

- It was not possible to prevent the Stasi destroying documents entirely or partially on a large scale that would have been of significant importance for reconciling with the past. These file destructions partially took place during a period in 1989 when the course of the revolution had not yet become clear, i.e. these activities couldn't be controlled from the outside. It's the civil movement's achievement having vitally disturbed this process by occupying the Stasi offices from December 1989 onwards and having made it a publicly perceived problem. Nevertheless, an effective or comprehensive prevention or at least monitoring of the destroyed files was not provided due to this. Thus, documents were destroyed in a not precisely definable scope which would have documented the Stasi's activities and listed the people collaborating with the Stasi.

Nevertheless, what is positive and needs to be stressed is that in spite of the file destruction, there have been vast amounts of Stasi documents preserved – which was quite contrary to the situation in any previously collapsed state. These documents enabled a comprehensive analysis of the Stasi's activities. Based upon law, they have been made accessible since 1991 for historical reappraisal with the dictatorship in general, for personal perusal of the files as well as for prosecution purposes, for vetting, for rehabilitating victims, for research, for the media and other purposes – under the condition of protecting the personality rights of the affected persons.

- The Central Round Table approved the Stasi's foreign espionage department, the Main Department for Intelligence (*Hauptverwaltung Aufklärung*) dissolving itself. This self-dissolution caused an almost full-scale destruction of the working documents from this field. The state leaders achieved the approval through deceiving the opposition. As it later came out, the HVA was not “merely” a foreign intelligence service but represented an integral part of the suppression apparatus also within the country.
- Destroying the Ministry for State Security's electronic data carriers was also done with the Central Round Table's approval. Also in this case, deception paved the way to approval: the claim that there was a written copy of all the electronically stored information was proven as false later on.
- Due to the fact that a vast amount of the Stasi documents were already opened in the early 90s, an imbalanced situation occurred that did not correspond to the relation of the Stasi's and the Socialist Unity Party's balance of power. While the sight was almost lost of the governing party and its responsible persons – with some rare exceptions – there were public discussions against Stasi collaborators even in less important cases which had labor law consequences for these people. Irrespective of how important coming to terms with the secret police work and the Stasi was and still is, the Socialist Unity Party's leading role needs to be respected also in relation to the Stasi.

Altogether we can state regarding the negative or critical dimensions that on the one hand, there was a dramatic erosion at the state and party leadership level, but both apparatuses didn't entirely lose their function. And on the other hand, the civil movement and opposition gained importance and power, yet the latter suffered so much from internal disputes, were not ready to take over power jointly and didn't have enough expertise regarding the mode of operation of the bureaucratic apparatus. Thus, it wasn't possible to omit adverse accompanying effects in spite of a highly successful process.

RECOMMENDATIONS

The end of a secret police, of a collapsing and finally also legally ending dictatorship is a complex process if we do not intend to restrict this to the correct but rather bold call for entire dissolution. Each affected country had to find its own ways; this shall apply to the future as well as the respective political and societal context and the very specific power relations within the transition process were and still are of decisive importance. As far as the GDR's collapse is concerned, the specific German-German history and the prospect of uniting both German countries

formed – as has already been mentioned – important framework conditions.

Nevertheless, some general recommendations can be noted down:

- Saving the legacy, preventing file destruction

This recommendation is meant to provide for the material substance being kept that can serve as an information source as comprehensively as possible and inform about the secret police's activity. Democratically legitimized institutions and bodies do have to decide upon the orderly access to these documents from the constitutional state point of view (see below). Although it is not clear yet how the approach to this heritage shall be shaped in detail later on, one has to strive to save the existing sources.

- Do not allow yourself to be deceived, create as extensive controls as possible

The "logic" of a secret police is – on the one hand – to preserve as much information as long as possible – which means so long as the deprivation of power may possibly be prevented. On the other hand, this "logic" also bears the growing probability to such an extent that files will be destroyed by the officers (still) in service as the probability of the regime's collapse grows. It's about wiping out traces, protecting collaborators and destroying all that could serve as evidence against these people later on. Also changes, counterfeits of existing documents can figure among these services' tactics during the transition process. Although the transition should be carried out in cooperation, in a non-violent and as consensual way as possible – for good reason – mistrust of the still active organizations and their activities is apt at this moment and strict controls are necessary. This also applies to situations where the secret police that is to be deprived of power cooperates, as such a situation does not make the above-mentioned "logic" invalid.

- No access to the files without constitutional state regulation

Secret service documents are most sensitive documents. They bear testimony to an intervention into frequently very personal and intimate spheres of people without paying respect to the rules applicable in a constitutional state. The personal rights of all people within a constitutional state deserve high protection. Providing this protection is a priority when overcoming the dictatorship. It's precisely here where the difference of a system that disrespects the fundamental rights of individuals becomes apparent. That's why discussing the rules about the access to these files is of the utmost importance. Carefulness is of more importance than speed, yet it is to be necessary that no unauthorized access occurs during the clarification phase. One has to strive for as large a consensus within the new legal system as possible regarding the document usage; this can prevent an everlasting quarrel about this issue also preventing repeated legal uncertainties or at least diminishing them.

- Inviting external experts to participate in the file access discussion

With all due respect to a national decision – it is advisable that representatives of other countries or possibly international institutions join the discussion about constitutional state governed access to the files. Both positive and less positive experiences should be mentioned just as the legal dimensions should – as this is actually a complex constitutional law, and data protection as well as an archive-legal issue. A path well

paved by constitutional law and the access to the highly sensitive files is to counterbalance the tensions between the interest for reappraising the dictatorship on the one hand and paying due respect to the personal rights of the affected persons on the other – irrespective of whether they are victims or perpetrators – as they are both persons entitled to fundamental rights to an equal extent in a constitutional state.

- Critically reflecting the focus on the secret police

As important as coming to terms with the secret police activities undoubtedly is, it's also important to reflect their role within the dictatorship. In the case of the GDR, it can be taken for granted that the Stasi represented the "Shield and Sword" as it called itself, performing thus a role through which it served the Party. Thus, working on the dictatorship activities may not confine itself to discussing merely the secret service activities as this would virtually relieve of blame the communist party that gave the orders. Thus, the role of the secret service within the collapsed system is necessary in order to define the priorities for coming to terms with the dictatorial past. There is the paradoxically seeming danger of exaggerating the role of the secret police as its activities incorporated suppression.

- Approaching the former secret police full time employees

Generally, further employing the former full time secret police employees within state institutions is to be regarded as a problem. It is to be prevented as far as possible when the newly built institutions' respect and integrity could be in danger. Yet in all cases a transparent and, furthermore, differentiated approach towards this topic is to be recommended. Thus, it may be important for shaping the transition and reappraisal of the dictatorship to use the former employees' expertise for inspecting the secret service's work. Such cooperation in the process of coming to terms with the past should be acknowledged as experience has shown that the vast majority of the former employees are not willing to cooperate in such a way that's perceived as a betrayal. Yet further employment of formerly collaborating employees should be designed in such a way that the feelings of the victims within the system that has collapsed are not unnecessarily burdened. Thus, these people should not be deployed in institutions serving the reappraisal of the dictatorship. Additionally, as far as further employment is concerned, it should be considered which role the particular person has played within the apparatus. Experience has demonstrated that blanket injustice convictions are not helpful, as only a differentiated check of individual cases brings us further on.

- Approach to former Unofficial Collaborators

As far as the transition process is concerned, uncovering the collaboration with the secret police carries a lot of politically explosive issues. This is another reason why it's important to provide for the document security as soon as possible. Actually, only reliable information derived from sources within the files carried out by the offices authorized to do so can establish a solid base for uncovering an Unofficial Collaborator and keeping them far from any political or professional functions. Suspicions or presumptions not based upon facts may not be enough. The consequences for a solidly provable activity as an Unofficial Collaborator have to be differentiated. There was a broad range of unofficial activities; this prohibits blanket decisions. The reactions may range from dismissal from the public services, to changing employment up to unchanged further employment.

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REGIME ARCHIVES

JOACHIM FÖRSTER

INTRODUCTION

The Ministry for State Security's files already played an important role during the Peaceful Revolution and the subsequently led fierce debate regarding the files being opened and finally, when the Socialist Unity Party (SED) dictatorship was reappraised. It was right that people warned about focusing too much on the Ministry for State Security and its files as the Ministry for State Security was no independent actor but a Socialist Unity Party power instrument. Yet also other files such as those coming from the Socialist Unity Party, from the parties and mass organizations, from the state administration or the National People's Army represent important proofs and research opportunities into the repressive structures and activities in the GDR dictatorship. These files were taken over by the Federal Archive (*Bundesarchiv*). On the one hand, the Stasi files' central significance lies in the fact that the Ministry for State Security including its observation and eavesdropping system as well as its collecting mania linked to these activities to many GDR citizens symbolized the lack of freedom and lack of transparency. The goal was to unlock the knowledge about power structures, address openly the injustice and make the information accessible which is indispensable for reappraising, thus turning around the purpose for which they were originally intended and used. The timely opening and use of the secret police files without any archive blocking period furthermore represented a legal challenge as this situation meant getting onto hitherto unknown societal-political territory of which there had been no historical example. The Stasi Records Act (*Stasi-Unterlagen-Gesetzes*, hence the abbreviation *StUG*) of 20. 12. 1991 laid down the foundation for a comprehensive reappraisal by using the Stasi files which is a process that has not been completed yet.

THE MINISTRY FOR STATE SECURITY ARCHIVES AT THE TIME OF TAKEOVER

In many ways, the legacy of the Ministry for State Security constituted an unprecedented and difficult task that was hardly to be coped with by the conventional archive working methods. This was not merely due to the content and the way the files originated but also due to the size, the complicated structure of the search and storage system organized according to the conspiratorial principles and methods used by the secret police and last but not least, it was due to the shape and the order in which the documents were when they were taken over.

As far as the content was concerned, it comprised the product made by a gigantic surveillance apparatus in whose eyes every dissenting person was already a potential enemy. The Ministry for State Security has countless times collected and processed information about citizens from the GDR or other countries infringing elementary personal rights of privacy and documented its own repressive measures. A key role in this process had the reports of the Unofficial Collaborators (*Inoffizielle Mitarbeiter*,

hence the abbreviation *IM*). In the late period there were approx. 180,000 of them. Apart from the files on the victims and the Unofficial Collaborators, there were also files about the permanent staff, the prosecuting offices files as well as other files of various kinds. After completion, the files processed in the numerous service units, were stored in the Archive department XII (*Archivabteilung XII*) which means not according to the usual archive storage principle, i.e. not in the respective service unit section but these files were stored in the "storage space" (*"Ablagen"*), instead. Thus, there was a main "operative storage space" (*"operative Hauptablage"*) and a general main storage space (*"allgemeine Hauptablage"*), with the classification appearing nontransparent, arbitrary to outsiders.

The main issue with the archive was the personal files related to surveillance.

The Ministry of State Security's central search mechanism was a huge index card system. The central card files contained information collected by the Ministry for State Security, which was regarded as interesting – be it for whatever reasons. These card files listed people (the so-called F 16), files (the so-called F 22), code-names (the so-called F 77) as well as streets and important objects (the so-called F 78). The fact that it was possible to take over these files in a virtually undamaged shape played a decisive role for the subsequent use of the archive for reappraisal purposes. Today, this card file classification forms the central search method applied for finding out whether a person was monitored by the Ministry for State Security and whether there are files on this person.

The Ministry for State Security's operational activities had been stopped due to many district administrations having been occupied by angry citizens at the beginning of December 1989 and due to the Berlin Central Administration having been seized by demonstrators and occupants on January 15th 1990. The state of the Ministry for State Security's legacy at the time when it was taken over in the Central Administration in Berlin and in the individual District Administrations proved to be quite inconsistent.

The records from the District and Object-specific Offices pertaining to the Ministry for State Security had already been brought by their staff to the Regional Administrations and partially been destroyed. In the course of the Peaceful Revolution, the scope of the files found was partially packed into sacks and brought to safe places such as bunkers, car parking halls or prisons, even though these facilities were patently unfit for storing and processing the files.

In the Berlin based Central Administration files had also partly been destroyed, though part of them had only been pre-shredded, i.e. torn manually. The majority of these files were saved.

When these files were taken over, only about one half of them had been stored in the archive. The other half of these files was found in the respective bureaus of the service units (and only in Berlin, there were 5,800 of these). As a first step, these incredible amounts of files were wrapped into packs and tied together indicating the respective office they had been found in. In this sense, there was neither order nor were the files accessible.

Following January 15th 1990 when these documents were taken over, this archive was submitted to the GDR State Archive Administration and the buildings were guarded by the police and Civil Committee members.

The overall volume of the rescued documents from the former Ministry for State Security was comprised of:

- Documents: approximately 111 so-called file kilometers, with approximately 41 Mio. index cards
- Filmed documents: if converted, this would correspond to approximately 47 km
- Sacks with torn documents: 15,000 of which containing reconstructible documents
- Audiovisual media (photographs, films, videos, audio tapes): approx. 1.7 Mio.
- Furthermore several computer files, as the Ministry for State Security had been using IT since the 60s as well.

This meant that people had to deal with one of the largest archives in Germany and the fate as well as the use of this archive was now to be decided upon.

The insufficiently secured archive legacy from the Ministry for State Security was now confronted by high expectations and the pressure created mainly by civil rights activists to use the Stasi-files for uncovering the Ministry for State Security's manipulations.

DESCRIBING THE TRANSITION

After the Ministry for State Security Archives had been seized and taken over, securing the buildings and documents became the primary task. The period prior to March 1990 especially, had not been free of uncertainties and uncontrolled influence exerted by forces of the Socialist Unity Party and the Ministry for State Security. Thus, it was mainly the employees of the Ministry for State Security who tied up the documents into bundles. This was carried out under the Civil Rights Committee supervision yet it was not possible to guarantee this supervision everywhere. Even in February 1990, employees of the Ministry for State Security had been destroying files in an uncontrolled manner.

In March 1990, the Central Round Table approved that all magnetic data carriers of the Ministry for State Security that contained personal data – including the electronic card file system of unofficial collaborators – be erased and destroyed. People didn't want to risk this information to be misused, yet were deceived by the misleading explanation that this information was available on paper as well.

Already in February 1990, the Task Force for Security of the Round Table, approved that the files of the Main Intelligence Administration (*Hauptverwaltung Aufklärung*, hence the abbreviation *HVA*) be destroyed in the course of this unit dissolving itself. Later on, this also proved to be a mistake.

Already at the beginning of the 1990s, files from the Ministry for State Security were first used by the GDR Department of public prosecution. Given the compromises and the retreat of the Socialist Unity Party rulers, these institutions as well as the police now appeared to support reappraising the Ministry for State Security's activities together. Though a ministerial decree dating back to 8. 2. 1990 generally blocked the use of files, the prosecuting offices and courts were granted access to the Ministry of State Security files in connection with investigating cases of abuse of power, and mainly in connection with the first applications for rehabilitation.

During the first and only free elections to the GDR parliament, the Volkskammer (*People's Chamber*) on 18. 3. 1990, it became public that several prominent top candidates within the new democratic parties had been long-term Unofficial Collaborators (IM) of the Stasi. The sources of these discoveries were information published by former Ministry for State Security officers. A first check of the representatives had been carried out by a Volkskammer Special Committee following the elections and according to the available options. Among others, two ministers of the new government resigned after their contacts with the Ministry for State Security had become public.

After the democratically legitimized government had been built, the Minister of the Interior became responsible for the Ministry for State Security archives. This partially led to tensions with the civil committees that had hitherto taken over the responsibility. In June 1990, the Volkskammer entrusted Member of Parliament, Joachim Gauck, who was chair of a Special Committee for the control and the dissolution of the Ministry for State Security/ for the Office for National Security (*Amt für Nationale Sicherheit*, hence the abbreviation *AfNS*), to prepare a bill for handling the Stasi files.

A controversial debate flared up in the GDR regarding this issue. The arguments ranged from the demand to destroy at least a part of the files, especially the personal data files, to blocking access to these files for a long time and there were even arguments going so far as to demand a comprehensive opening and handing over of the files to the respective affected victims ("Everybody gets his file"). The GDR government had a restrictive opinion. The Prime Minister de Maiziere – who himself was facing reproaches for having allegedly been an Unofficial Collaborator – expressly claimed that he feared "blood and thunder" would follow especially if the files were made accessible to the citizens. The government bill of 1990 then provided that the files should be used only in exceptional cases.

The Volkskammer Act that was finally passed on 24. 8. 1990 following a critical debate and fundamental amendments granted the affected people the right to information if this wasn't interfering with other people's interests. Furthermore, this act stipulated that additional to rehabilitation purposes and for prosecuting crimes linked to the Ministry for State Security activities, the files should be used for safety checks and for proving whether a person had been officially or unofficially collaborating with the Ministry for State Security – with the affected person's consent. On principle, information to intelligence services was not to be provided.

In the meantime, the German-German negotiations regarding the GDR's accession to the Federal Republic of Germany assumed concrete forms. When it became public that the Act of the Opening of the Stasi's Files was not to be incorporated by the Reunification Treaty in line with the mutual will expressed during the negotiations between East and West and that the Stasi-files were to become part of the Federal Archive agenda both de jure and de facto, the civil rights activists started protesting. They didn't want to abandon this achievement of the Peaceful Revolution. Again, former Stasi offices were seized by civil rights activists.

The discussion regarding Stasi file use gained another dimension due to having been extended to the West German territory. Leading politicians from the West feared as well that granting access to the files would threaten social peace as well as poison the climate in the reunited Germany or even cause a split within

the society. Furthermore, granting access to the personal data without any blocking periods appeared to be hardly compatible with the rule of law in the Federal Republic of Germany.

Due to the time pressure caused by the Unification Treaty that was soon to come into effect, the need to provide for an early and comprehensive legal regulation of the Stasi file use was expressly defined in additional agreements to the Unification Treaty.

Joachim Gauck, the Special Commissioner for Stasi-Documents appointed by the Federal government commenced his work immediately after the reunification on October 3rd 1990. He was supported by a committee that was set-up consisting of members from the Federal Ministry of the Interior and members from the former Civil Rights Committee as well as employees from different federal institutions who were entrusted with this task. Together they faced an almost impossible task: The Special Commissioner had to establish the structure of an authority, in parallel hire employees and train them, provide for the archive's provisional mode of use and to find documents in order to be able to process thousands of official applications and to provide information without delay. For these special, difficult and demanding tasks within the information and archive sector, no trained personnel were available. The staff volume was to rise within a few years from slightly below 60 to more than 3,000. To most, this meant "learning by doing". Based on the preliminary user rules in connection with the additional agreements to the Unification Treaty, it was possible to provide information as early as December 1990 onwards. This information was used in relation to rehabilitation authorities or to prosecuting offices (now anchored in the constitutional state system), and for the purpose of checking the representatives and members within the public service. Several thousand applications came in every day.

Thanks to the central card index system, it was possible to find out relatively quickly whether a person was registered by the Ministry for State Security. Yet, especially finding the files that had not yet been archived proved to be very difficult under the given conditions. There were many cases where this would not have been possible without the insider knowledge of certain individual former staff from the Ministry for State Security who were willing and cooperated.

On 20. 12. 1991 the Act comprehensively governing the access to the Stasi's documents, i.e. the Stasi Records Act (*Stasi-Unterlagen-Gesetzes*, hence the abbreviation *StUG*) came into force. This was preceded by an objective discussion at a parliamentary level. It led to a general consensus, which was last, but not least a result of the lessons learnt from German history after 1945, according to which a comprehensive reappraisal of the Ministry of State Security and the Socialist Unity Party Dictatorship was to be made possible immediately and without any blocking periods. The framework conditions were now defined by the "Grundgesetz" (the Federal German constitution) and the general right of privacy anchored in it, the civil rights activists' interests and the interests of the victims in the former GDR as well as the safety interests of the reunited federal Germany.

The StUG aimed at paying due respect to and balancing the different interests and providing a solution to the main disputed issues and it proved to be surprisingly stable within the subsequent period.

The Ministry for State Security archives became the agenda of the Federal Commissioner for the Records of the State Security Service (*der Bundesbeauftragte für die Stasi-Unterlagen der*

ehemaligen DDR, hence *BStU*) who was elected for a 5-year period (eligible for a maximum number of 2 periods) by the Bundestag (Federal Parliament). Yet they remained decentralized, located at their hitherto sites in Berlin and the former Regional Administrations. The BStU is not subject to a subject-specific supervision, but only to legal supervision by the federal government (§§ 35 ff. StUG). As far as fundamental issues are concerned, he is advised by an advisory committee (§ 39 StUG), the members of which are appointed by the federal parliament and individual federal states.

As the main issue this act stipulates that the BStU has the exclusive competence to store and take custody for the Stasi-files, which is closely linked with the duty of disclosure and duty to hand over all external Stasi-files (§§ 7 ff. StUG) as well as the use of these files exclusively for the purposes specified in the act, i.e. the use is strictly bound to a specific purpose (§§ 4 subs. 1, 29, 32 subs. 4 StUG).

The StUG not merely gave the victims the right to get information but emphasized the individual's right to get access to the information collected on him. This claim of the civil rights activists corresponded to the "Right on information self-determination" derived by the Federal Constitutional Court from the Grundgesetz. This not only refers to the protection of personal data that may not be re-used without consent, but also to the fundamental right to see these data and to determine their use. In order to be able to grant the Stasi victims the right to inspect their personal data, extensive protective rules were required to protect data of third persons. According to the StUG, the right to gain access into "one's own file" also encompasses the right to get to know who provided the information about the person. Disclosing the legal (uncodified) names of Unofficial Collaborators without their consent requires a restriction of the personal rights of former employees of the Ministry for State Security. Differentiating between "victims and perpetrators" (the StUG actually doesn't use these terms) thus became a general principle throughout the whole StUG. This act differentiates between the "affected and third persons" who have an unrestricted right to inspect the files regarding themselves on the one hand, and the "collaborators" or the "beneficiaries" on the other hand, who may only inspect their own personnel files, not the case files. But above all, they do have to accept that their names are disclosed without prior consent within the legally defined purposes of use. The StUG formally defines the previously mentioned groups of persons in § 6 StUG.

The right of access to personal files has been anchored in §§ 12 ff. StUG. If certain conditions are met, information may also be provided regarding the fate of lost or deceased relatives (§ 15 StUG).

The rush of applicants that arose in January 1992 surpassed all prognoses. By March 1992, already 200,000 applications had been filed and in 1995, there were already more than one million. The talks to be led with the applicants required not only expert knowledge but also empathy, as many had been victims of the measures applied by the Ministry for State Security and were now facing file contents that partially felt like a burden. Especially those who opposed the GDR regime and who significantly contributed to the files being opened, but also simple citizens who merely wanted to make use of their most fundamental rights in the GDR, now had the opportunity to gain clarity regarding the methods the Stasi used for interfering in their lives by influencing them covertly. They now had the opportunity to read what the Ministry for State Security knew about

them, which person from their surroundings had provided information, which methods had been applied to recruit Unofficial Collaborators, but also who resisted the recruitment attempts. Especially the last subject was of vital importance for trusting the respective people's personal environment. Particularly tragic fates resulting from particularly insidious Stasi methods called "Zersetzungsmaßnahmen" (*decomposition methods*) became known, due to which friendships and families were destroyed or as a result of which people suffered mental crises. Quite frequently, the Ministry for State Security decisively contributed to youngsters being sent to childcare homes and youths to educational institutions. Understandably, the affected persons' reactions to reading the files that sometimes amounted to several folders and several thousand pages of record were varying – depending upon the circumstances and the persons themselves. Especially during the first period these reactions frequently included horror, speechlessness, disappointment, grief and anger. In cases of less voluminous documents, they were sent to the applicant by post. In difficult or significantly larger cases, an appointment for personal inspection of the documents was made, in which the documents were explained to the applicant in a preliminary talk. It has proven to be sensible to keep in contact with victims' organizations to which the person could be referred if necessary.

For further information on the purpose of vetting, see the Chapter "Lustration and the process of vetting".

The question to what extent the state authorities, investigative bodies and especially intelligence services were to be granted access to the information that had been collected by the previous secret police about affected and third persons proved to be essential. The use of documents that resulted from unconstitutional activities should in no way prolong and repeat the injustice suffered by the victims of the Ministry for State Security. Thus, any use of the documents to the disadvantage of a victim is prohibited (§ 5 Abs.1 StUG). Except in the case of criminal prosecution of regime-related crimes, the Ministry for State Security files may only be used as evidence in cases that are listed in a specific list of serious crimes such as murder, manslaughter etc. (§ 23 Abs.1 Nr.1 StUG). The Ministry for State Security documents were of great importance in detecting the Socialist Unity Party's assets abroad as it enabled the detection of assets that were placed in foreign front companies. A special investigation committee and an investigative commission of parliament had been established for this purpose.

The StUG basically prohibits the use of documents on affected and third persons by the now responsible federal German intelligence services. Exceptions are only allowed in the case of the intelligence services' own employees, if the inspection is serving the employees' safety (§ 25 Abs.1 StUG). This restriction, furthermore, mitigated the sharpness of the previously disputed issue of providing information. In this case, the very specific situation of the reunified Germany became apparent. The secret services active working in the Federal Republic of Germany were interested in counterintelligence-related and terrorism-related information, whereas they didn't show any interest in the Ministry for State Security's reports on citizens pertaining to the opposition within the GDR. First named documents have to be archived separately by the BStU like other documents classified as secret (§ 37 Abs.1 No. 3 StUG) and may only be used if the Ministry of the Interior agrees. Yet this refers to rare cases only.

By granting access to the researchers and media (§§ 32–34 StUG), the foundations for a comprehensive and historical

reappraisal of the Ministry for State Security's and the Socialist Unity Party's activity were laid. The use of personal data in research and by the media naturally represents an especially sensitive area of application as here personal rights require special protection, yet at the same time, they are in a charged relationship with the fundamental rights of freedom of press and freedom of research.

In this case too, a legal distinction is made between the affected and the third persons on the one hand, who do have to give their consent to any provision and use of documents – in contrast to the collaborators and beneficiaries on the other.

Furthermore, there is a special category of people comprising prominent persons of contemporary history and holders of political functions or of a public office, as long as the request refers to their contemporary history role or their line of public action. As a result of a supreme court ruling, caused by the West German politician Helmut Kohl, access to Ministry for State Security documents relating to prominent persons of contemporary history and holders of a public office was modified. In this case, a notification procedure was introduced which gave the person of contemporary history or the holder of a public office the opportunity to raise objections in advance regarding the planned provision of the documents (§ 32 a StUG). Only after following another – judicially reviewable – consideration of legal interests, these objections can be ignored.

According to the law, any provision of documents for research or media purposes is limited by the overriding legitimate interests of third persons who need to be protected, which is especially the case for documents of a highly personal content that aren't connected to the reappraisal in any way. Such documents cannot be handed out.

As additional protection, the legal preconditions for the provision of the documents by the BStU authority have to be observed by the recipient as well, when he himself publishes later on (§ 32 Abs.3 StUG).

The task to inform the public about structure, methods and about the mode of operation of the Ministry for State Security (§ 37 Abs. 1 No. 5 StUG), formed the foundation for establishing basic research in history issues and for using the Stasi-files for political education by the authority of the BStU itself.

CURRENT SITUATION

The legal basis for the use of Stasi-documents, i.e. the StUG has not fundamentally changed within the 25 years of work on millions of cases. Yet there were turning points, new findings and special conflicts in practice, which partially resulted in changes and the further development of the act.

As far as the personal records inspection is concerned, the option that had previously been granted to the victims, namely to demand that their personal documents be erased, was annulled before this provision had actually come into effect, as it is de facto not possible to strictly separate it from information on other people. Yet there is the option to prevent the relatives of a deceased person gaining access after their relative's death if the person stipulates this by a written declaration prior to his/her death (§ 15 Abs. 5 StUG).

In 2006 and in line with the archive law, the use of victim's documents (basically 30 years after their death) was permitted.

More than 25 years after the BStU commenced his work, the numbers of applications are still at a level nobody reckoned

with at the beginning. In 2016, an overall number of 64,000 applications were filed.

Almost 40,000 citizens filed an application in 2016 for personal data inspection; ¾ of them did so for the first time.

Many citizens decide to get an insight into their files only after a very long time. The reasons are manifold (they become pensioners, they hesitate to clear the uncertainty about assumed information in the files, questions of their grandchildren etc.).

In 2016 still more than 3,000 applications related to rehabilitation, compensation and criminal prosecution were made.

The number of research and media applications is currently and constantly at approximately 1,300 per year. In contrast to previous years ¾ are now pertaining to research and ¼ to the media. The respective departments for processing these applications are specialized according to topics, so that during the applicant's topic-related research, specialist advice can be provided. In the future documents shall also be provided in digitalized forms and generally processes shall be digitalized in order to meet the requirements of our time.

The archive indexing of the Ministry for State Security records is not yet finished. Until 2016, at least those documents that had not yet been archived by the Ministry for State Security were indexed according to topics. After the archive indexing process is completed, new search indexes shall be established and made available online as a long-term perspective. Hitherto, more than 1.6 million partly torn or damaged paper sheets have been manually reconstructed by 2016. A pilot project with an IT-supported reconstruction method developed by the Fraunhofer-Institut is intended to help reconstruct at least part of the torn documents in sacks. Due to unresolved issues regarding costs and effort, this process has hitherto not been used on a large scale.

As far as the preservation of the records is concerned, inventory protection measures, such as the digitalization of video- and audio-material play a vital role. Frequently, written documents require preservation too.

Until now, numerous publications and handbooks written by the BStU research department focusing on the Ministry for State Security have been published to inform the public about the Ministry for State Security's areas of activity, to give reports on various aspects of the state and the society within the GDR, as well as on the cooperation of the Ministry for State Security with other Communist secret police forces. Political education such as education at schools is supported by providing appropriate material. The Ministry for State Security's activities are shown in a permanent exhibition in Berlin, through regional as well as trans-regional temporary exhibitions and by a travelling exhibition in Germany and abroad. There is a plan to establish a comprehensive presentation of the Stasi's activity using sample cases in the former Central Administration building of the Ministry for State Security. In previous years, the BStU public relation effort has focused more and more on establishing a media library on the Internet as well as on using the new media.

International relations, be it via cooperating with partner organizations in other post-communist countries and numerous visits paid by delegations from all over the world play an important role as well.

Currently, the BStU has a staff of about 1,600 staff in Berlin and its 12 branch offices (as of 2016).

With regard to the future of the Stasi-files the German Bundestag (parliament) decided on 9. 6. 2016 to promote and consequently support the reappraisal of the Socialist Unity Party

dictatorship and to take care that the existing access options according to the StUG will be maintained in the future. This decision was preceded by a recommendation of 5. 4. 2016 by an expert commission assigned by the German Bundestag. This recommendation says that the Stasi file archive is to be incorporated into the German Federal Archives (*Bundesarchiv*), while still retaining a certain organizational independence and remaining on its historical site in Berlin. The documents nowadays stored in the branch offices shall remain at appropriate locations within the five new federal states on a long-term basis – while maintaining the centralized administration. The territory of the former Central Administration of the Ministry for State Security shall be reshaped and turned into a centre of information and events.

LESSONS LEARNT

Opening the Ministry for State Security archives was based on the historical experience that it's not oblivion but only confrontation and uncovering the actual entanglements, injustice and betrayal that constitute a solid base for overcoming the impacts of a dictatorship. Germany opted for a timely and large-scale opening up, while granting access for its citizens as well, and at the same time providing for a comprehensive guarantee of personal rights to be protected and respect of state-related security interests. The path Germany has embarked on was and still is ambitious and demanding. Especially balancing the interests in coming to terms with the past and the rights of the individual became a central and ongoing challenge in handling the Stasi documents in Germany. The fact that the GDR acceded to the Federal Republic of Germany was a special and favourable factor.

By setting the regulations in the Stasi Records Act (StUG) and establishing the authority BStU and permitting the provision of Stasi documents for certain purposes only, the legislator merely created the preconditions and framework for a reappraisal process within society. There was no intention of claiming to have the sovereignty of interpretation or the sovereignty of evaluation, but the intention of the opening was to deprive the Ministry for State Security staff who were the sidekicks of the Socialist Unity Party dictatorship, and the functionalist elite from the former GDR of the chance from creating legends.

- Taking into consideration that there is an act that has remained stable throughout 25 years as far as the fundamental issues are concerned and given the fact that it formed the basis for 7 million applications for the provision of information or inspection of the Stasi files, we may regard the path that has been chosen as a success story. Especially the fears of negative impacts referring to a split society, social unrest or even acts of vengeance have not been fulfilled.
- Establishing the office of the Federal Commissioner for the Records of the State Security Service (BStU) by parliament and electing him in an election with a consensual result across the political parties, this independent institution with significant instructional autonomy and a centralized responsibility for the Stasi records, has proved to be successful in preventing the misuse or an inappropriate exploitation of the Stasi-documents during the transition period. The BStU is controlled by government, the parliament and the judicial system.
- As far as criminal prosecution, vetting and rehabilitation were concerned, the documents from the Ministry for State Security

proved to be indispensable information sources. (for further information on these issues, see the respective chapters).

- Since 1992, more than 2 million individuals have made use of their right to apply for a personal inspection of the Stasi-documents. In approximately one half of these cases, the result was that information had been collected on them, and in more than one third of the cases, documents were found. Although facing the facts that came to light was painful for the affected people in many cases, it has generally been perceived as a liberation and an important step towards regaining sovereignty over their lives.
- The Ministry for State Security records being used by the press, in radio broadcasting and in movies have significantly contributed to the reappraisal of the Socialist Unity Party dictatorship by the public. The media are indispensable actors within the public discourse of civil society. Without the media portraying the Ministry for State Security's and the Socialist Unity Party's power mechanisms, sometimes namely exemplified by the fate of individual people documented in numerous reports or documents, it would not have been possible to explain the Socialist Unity Party dictatorship and the reappraisal thereof to the broad public in the Eastern and Western part of the country equally. It was frequently the press that became the first actor to uncover the connections and the entanglements of important personalities or areas of society.
- The GDR power mechanisms being reappraised via topic-related research projects is equally important. Thanks to numerous publications, analyses and monographies issued by either private researchers or by research institutes investigations were carried out regarding the Socialist Unity Party dictatorship in relation to any possible aspect using the Stasi documents for this purpose, explaining and presenting them in a more comprehensive context. Also Research projects of the utmost importance, such as those on the victims on the German-German border, on the fate of political victims or the Ministry for State Security's influence on West German policies as well as regarding the cooperation with other Eastern European secret services have been completed or launched only throughout recent years.
- Furthermore, the Ministry for State Security files are an appropriate starting point for introducing the issues of dictatorship, of rights of freedom and of a constitutional state to younger people in the framework of political education by showing them individual cases that have been prepared for this purpose.
- Even in the GDR, where the dictatorship fell within just a few weeks, where the secret police archives were occupied and where the Ministry for State Security was finally dissolved, people didn't succeed in saving all Stasi-files without any losses. Such a thing would have required a sharp break without any transition and a strict safeguarding of the files being stored consistently. The question remains, whether it is realistic to interrupt a secret police's activity so abruptly that this secret police does not have any option to destroy file material prior to handing over the archives. In the case of the Ministry for State Security, such destruction took place even after its activity had ended. Yet the type and the scope of this destruction didn't reach a level that would be sufficiently high for questioning the reappraisal itself.
- Due to the vast amount, it was not possible to complete the topic-related indexing of the records as well as the provision of a complete search system for research purposes even after 25 years.
- Making personal data available, at an early point, especially concerning the former Ministry for State Security staff, was only possible by differentiating between documents related to different groups of persons ("the affected" and "the collaborators") that were granted a different level of protection as far as handling the documents and the use thereof was concerned. Yet if the content of the information and an Unofficial Collaborator's motives for their activity were not taken into consideration, there was the threat that already the notion of an "Unofficial Collaborator file" (*Unterlage zu einem IM*) would be perceived or used as a stigmatization. First, this was merely about the procedural issue whether providing the information (as information of an affected person) required previous approval. It is difficult and problematic to clearly differentiate between "perpetrators" and "victims". The evaluation of the content is something only the affected person is entitled to carry out, he/she is responsible for considering all the circumstances and sources of information. Classifying whether a document may or may not be provided is a tricky task in cases of doubt. The decision has to be taken on by the BStU staff. If it is not possible to conclusively prove that a person had wittingly and willingly collaborated with the Ministry for State Security, it is not possible to provide the document without consent.
- The price paid for the extensive access rights granted while ensuring a simultaneous protection of personal rights consists in the high effort linked to this work. The files have to be processed in an appropriate way, which means that, for example, information about unrelated third persons has to be made illegible (i.e. blackened). Furthermore, it was not possible to reject repeated applications as long as the indexing within the archives is not completed.
- It is not possible to assess whether and to what extent clarifying discussions or reconciliations among friends or in families took place as a result of personal file inspection. Yet apparently, former Unofficial Collaborators hardly ever conceded their guilt. Mostly, former Unofficial Collaborators evade a confrontation with people they had been reporting on. Yet this is an aspect pertaining to private life and something that cannot be influenced by the state.
- As far as the applicants for research purposes are concerned, they are not used to the indirect research via the BStU-staff, as this method differs from work in other archives with search systems that are tailored to serve their purposes. Many private applicants appreciate the project-accompanying advice offered by BStU employees in relation to the research work carried out in the numerous partial stocks within the Stasi-archive, whereas primarily professional, specialized researchers criticize that they do not have the option of carrying out free, direct research within the archive via externally available search mechanisms as it's possible in other archives. They fear that information gets lost in the indirect research performed by the BStU-staff and complain about the anonymization that is too frequent in their opinion. Within this context the BStU research department finds itself in a charged relationship towards external researchers which have to rely on and go by the application procedure (according to § 32 StUG). Since the option to inspect

non-anonymized files has been introduced for institutionally linked researchers, if certain conditions are met (§ 32 subs. 1 no. 7 StUG) the critique has been silenced to a significant extent. Inspection is being granted when a special obligation of secrecy is signed. But here too, copies of the documents may be handed out either in an anonymized form only or following the affected person's consent. Given the very specific and sensitive content of information and the unconstitutional methods that have been applied in acquiring these documents, it is to be expected that due to constitutional reasons the special legal regulations of the StUG regarding personal data will have to remain valid in the future as well.

RECOMMENDATIONS

- The secret police archives are of special importance in overcoming a dictatorship. They can significantly contribute to make the facts known which are required for achieving the different methods and aims of coming to terms with the past.
- The archives and documents are to be protected from destruction, theft or abuse as rapidly as possible – irrespective of how they are to be used later on. They should be especially protected against further access by the hitherto active secret police forces or by unauthorized third persons.
- Any moving of the documents should be done as orderly as possible. Otherwise, there's the danger that context gets blurred and later use becomes significantly more difficult.
- The documents should be archived, administered and used exclusively by an institution with far-reaching autonomy, which is controlled by parliament based on legal basis.
- The admissible purposes for gaining access to these documents and for using them should be legally defined and formulated as clearly as possible. Especially the victims' personal data (the affected and third parties) should be strictly protected and basically, the use thereof should be permitted only with the victims' consent.
- The information about affected persons being used by security agencies or the intelligence services should be limited to narrowly defined cases of overwhelming public interest. One has to find methods of clearly differentiating secret police manipulations from the past that deserve to be reappraised from future legitimate security interests that have to be taken care of.
- In sensitive cases, the personal file inspection by the victims should include a personal talk with the file specialist from the respective providing institution. Furthermore, the aid by professional psychological victim counselling should be mediated if necessary.
- The media are important partners in the process of coming to terms with the past and the public discussion about it. Inappropriate use should be prevented.
- When handing out personal data, interests that need to be protected should be paid respect to and highly intimate information unrelated to reappraisal as such, should be left out in any case.
- The archive indexing of the archive stock should also be carried out according to research-relevant topics and research as such should be provided with appropriate search mechanisms as soon as possible.
- Due to inventory protection reasons and due to reasons of using the material effectively, digitalization options should be made use of at an early stage. This should be primarily focused on documents that are of fundamental importance as far as research, media and political education is concerned. As far as victim files that are used only a few times, digitalization is not such a current topic.
- Reappraisal is a long-term process both within the private and within the societal sphere and this process requires endurance. The authorities administrating the secret police archives should be prepared for that.

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ILLUSTRATION AND THE PROCESS OF VETTING

JOACHIM FÖRSTER

INTRODUCTION

A decisive factor in establishing a constitutional democracy following the collapse of a dictatorship is that not merely the leading representatives and functionaries of a country but rather the whole public service shall provide a guarantee for the new constitutional order to become reality in daily life and be reliably promoted. It was necessary for the GDR citizens who hadn't been in touch with democratically legitimized state power to be able to trust the future state institutions. Preventing the hitherto existing political insider relationships also played a vital role. The vetting as to whether the people had collaborated with the Ministry of State Security played a significant role in this respect.

STARTING POSITION

Following the rules stipulated in the Unification Treaty of 27. 8. 1990, the employment relations within the public services in the former GDR generally existed further (Art. 10 as amended by Appendix 1 of the Unification Treaty (in German "Einigungsvertrag"). Yet a termination of employment without prior notice was possible in cases where the principles of humanity of the constitutional state had been breached, or where a collaboration with the Ministry of State Security had been detected which made it unacceptable to further continue the employment. Furthermore, as far as the period of the following two years is concerned (i.e. until 3. 10. 1992), an ordinary right to terminate was provided for in cases of a lack of expertise or of the lack of personal suitability of an employee.

From October 1990 on, many ideologically and politically influenced GDR institutions were shut down and thus, there was a significant reduction in personnel. Also the fact that highly ideology-driven school subjects such as civics or "Wehrkunde" (*Military training*) were abolished led to several dismissals. The same applies to the diplomatic service and the National People's Army. As far as the judiciary is concerned, judges and prosecutors had to pass a special aptitude test. Only about 1/3 of them remained within the federal German judiciary system.

The checks as to whether a person had collaborated with the former Ministry for State Security which had already started in the GDR with regard to the Volkskammer representatives freely elected in 1990, became the key issue from 1992 onwards, following the reunification and the Stasi Records Act (*Stasi-Unterlagen-Gesetz*, hence the abbreviation *StUG*) and led to the vetting of many functionaries and especially public sector employees within the new federal states, that means the territory of the former GDR.

TRANSITION

The Stasi Records Act (StUG) laid down a binding and detailed explanation of the categories of persons that could be checked,

as to whether they had collaborated with the Ministry for State Security. It defines regarding which persons a request to the Federal Commissioner for records of the State Security Service of the former GDR (BStU) (§ 20 Subs. 1 No. 6 and 7 StUG) is admissible. This included all public administration members, members of the federal parliament and of the federal state parliaments (regional parliaments, municipal councils), government members and other holders of official functions, party and association functionaries, judges and lawyers, church functionaries, workers' councils, people in managing posts within the business sphere as well as people in security-relevant areas. Also the applicants for jobs in these offices could be checked. Checking members of parliament was generally possible only on a voluntary basis. The responsibility and right to submit such a vetting application was based on the legal provisions applicable for the office or organization handing in such an application. After checking whether the prerequisites were fulfilled, the BStU archives were searched for clues pointing to a full-time or unofficial collaboration with the Ministry of State Security. If such clues were substantiated and if documentary evidence was found, a report was issued to the applying authority describing and summarizing the file content relevant for evaluating the extent of the activity in question. Copies of the respective documents were attached. As far as the Unofficial Collaborators were concerned, this comprised the type and duration of the collaboration, their code name, the case officers, the size of the files, the reason, aim and course of the recruitment, the date of signing the declaration for commitment, the motives, the type and the number of reports delivered, the benefits such a person received, including awards etc. In certain cases, it was difficult to state whether an Unofficial Collaborator had been cooperating willingly and wittingly with the Ministry for State Security, if neither written declaration of commitment nor clear reports filed to the Ministry for State Security were found. In case of full-time employees, it was usually relatively easy to prove the cooperation and determine their field of work, but the cadre documents usually contain little detailed information on their duties.

In certain cases – e.g. in cases of an Unofficial Collaborator under the age of 18 – no report at all should be delivered.

Evaluating the documented activities was not the BStU's task but was carried out by the applying authority responsible for the respective personnel or by a special commission, which held hearings of the respective person. The eligible authorities and committees that were entitled to hand in an application also decided on whether and which consequences should be taken on base of the report. Frequently, further explanation of the context, especially the specific, conspiratorial working methods of the Ministry for State Security and the meaning of the terminology, were required from the BStU – yet this didn't comprise an evaluation with respect to the future employment of the vetted person.

Only in exceptional cases – if an involvement of members of parliament or of certain higher ranking functionaries with the Ministry of State Security was discovered by chance – the BStU

had to issue a report even without prior application (§ 27 Subs.1 StUG).

On principle, the information given within the context of a report shall only be used for the purpose it has been applied for (§ 29 StUG).

The option of vetting people with regard to activities for the Ministry for State Security was to end on 31. 12. 2006. The legislator presumed in 1991 that after 15 years, a person should not be reproached for such a connection any more. Yet this period was prolonged twice (in 2006 and in 2011) – each time with amendments (see below).

The first years which are decisive for the renewal of the public service, witnessed the highest number of vetting. By May 1993, it had already exceeded one million. In 2006 the overall number of applications regarding members from the public service, MPs or other functionaries amounted to approximately 2 million.

Yet right from the beginning, there were differences between the different new federal states regarding their vetting practice. Frequently, the respective departments decided themselves, whether a check or consequences would be necessary. There were neither any unified federal or state rules regarding which persons in which offices or functions were to be checked nor in which cases a further employment should be regarded as unacceptable. Usually, the employees had to indicate possible activities for the Ministry for State Security in a questionnaire, which meant that it was not only necessary to evaluate the collaboration itself but also, whether a person had fraudulently lied in relation to it.

After some uncertainties at the beginning, judicial decisions on the subject of protection against unlawful dismissal led to a differentiated practice in the individual cases that had to be decided upon. Reports with hints at collaboration with the Ministry of State Security didn't automatically lead to a person being fired. Within this context, the relatively broad definition of an Unofficial Collaborator in the StUG needs to be considered, according to which a written commitment to provide was regarded as sufficient. But even a job applicant's false statement related to contacts with the Ministry for State Security didn't automatically lead to a dismissal. There is no centrally issued statistical evaluation of incriminating reports in relation to the consequences taken. Yet there are studies of individual cases from different categories. According to these there are significant deviations between different groups (police, teachers, financial sector etc.) yet one can presume an average rate of approximately 5 to 6 % of the checks where an involvement with the Ministry of State Security was discovered. In approximately half of these cases, the respective persons retained their employment after the check, but here again – there are clear differences between the individual federal states and areas. According to estimates, in approximately 42,000 cases, the persons concerned were fired. The option of vetting within the non-public sector, especially as far as management employees from the private sector are concerned, was used in only a comparably small number of cases.

The microfilm files (the so-called Rosenholz-files) from the Main Intelligence Administration (*Hauptverwaltung Aufklärung*, hence the abbreviation *HVA*) being handed over to the BStU in 2003 led to another wave of checks during subsequent years within the public service of some federal states and also for members of the parliament. Yet, due to the mostly missing files and additional documents it was often impossible to prove a wittingly and willingly committed collaboration with the Ministry

for State Security. Thus, the frequently expected revelations remained far below expectations. Still, a number of activities for the Ministry for State Security were proven this way. Prior to the vetting options period running out in 2006, fierce political debates were held on the issue of whether the time for a clean break had already come. Furthermore, the fact that it could not be ruled out that further important new information would be uncovered thanks to newly accessed files, played a certain role. Finally, the StUG (7. StUGÄndG of 21. 12. 2006) was amended and determined that the option of vetting should remain only for certain functions (government members, members of parliament and municipalities, leading officers, judges etc.) until 31. 12. 2011 (§ 20 Subs.1 No.6, Subs.3 StUG). Furthermore, a separate provision was made for higher-ranking and international functionaries in the field of sports (§ 20, Subs.1 No.6 g StUG). Finally, several options of vetting now remained for an indefinite period of time (concerning persons working in the field of historical analysis and reappraisal of the GDR and State Security or rehabilitation issues, § 20 subs.1 no.7, for security checks, § 20 subs. 1 no. 11 StUG etc.).

CURRENT SITUATION

Due to the now limited circle of persons to be vetted, the number of checks significantly decreased from 2007 onwards. Within the public service, there were only several hundred applications per year, for members of parliament and other important functionaries – especially within the municipal sector – there were less than 2,000 applications per year on average. Still, the approaching end of the vetting option period again became the subject of political discussions. This was caused by media reports about the past of some public servants being linked with the Ministry for State Security, especially referring to the police force of the federal State of Brandenburg. The checks of the 90s became a publicly discussed topic and within the federal state of Brandenburg, they were also examined by an "enquête", i.e. an inquiry commission within the federal state parliament.

On 22. 11. 2011, the German parliament (Bundestag) prolonged the vetting option period of the StUG yet another time – until 31. 12. 2019, with the circle of leading officials being widened and now including lower level officials (§ 20 subs.1 no.6 d StUG). An additional vetting option for members of the public service was newly introduced in cases of substantiated suspicion. Yet both new regulations do not play a significant role today. Nevertheless, what is of practical importance, are the checks of representatives, even at the municipality level, as these elected people may be of older age and involvements with the Ministry of State Security are still an issue that people are focusing on in the respective regions.

LESSONS LEARNT

- The checks as to whether individuals holding an office or performing a function within the parliament, administration or the judiciary had formerly collaborated with the Stasi contributed to establishing a functioning constitutional democracy within the new federal states and strengthened the trust in the administration and justice system as well as freed the educational sector from insider connections coming from the old

system, particularly in the state sector. This has been facilitated by the special conditions of German reunification.

- Due to the early beginning of the checks, speculation and rumors could be counterbalanced in good time. Basically, thanks to a differentiated vetting practice with decisions taken individually, the proportionality principle has been preserved.
- Dismissals of former employees of the Ministry for State Security from public service in Germany were carried out on basis of a wide societal consensus.
- The confidentiality of the vetting procedure and the reports being linked to a particular purpose prevented persons being stigmatized.
- Time limitation of vetting corresponds to the principle of a state under the rule of law not to reproach a person for his past for their whole life.
- Yet even after 25 years, the public is still very sensitive when it comes to the credibility and trustworthiness especially of elected and high-ranking representatives within state and municipal institutions. Thus, even today, there are heated debates regarding the Stasi's past of people within public life.
- The vetting rules should not be upheld if there is the threat that they would serve a sheer formalism and no new information would be expected.
- It is important that the institutions, which decide upon the consequences resulting from discovered involvements with the Ministry for State Security, receive proper expert advice.
- It has proven to be a disadvantage within a federalized Germany that there were no unified directives as to how to make use of the vetting options. Thus, significant differences appeared between individual Federal States and areas both with respect to carrying out the vetting and to the consequences arising from them.
- It is understandable yet not unproblematic that people significantly focused on the Ministry for State Security. Thus, frequently a prior collaboration with the Ministry for State Security became the one and only criterion for further employment, whereas jobs within the governing Socialist Unity Party of Germany (German abbreviation "SED") were neglected. Unequal treatment, which arose from this situation could only be partially balanced and even this only later on.
- In contrast to the public sector, the private sector used the vetting only to a limited extent. Thus, for example, the publicly owned media and the privately owned media differed significantly as the latter showed little or late interest in coming to terms with the past regarding the State Security.

- Unfortunately prior to 3. 10. 1990 former full-time employees of the Ministry for State Security were not prevented from becoming attorneys.
- In spite of comprehensive vetting and large-scale research it wasn't possible in all cases to answer the question of collaboration with the Ministry for State Security beyond reasonable doubt – including cases of prominent politicians. This was, of course, partly due to incomplete records.
- There's always the danger that contacts to the Ministry for State Security could be politically exploited. This can only be counterbalanced through the greatest possible transparency also by the respective persons themselves.

RECOMMENDATIONS

- The vetting should be started as soon as possible in order to prevent speculation and exploitation regarding secret police contacts.
- The checks should be carried out according to joint directives and criteria in order to prevent unequal treatment. Yet, it is absolutely necessary to decide each individual case while taking the whole context into consideration. The concrete activity performed by individuals for the secret police should be the focus. Furthermore, attention should be paid to how openly, and how honestly, the respective person has dealt with his/her past.
- Setting a time limit for the vetting option is essential when seen from constitutional law and from the societal-political principles point of view. Still, sensitiveness of the public and the victims as well as their claim for coming to terms with the past should not be underestimated. Mistakes committed at an early stage and untimely leniency can hardly be remedied later without new findings.
- Checking whether a person has previously worked for the secret police is correct and important, yet it shouldn't become the one and only criterion per se or the decisive criterion as to whether to employ the respective person further on. Other functions within a dictatorship's repressive system shouldn't be neglected.
- Trust in the judiciary and thus also checking the judiciary is very important. Furthermore, apart from leading functionaries, the police, teachers and other persons of trust should be checked with priority for contacts with the secret police.
- The private economy should not be exempt from checking whether people in its leading positions had connections to the secret police. Also the private media should not refrain from coming to terms with the past.

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INVESTIGATION AND PROSECUTION OF THE CRIMES OF THE REGIME

JUDICIAL RECONCILIATION OF THE GDR'S PAST

CHRISTOPH SCHAEFGEN

INTRODUCTION

There have been two totalitarian regimes in Germany in the previous century with the Nazi regime prevailing from 1933 until 1945 and during the 1945–1989 period, the communist dictatorship gained control over the eastern part of Germany, in the GDR. Following the breakdown of both systems, it was each time the German criminal justice's task to prosecute and punish the injustices that had been committed. The criminal prosecution of Nazi crimes that had been eagerly put through in the early stages by the victorious powers, almost came to a standstill after the Federal Republic of Germany had been founded as there was a massive desire for amnesty. It was as late as in the 60s that the following generation started posing questions when the time of keeping silent and pushing the issue to one side ended. Due to this temporarily missing will to prosecute, the German criminal justice system still has to deal with the darkest chapter of German history even after more than 70 years. In the time between the peaceful revolution in autumn 1989 and the reunification with the old Federal Republic of Germany on October 3rd 1990, criminal justice with the GDR-judiciary was responsible for communist state injustice reconciliation – this judicial system had hitherto remained a supportive structure of the system that had broken down. Thus the focus wasn't laid on the violation of human rights which is an immanent feature of a dictatorship but on the economic privileges provided to communist leaders and on the electoral frauds that could hardly be denied any more. It was only with the judicial system of a reunited Germany when all aspects of state injustice within the GDR were criminally prosecuted. The mistakes committed during the reconciliation of injustice from the Nazi period were not to be repeated and people were able to make use of their legal expertise. The judicial reconciliation that was finished after more than a decade, already belongs to history today.

THE HUMAN RIGHTS SITUATION IN THE GDR UNTIL 1989

The GDR constitution didn't contain any fundamental rights area protected against the state's influence. On the one hand, it laid down civil rights, yet on the other hand, these rights were not to be understood as individual rights of freedom in relation to the state but rather represented rights of participation and discretion in establishing the communist state order and the communist social order. The immanent borders of the fundamental rights that were understood in this way, were constituted by the "societal interests" which in turn were interpreted by the Socialist Unity Party of Germany (SUPG) as binding on the basis of this party's monopoly of knowledge and leadership¹.

The GDR inhabitants had been hindered right from the beginning until the end of the country's existence from living a life according to their own ideas and from 1961 onwards, they were even imprisoned by a border protected by the army. Using power that was not derived from the people's will but vested upon the impeccability of the communist party that was the leader of the workers and peasants, there were trials to establish the first anti-fascist and socialist country on German soil. Heavy human rights violations pertaining to the criminal categories of murder, manslaughter and deprivation of liberty were committed on a large scale and systematically by the military that was protecting the borders, by the judiciary in politically motivated criminal proceedings and by the Stasi which led operations directed against people who had been declared enemies of the GDR. At least 265 people were killed by gunfire or mines in an attempt to cross the border from East to West Germany and several hundreds were partially or very seriously wounded.² According to estimates, more than 280,000 people fell victim to the politically motivated judiciary.³ There were 72 death penalties, 52 of which were actually carried out.⁴ Especially within the first years, political prisoners were housed under inhumane conditions, blackmailed to make certain declarations and mistreated – though not systematically. Prosecuting these deeds as a crime was intentionally hindered.

The Ministry for State Security persecuted persons that had fled from the GDR or who had harmed the GDR from its point

1 Iris Keller, *Die strafrechtliche Aufarbeitung von DDR – Justizunrecht*, Frankfurt: Peter Lang GmbH, 2013, 161 referring to Ernst-Wolfgang Böckenförde, *Die Rechtsauffassung im kommunistischen Staat*, München: Kösel-Verlag, 1967, 45f; Kurt Sontheimer, Wilhelm Bleek, *Die DDR: Politik, Gesellschaft, Wirtschaft*, Hamburg: Hoffmann und Campe, 1979, 126.

2 Falco Werkentin, "Souverän ist, wer über den Tod entscheidet". Die SED-Führung als Richter und Gnadeninstanz bei Todesurteilen, in Roger Engelmann, Clemens Vollnhals, eds., *Justiz im Dienste der Parteiherrschaft*, Berlin 1999, Ch. Links Verlag, 184; Karl Wilhelm Fricke, *Politik und Justiz in der DDR. Zur Geschichte der politischen Verfolgung 1945–1968*, Köln: Verlag Wissenschaft und Politik, 1990, 525. The number of the hitherto proven death penalties amounts to 205 – see Fricke, *Politische Straf-Justiz im SED-Staat* in *Aus Politik und Zeitgeschichte*, supplement to the weekly *Das Parlament*, B 4/93 (22. 1. 1993), 22, at least 170 death penalties were carried out, see Federal Ministry of Justice (BMJ) – Exhibition Catalogue "Im Namen des Volkes", Leipzig 1994, 217.

3 Andreas Märker, *Psychische Folgen politischer Inhaftierung in der DDR aus Politik und Zeitgeschichte*, in *Aus Politik und Zeitgeschichte*, B 38/95, 30, Falco Werkentin, *Politische Strafjustiz in der Ära Ulbricht Politische Strafjustiz in der Ära Ulbricht. Vom bekennenden Terror zur verdeckten Repression*, Berlin: Ch. Links Verlag 1995, 13, considers the estimations counting from 200,000 up to 250,000 victims as not exaggerated. Ansgar Borbe lists an overview of several estimates, *Die Zahl der Opfer des SED-Regimes*, Erfurt: Landeszentrale für politische Bildung Thüringen, 2010, 16–18.

4 Werkentin, "Souverän ist, wer über den Tod entscheidet", 184; Fricke, *Politik und Justiz*, 525. Hitherto, at least 205 death penalties have been proven – see Fricke, *Politische Straf-Justiz im SED-Staat*, 22, at least 170 death penalties were carried out, see "Im Namen des Volkes", 217.

of view, even abroad – intending to liquidate these people. Furthermore, hundreds of people were kidnapped from the West, smuggled into the GDR and sentenced there. Within the country, there was a nationwide monitoring of long-distance calls, letters and parcels that also served to gather foreign currency and the so-called *Zersetzung* (or: decomposition) methods were being applied in order to fight the “negative and adverse forces”. The latter especially included systematically discrediting and undermining the self-confidence and opinion of selected people.⁵ The high value ascribed to the performance of athletes in relation to the GDR’s reputation within the world and to stabilizing the country internally made the GDR develop a state-administered doping system where not only the consequent health problems of adults but also those same problems among unaware youths were willingly accepted.

OPTIONS AND LIMITS FOR PROSECUTION

When the GDR entered the FRG on October 3rd 1990, the application area of the old republic, the FRG was extended to the former GDR territory.⁶ A transition regulation was applied to crimes committed within the GDR prior to its accession.⁷ An amnesty for crimes committed by members of the GDR state apparatus hasn’t been provided for herein which is why also impacts on the life, health and freedom of people were subject to criminal inspection. This criminal law was considered as indispensable for a successful unification process, for a reconciliation between victims and offenders and for establishing a strengthening of trust into the constitutional state. On the other hand, all the responsible people were aware of the fact that criminal law could play an important role within the unification process, yet not the main one. It was foreseeable that criminal justice would merely be able to react to part of the injustice. Apart from criminal reconciliation, rehabilitating and awarding damages to the victims, compensating the incurred financial losses but also historical and political revision were to be used.

Criminal prosecution was limited merely by the limitation period. Thus it had been clarified both by jurisprudence and the legislator that the limitation period was suspended during the GDR era because, according to the leadership of the state and the party within the GDR, criminal prosecution of systematically committed injustice hadn’t been promoted during this era.⁸ The criminal prosecution limitation period had been further postponed through two other limitation period acts by three or five years respectively.⁹

Yet it was necessary to stick to the limits laid down by the Constitution. According to this, an act or the failure to act may be punished only if it is considered as criminal both prior to such an event according to an act and if it’s considered criminal during the time when the decision is made as well. Applying this prohibition of retroactive punishment for deeds committed by state functionaries in the former GDR required three aspects: first, it was necessary to check, whether the punishable character was defined by law at the crime scene and at the time of the crime; furthermore, whether the punishability prevailed until the time when the decision was made and finally; which law was the more beneficial one for the perpetrator. This regulation whose principle for legal amendments within a legal system isn’t conflictual, leads to significant problems, if it is to be applied to activities committed in another legal system that appear to be

punishable where there are other value systems and protective mechanisms of norms.

The most significant difficulties were connected with answering the question regarding which law was applicable to the deeds committed during the GDR era. This defined the criminal liability of border soldiers and their commanders for the dead and injured at the border and the GDR judiciary members’ liability for death penalties and deprivation of liberty due to a sentence.

The GDR had laid down a legal permission with the Border Act¹⁰ and permitted the firing of even deadly shots in order to prevent escapes or to wound the so-called “border violators”. The GDR’s political criminal law which criminalized making the use of one’s rights for freedom such as the freedom to exit, the freedom of opinion, the freedom of assembly and the freedom to demonstrate enabled the GDR judiciary to put through a hard line against citizens criticizing the regime or those willing to emigrate by punishing the “traitors” even with the death penalty.

There was a clarification process that lasted several years and referred to the criminal proceedings against the people responsible for killing refugees at the border. During this process, even the German Constitutional Court and the European Court of Human Rights were contacted by the accused and it has been found out that the GDR acts including the interpretation thereof shall not be paid any attention to in cases where the state severely crossed the line in its deeds that is given to any state according to common opinion.¹¹ In doing so, the Federal Court of Justice (*German abbreviation*: BGH) added up to its jurisprudence regarding the reconciliation with injustice from the Nazi period.¹² The standard for reviewing such a “crossed line” was the Human Rights Pact signed by the GDR and the UN Human Rights Declaration from 1948. It has been stated that the right to live in a society of peoples has a role superior to any other value and that the state is entitled to interfere in this right only in limited extraordinary cases. Given the Border Act and its application in everyday life, the protection of the border was prioritized over human life. This constituted an arbitrary decision regarding the right to live that could not be justified by anything. This jurisprudence posing limits to the right of the state “to govern its internal affairs” may be regarded as pioneering and groundbreaking also for the following criminal law approach regarding the misuse of a country’s monopoly of power. The judiciary of the reunited Germany has become the “pacemaker of human rights protection.”¹³

Thus, it was possible to prosecute and punish the people responsible for killing the refugees. The prosecution offices filed

5 Directive 1/76; BStU, ZA, DSt, BdL-Dok. 3235.

6 Art. 8 of the Reunification Contract from 31. 8. 1990 BGBl. II, 889ff, as amended by the Act from 23. 9. 1990 regarding the contract from 31. 8. 1990 concluded between the Federal Republic of Germany and the German Democratic Republic on the Reunification of Germany – Reunification Contract – and the agreement of 18. 9. 1990, BGBl. II 1990 885 ff.

7 Appendix I Chapter III Topic C Section II Nr. b) regarding the Reunification Contract

8 Limitation Period Act from 26. 3. 1993 (BGBl I 1993 S 392), BGHSt [Federal Criminal Court], Bd. 40, 113 ff.

9 Art. 315a EGVStGB; 2. and 3. of the Limitation Period Act 27. 9. 1993 (BGBl 1993 I, 1657) and 22. 12. 1997 (BGBl 1997 I, 3223).

10 § 27 DDR-Grenzgesetz [the GDR Border Act] of 25. 3. 1982.

11 BGHSt 39, 1 ff.; 168 ff., 353 ff.; 40, 218 ff. and lately sentences from 20. 3. 1995 – 5 StR 111/94 – and from 24. 4. 1996 – 5 StR 322/95 –, where the Federal Court of Justice addresses all the arguments opposing its jurisprudence.

12 BGHSt 2, 234 ff.

13 Gerhard Werle, “Rückwirkungsverbot und Staatskriminalität”, in *Neue Juristische Wochenschrift*, 2001, 3001 ff.

charges against approximately 500 persons due to completed or attempted manslaughter. 275 of the accused were also sentenced.¹⁴ The Politburo members and the National Defense Council members who organized the deadly regime and other high ranking military leaders were sentenced to up to seven and a half years in prison. Soldiers acting upon a command and mostly committing a preventable mistake in relation to what they did, were given suspended sentences.

The fundamental conviction of all civilized peoples regarding the general prohibition of killing made jurisprudence consider the GDR judiciary's death penalties as lawful only in cases where the most severe injustice and most severe guilt was punished.¹⁵ A judge blunted by his/her political conviction and submissiveness to his/her political leaders could not refer to having committed an unintentional act nor did a provision of a reduced sentence on the basis of having committed a mistake apply to him/her.¹⁶ The responsible judges and lawyers were sentenced because of a perversion of justice and manslaughter because of the fact that the GDR judiciary pronounced death sentences and executed these even in cases where the act that had been committed didn't cause significant damage. Yet judiciary members who were involved in GDR citizens being hindered on a large scale from exerting their human rights such as the freedom to exit, the freedom of opinion, the freedom of assembly and the freedom of association due to prison sentences, could hardly be criminally prosecuted given the prohibition of retroactivity. It was almost only in cases where the type or the level of the sanction was in gross disproportion to the crime committed that led to the moderate conviction of less than 200 judges or prosecutors.

Punishing members from the Ministry for State Security for the measures that were disrespectful to the life and freedom of people was predominantly complicated due to the difficulties in proving these and due to the perpetrators' bad state of health. On the other hand, there were predominantly legal difficulties preventing a criminal prosecution below the level of interventions that had an impact on life, health or freedom. Only 69 members from the Ministry for State Security were convicted.

FINAL REMARKS

Due to the given legal situation that it was on the one hand necessary to start proceedings even in cases where there was a slight suspicion but on the other hand, it was almost exclusively necessary to apply the GDR's written law as there was the prohibition of retroactivity and to consider also the other procedural rights of the accused applicable in a constitutional state, there was a tremendous discrepancy between the high number of approximately 74,000 investigation proceedings led against approximately 100,000 suspects and the low number of merely 753 convicted people. It is understandable that most of the victims of the systematic injustice within the GDR are disappointed by this result. Bärbel Bohley, the GDR human rights activist who has unfortunately died way too early expressed her discontent this way: "What we wanted was justice, what we've got is a state under the rule of law." Allegedly, if another form of approaching the injustice committed by and in the GDR, such as an amnesty or a commission for finding out the truth and serving the reconciliation had been opted for, the result would not have been more but less justice that can never be achieved but which one can merely strive for. Within Germany, it was politically correct to opt for criminal

prosecution and against amnesty. Penalties for infringements of law are the rule in a constitutional state. In contrast to many other states where the regime changed, people didn't have to fear any civil war like conditions neither did they have to fear social unease. The overwhelming majority in both German countries was against an amnesty. The political rulers from the former GDR and the successor to the Socialist Unity Party of Germany, the SUGP, were too weak to have a decisive influence on forming the political will within the reunited Germany. To a large extent, it was possible to switch the elite within the former GDR territory even in the sphere of the judiciary as there was a large amount of unburdened and competent personnel available in West Germany available to transfer the legal and administration system from West Germany to the former GDR territory. It was due to these positive conditions present during the reunification process that enabled and committed Germany to start an attempt led by rule of law principles and to work on a reconciliation with all forms of communist injustice within the GDR through criminal penalties.

The communist regime in the GDR showed its inhumane face by killing people on the border between East and West Germany and people succeeded in punishing these most severe crimes. Apart from the cases where decisions were made, general declarations were stated regarding the fact where the borders for a dictatorship lie in relation to its interfering with human rights. Currently, given the legal situation and following the change of regimes, the rulers are facing sentences merely in cases of interference into somebody's life or physical integrity. In the case of the infringement of other rights the citizens have, especially their civil liberties, the perpetrators do not have to fear too much. The national law they designed protects them. Something has to change about this. Without freedom of opinion there are no other rights.¹⁷ The Berlin trials contain another lesson international law still has to learn. Withholding fundamental rights constitutes a crime.¹⁸ Let's hope that this understanding falls upon fruitful soil in the long term within the international community and is reflected in international criminal law.

LESSONS LEARNT

Criminal justice thus contributed to protecting fundamental human rights by criminal law. In spite of the GDR's opposed legal practice, it was possible to punish and individually ascribe severe human rights violations. The prohibition of retroactivity did not prevent this. A state's arbitrarily killing people cannot be justified by the state's legalizing this nationally. Another key contribution of these criminal proceedings is clarifying and recognizing the GDR's past. The actual judicial findings can – apart from their legal evaluation – claim to be substantially reliable.¹⁹

14 Klaus Marxen, Gerhard Werle, Petra Schäfer, *Die Strafverfolgung von DDR-Unrecht. Fakten und Zahlen*, Berlin: Stiftung zur Aufarbeitung der SED-Diktatur – Humboldt-Universität, 2007, 41.

15 BGHSt, 41, 317.

16 BGHSt, 41, 317, 339.

17 Salman Rushdie at the occasion of opening the 67th Frankfurt Book Fair; see Volker Breidecker, "Alle Grenzen offen", in *Süddeutsche Zeitung*, 14. 10. 2015.

18 Heribert Prantl, "Honecker, Mielke et al.", in *Süddeutsche Zeitung*, 1. 9. 1999, 4.

19 Klaus, Marxen and Gerhard Werle, *Die strafrechtliche Aufarbeitung von DDR-Unrecht, Eine Bilanz*, Berlin – New York: Walter de Gruyter, 1999, 244, 245.

Both the period required for the whole procedure and a unified approach have been negatively impacted by the fact that the legislator didn't make any declarations regarding the applicable criminal law leaving this aspect up to practical experience and that the competence area for criminal prosecution hasn't been properly adapted given this task's special character. If a **centralized** police and criminal prosecuting office had been established, the procedures would have been speedier and divergences within the prosecution activities would have been prevented.

RECOMMENDATIONS

It isn't possible to generalize answers to the question regarding whether and how a reconciliation with the pre-democratic past is to be carried out. Both the way of the transition from dictatorship to democracy and the balance of political powers prior to and after the change represent the decisive factors. Hitherto and in any discussion led following a dictatorship being replaced by a democracy, the opposite poles are prosecute and punish on the one hand and forgive and forget on the other. Hidden amnesty through factual non-prosecution, full-scale or partial amnesty laid down by the law or the establishment of commissions

striving for the truth and reconciliation are paths one can opt to go along. In our experience, the question as to which option a state chooses furthermore depends upon the fact whether the elite changes and which impacts the decision that is to be made will have on the internal peace and stability of the hitherto young democracy.²⁰ A recommendation to promote a certain approach towards a dictatorship past can thus not be made. Yet seen from the perspective of a constitutional state, punishment represents the normal reaction towards the breach of law. Furthermore, the discussion in many new democracies which opted for impunity demonstrates that the issue of punishing the perpetrators still remains subconsciously vivid and is being re-discussed whenever the slightest impetus emerges. Countries opting for criminal prosecution should consider the experience the German criminal justice has acquired which states that it is very difficult to prove the required personal responsibility for crimes committed by henchmen who have been given orders by their rulers within the regime that has collapsed, if it's the case of crimes below a threat to somebody's life. In that sense, partial amnesty should be considered.

20 Jutta Limbach, *Gerechtigkeit oder Versöhnung*, Speech at the occasion of the Chamber of Industry and Commerce New Year Convention in Berlin on 9. 1. 1998.

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REHABILITATION OF VICTIMS

ANNA KAMINSKY

INTRODUCTION

To the GDR, democratizing the state and society didn't merely refer to fundamentally restructuring political structures within the legal system, in the educational sector or within the economy, but also to the way people dealt with the past. This subject had previously been exclusively oriented towards legitimizing the leading communist party's (Socialist Unity Party – SED) governance. As far as the reappraisal of the past is concerned, the issue of how to deal with the perpetrators and victims forms one of the most important issues that have to be clarified. In other words, it's about considering how those that have been persecuted, imprisoned or disadvantaged for political reasons could be offered legal rehabilitation and how the disadvantage from which they suffered could be compensated. Considerations like this had been made already at the time when the revolutionary upheaval was going on in the GDR. Carrying out this kind of clarification and reappraisal of the injustice and crimes that have been committed during the second, the communist dictatorship in Germany, one should prevent the mistakes that were linked to the sluggish reappraisal of the Nazi crimes.

According to estimates, there were approximately 200,000–250,000 political prisoners in the Soviet Occupation Zone and in the GDR that were sentenced to a total of 1 million years of imprisonment.¹ Furthermore, hundreds of thousands were administratively repressed. People had to be subdued and moved to forced settlements and move out of the border areas, or they faced manifold chicanery and obstacles as family members. After the GDR had been founded, more than one thousand people were kidnapped, taken to Moscow and shot there.² Tens of thousands vanished in the Gulag camps. Furthermore, there were hundreds of thousands who were “administratively” persecuted. These were, for example, the people who were forced in several actions to move away from the areas adjoining the border to the FRG as well as a group of persecuted pupils or the children and youths that were taken away from their families due to political motives and put into children's homes. Among the persecuted people, there were also those, whose attitude towards the GDR was regarded as “ill-disposed and hostile” and who had to suffer repressions at work and in their private life and on whom the “Zersetzung”-method (decomposition) was applied. Only the registration place in Salzgitter documented more than 40,000 cases from 1961 until 1989. Within recent years, attention has been drawn to new groups of affected persons and new topics: the forced labor system in prisons, as well as the fact that children were brought to children's homes due to political reasons or the sensitive topic of politically motivated forced adoptions or children taken away from their families. The actual numbers are not known in many of these cases, which is partly due to the fact that research and studies are missing which would enable one to estimate the scope of this kind of persecution. More than 1,000 people were shot at the Berlin wall and in other sections of the border to the Federal Republic of Germany by East German border guards when these people tried to flee. More

than 30,000 political prisoners were bought free by the Federal Republic of Germany between 1962 and 1989.

Whereas until September 1989, it had not been possible to discuss in public about the arbitrariness one experienced and about the political persecution people suffered, this changed during autumn 1989 already prior to the date when the Berlin Wall fell, i.e. prior to November 9th 1989. One of the important starting points of these debates was a lecture by Walter Janka that took place in the “Deutsches Theater” on October 28th called “Schwierigkeiten mit der Wahrheit” (Difficulties with the truth), which had been forbidden up to that time. This lecture, which starred Ulrich Mühe, one of the most renowned GDR actors who played in the Oscar winning movie “Das Leben der Anderen” (The Lives of Others) later on, was transmitted across the whole GDR. This lecture constituted a twofold breach of taboo: Not only was a hitherto forbidden book read in the most renowned GDR theatre, but above all, this was the first time that people had expressed their experience of injustice and crimes during the communist dictatorship. This lecture led to many letters being sent in by the audience where people described their experience of injustice. From now on, reports on political persecution, suppression and the omnipresent surveillance by the secret police, the Stasi, characterized the public discussion. What had previously been hushed up under the threat of punishment with persecution and imprisonment, now came into the spotlight. Influenced by the nationwide protests in the GDR and the publicly articulated crimes and injustice within the system, already the representatives of the last and only democratically elected East German parliament the Volkskammer and the GDR judiciary prepared various bills for reappraising the past, opening the archives, punishing systematic injustice and rehabilitating the victims.

LEGAL FRAMEWORK OF THE REHABILITATION

Following 1989/1990, a lot of hope was laid on the judiciary, on the prosecution of crimes that had been committed in the communist dictatorship as well as on rehabilitating, compensation and acknowledging the victims. Taking into consideration the trust laid in the legal options of a democratic constitutional state and the possibilities that are limited within the scope of

1 The data on this issue varies. Oliver W. Lembcke indicates that there were 330,000 (Oliver W. Lembcke, Rehabilitierung politisch Verfolgter in der DDR. Politisches Programm und Praxis des Rechts, in *Jahrbuch Politisches Denken* 2008/09, 170); Beer/Weißflog are indicating a spectrum of 170,000–280,000 political prisoners, see Kornelia Beer, Gregor J. Weißflog: “Ich könnte ein dickes Buch schreiben...” Zur gesundheitlichen und sozialen Situation von in der SBZ/DDR politisch Inhaftierten, in *Horch & Guck*, 2009, (3), 56. Ansgar Borbe summarizes the differing figures in a table (see Ansgar Borbe, *Die Zahl der Opfer des SED-Regimes*, Erfurt: Landeszentrale für politische Bildung Thüringen, 2010, 18).

2 Frank Drauschke, Anna Kaminsky, eds., *Erschossen in Moskau*, Berlin: Metropol Verlag, 2008.

applicable law and the chance to be able to fulfil the respective hopes and expectations, one had to create further supportive options in order to achieve reconciliation. In cases where the justified expectations for a legal prosecution of dictatorship injustice committed by the perpetrators were not effective, it was necessary to find other instruments in order to mitigate the damage caused to the victims of dictatorship despotism as well as to mitigate the damage suffered by the politically persecuted. The respective rehabilitation and compensation regulations were adopted in parallel with the legal options of carrying out a criminal prosecution. Thus, already at the beginning of 1990, an attempt was made to “compensate” the injustice caused by the ruling communist party SED dictatorship in a kind of self-cleansing process. The prosecution offices checked the criminal sentences that had been imposed on opponents and critics of the communist party dictatorship and possibly “reversed” these sentences, which meant that they were declared invalid. The criminal sentences against prominent victims of justice such as Walter Janka, Wolfgang Harich, Vera Wollenberger, Rudolf Bahro and Erich Loest were annulled and consequently, these people were “rehabilitated”.

On September 6th 1990, the GDR Volkskammer adopted the first Rehabilitation Act.³ Parts of this act were taken over by the reunification treaty and applied until the communist party SED Injustice Settlement Act of November 4th 1992 that governed the criminal rehabilitation came into force. The first Socialist Unity Party Injustice Settlement Act was followed by the second Socialist Unity Party Injustice Settlement Act in 1994 which regulates the administrative-legal and professional rehabilitation. Hitherto, these legal regulations have been amended five times with new victim groups such as the children that had been accommodated in children’s homes under prison-like conditions and the youths brought to reform schools having been included as well. In August 2007, the third Socialist Unity Party Injustice Settlement Act came into effect, which was the act on “Special Allowance for Victims of Imprisonment”, introducing the so-called “victim’s pension”. Former political prisoners that had been incarcerated for more than 180 days are entitled to receive this victim’s pension amounting to € 250 (since 2014: € 300) for their entire life. Until the former victims become pensioners, this payment is conditioned by the fact of whether these persons are in social need.

Hitherto, 206,000 applications for criminal rehabilitation have been filed. Criminal rehabilitation is in turn the precondition for compensation payments. Until now, 170,000 out of these persons have been rehabilitated. An overall compensation amount of € 660m has been paid. According to statistics provided by the Federal Ministry of Justice as well as according to the overview from the “Report on German Unity” (Bericht zum Stand der deutschen Einheit) an overall amount of over € 2B had been paid as part of the “Criminal Rehabilitation Act” (*Strafrechtliches Rehabilitierungsgesetz*, hence the abbreviation *StrRehaG*) as well as the “Professional Rehabilitation Act” (*Berufliches Rehabilitierungsgesetz*, hence the abbreviation *BerRehaG*) until 2015.⁴

While it was easy to give the evidence necessary for a criminal rehabilitation through the verdict that was to be presented, proving discrimination within the administrative or professional development and politically motivated persecution proved to be much more difficult. People who suffered from politically motivated imprisonment and/or administrative persecution may apply for compensation due to health-related problems resulting

from this. Yet the acceptance rate is very low, only 20 %. It is very burdensome for the affected persons to undergo the necessary questioning and examinations which many people regard as “discriminatory”. Borbe and Siegmund have repeatedly pointed to this fact with Siegmund saying, for example, “that the type and form of discriminations suffered in this way significantly varies”.⁵

Furthermore, there are victim groups – such as the persons kidnapped from the territory on the Eastern bank of the Oder or the Lusatian Neisse and taken to Siberia – that more or less are not entitled to receive any compensation payment. While the prisoners from Soviet special camps are entitled to receive compensation for having been imprisoned because these camps were in the future GDR territory, the people that had been deported from the former Eastern part of Germany and forced to labor – mostly these people were women – received nothing, because according to the Prisoner Aid Act (*Häftlingshilfegesetz*, hence the abbreviation *HHG*) §1 sent. 6, they pertain to a group of people who were “accommodated in a camp due to a commitment to work” and who counted as “living reparations”.

Due to the fact that they are unable to present a certificate according to the Prisoner Aid Act (HHG), they frequently receive nothing. The only place they can turn to in applying for special allowances according to the principle of neediness is the foundation for former political prisoners.⁶ On July 6th 2016, the Budget Committee in the German Bundestag decided to provide a total of € 50m until the end of 2018 via the prisoner aid foundation in order to provide further aid to these victim groups comprised of a high percentage of women. This especially refers to women who were taken to the Soviet Union between September 1st 1939 and April 1st 1956 to perform their “work assignment” in the Soviet Union. The respective one-off special payment amounting to € 2,500 can be applied for only until 31. 12. 2017. Yet for most of the women and men who suffered this fate, this acknowledgement comes too late as most of them have already died.

SOCIAL SATISFACTION – STATUS OF THE REHABILITATED

Many statements claimed repeatedly how important it is for the affected to strive for a criminal prosecution of system injustice and that “(...) clarifying and acknowledging the system injustice that has been committed”⁷ has a special function for the victims. Nevertheless, given the very low number of actual convictions, this plays only a marginal role. “Ascertaining the truth” and “legal denunciation” of these deeds frequently petered out. It was by far too often due to limitation periods running out, due to missing documents or missing clear evidence of a specific guilt in the criminal law sense as well as the old age of many suspects that

3 Rehabilitation Act of 6. 9. 1990. GBl. d. DDR I, p. 1459.

4 This statistics shall be published soon on the website of the Ministry of Justice.

5 Jörg Siegmund, *Opfer ohne Lobby. Ziele, Strukturen und Arbeitsweise der Verbände der Opfer des DDR-Unrechts*, Berlin: Berliner Wissenschafts-Verlag, 2002, 126.

6 In November 2015, the Budget Committee in the German Bundestag decided that those who had been deported to Siberia to perform enforced labor and had been hitherto excluded from the aid, may file applications from now on. € 50 Million is available for that in total.

7 Klaus Marxen, Gerhard Werle, Petra Schäfer, *Die Strafverfolgung von DDR-Unrecht. Fakten und Zahlen*, Berlin: 2007, 59.

prevented a conviction. Thus, the investigations and reporting contributed to the fact that public awareness of the injustices that had been committed was raised. Yet to those who had become victims of political persecution under the communist regime, the low number of convictions was disappointing and disillusioning. 100,000 preliminary proceedings led to 750 actual trials and in only 40 cases, the accused was sentenced.

Furthermore, many former victims and persecuted people repeatedly experienced significant trouble in pursuing their claims for compensation and acknowledgement which was especially the case if they suffered from health-related problems. Here, especially the regulation that the burden of proof for psychological and physical damage which the affected suffered is placed on the affected people who then have to prove that the damage is a result of the persecution and the imprisonment they suffered from.

The fact that the affected persons are frequently less well off than the former “representatives of the system” is an additional burden. On the one hand, they actually received a one-off payment amounting to € 306 per month in detention as a kind of compensation. The “victim pension” of € 250 per month that was introduced in 2008 and raised to € 300 per month since 2014 and which was meant to appreciate those that had demonstrated their courage towards the dictatorship but paid for it with imprisonment and persecution, is only paid to people in need who in turn have to regularly prove to the authorities that they suffer from a financial crisis. Only after becoming a pensioner, they receive this “victim’s pension” automatically, without having to prove their neediness.

Furthermore, many people get to know when they become pensioners which disadvantages they have as a result of the persecution even after several years. This refers not only to victims of unjustified imprisonment but also to tens of thousands who were acknowledged as victims according to the administrative rehabilitation act. Having been persecuted and suffered income loss during the dictatorship period meant that their pension calculation time was shortened as well but many people become aware of this only when they themselves become pensioners. On the one hand former members of the repressive organs may not be punished for their previous activity with a pension reduction, but they actually are entitled to their pension that they earned due to working in the GDR. This was stated in a resolution made by the German Federal Constitutional Court (pension legislation is no pension punishment legislation). On the other hand, the people formerly persecuted by the regime frequently suffer a pension shock when getting old.

The people who had suffered under political persecution and state despotism after 1945 and felt they had been forced to remain silent about the injustice they suffered from, believed that after 1989, the time had come for their fate to be publicly brought to light and for them to be acknowledged. What had started as a promising process for many of the affected in 1989/1990, has now been replaced by disillusionment and bitterness which in turn frequently distorts the view even of the positive achievements. Improvements are definitely appreciated, yet the expectations in general and the hope that the injustice they suffered would be acknowledged, have not been fulfilled. Firstly, many formerly persecuted people believe that their financial and professional situation still lags far behind the opportunities the people had who were responsible for the previous regime. Secondly, the impression that following the first regulations dating back to

the beginning of the 1990s one had to argue and fight for every single improvement, be it even the smallest one, is very tiring. The famous German historian Jörg Siegmund stated in 2002 in his investigation into the Associations of the Victims of Socialist Unity Party injustice that “their interests are not backed by society.”⁸ This is not merely due to the fact that only one fifth of the citizens in the current Federal Republic of Germany, i.e. the former GDR citizens, could have been affected to a greater or lesser extent by the persecution in the Soviet Occupation Zone /the German Democratic Republic. The image of the GDR being a moderate or rather “commodious” dictatorship which originated in the 1970s and 1980s overlays the perception of massive suppression and persecution in the Soviet Occupation Zone /the German Democratic Republic carried out by the Soviet occupation power and the Socialist Unity Party in the period from the 1940s to the 1960s. This period was characterized by extraordinarily massive human rights violations and brutal terror. The fact that the GDR had been perceived during the 1970s and 1980s merely as the “other” German country in line with the policy of détente which in turn led to neglecting the repressive traits this regime had, is hitherto making it complicated for the people to accept knowledge about the injustice and crime.

The discussions that have been led since 1990 concerning the approach to the victims of communism/Stalinism including the value we can ascribe to them within the reunified culture of memory haven’t become a less current topic in spite of all the enjoyable developments within the previous twenty-five years. For the persecuted and the victims, the legal reconditioning was especially connected with many disappointments, as, for example, Ulricke Guckes outlines in her thesis.⁹ Bärbel Bohley characterized this situation as early as in the 1990s saying “What we wanted was justice, what we’ve got is a state under the rule of law.” Many felt like being discriminated as “second-class victims” and complained that people showed too little interest in their fate. Although it was possible to achieve numerous financial improvements, the financial losses incurred due to the persecution and imprisonment weren’t made up for in most cases. It is very difficult for many affected people to understand and notice that there are financial restrictions given the blank spaces in their CVs; especially bearing in mind that these restrictions to pension payments do not apply to the representatives of the former regime. Rainer Wagner, the chair of the Union of the Associations of the Victims of Communist Tyranny (*Union der Opferverbände kommunistischer Gewaltherrschaft*, hence the abbreviation UOKG), said during a hearing in the Committee on legal Affairs of the German Parliament in November 2014 that “the victims can only be appreciated if the perpetrators aren’t paid court to anymore and if they are not better off than their victims.” And Dieter Dombrowski, his successor at the UOKG explained in a paper bearing the headline “How can we advocate our interests effectively” (*Wie können wir unsere Interessen wirksam vertreten*) that one of the problems of the people persecuted by the communist dictatorship is that they frequently “are facing problems in presenting our interests to the public.”¹⁰

8 Siegmund, *Opfer ohne Lobby*.

9 Ulrike Guckes, *Opferentschädigung nach zweierlei Maß? Eine vergleichende Untersuchung der gesetzlichen Grundlagen der Entschädigung für das Unrecht der NS-Diktatur und der SED-Diktatur*, Berlin: Berliner Wissenschaftsverlag, 2008. See also Borbe, *Die Zahl der Opfer des SED-Regimes*.

10 *Der Stacheldraht*, 2017, (3), 2.

ORGANIZATIONS OF FORMER VICTIMS

In order to add weight to their demands, but especially in order to get in touch with fellow sufferers, there were numerous victims' associations founded immediately after the communist dictatorship in the GDR had collapsed. Associations that had already been existing in West Germany such as the oldest victims' association, the Association of Victims of Stalinism (*Verband der Opfer des Stalinismus*, hence the abbreviation VOS) established in 1951, founded new unions in the East. The oldest victims' associations founded after 1990, were those consisting of former special camp prisoners as for example in Sachsenhausen, Mühlberg or Buchenwald. These were the prisoners that had been incarcerated by the Soviet occupation force in the former Nazi concentration camps like Buchenwald or Sachsenhausen immediately following 1945. More than one third of the 120,000 prisoners didn't survive the imprisonment. In 1992, the existing associations united, establishing the Union of the Associations of the Victims of Communist Tyranny (*Union der Opferverbände kommunistischer Gewaltherrschaft*, hence the abbreviation UOKG),¹¹ which is also a member of the "Internationale Assoziation der Verfolgtenverbände (InterAsso)", i.e. the International Association of Victim's Unions¹² which is organized according to German law. The work of these associations is paid for by donations from its members and relatives as well as from resources provided by the "Federal Foundation for the Reappraisal of the SED-dictatorship" and the respective State Commissioners for the Records of the State Security Service or rather for the reappraisal of the communist dictatorship.

LESSONS LEARNT AND RECOMMENDATIONS

- The way policy and society chooses for approaching the victims is one of the most important issues that are to be solved after a dictatorship is overcome. The experience drawn from *Transitional Justice* processes worldwide shows that the issue of transition is comprised of far more than just court trials or administrative changes. Especially if one reaches the limits of the law within a constitutional state, other forms have to

be found in order to provide the victims and persecuted not merely with financial compensation or criminal rehabilitation.

- In this case, it's important to find forms and means of appreciating the victims and giving them the opportunity through visible identification points such as memorials, national memorial days etc. to see that their fate and experience is reflected and stored in both the public space and awareness
- Furthermore, it's important to establish public structures in order to create a public awareness within commemorations themselves as well as in the education sector, in research and in science, and this awareness is to be about the crimes and the injustice as well as the victims and the responsible people and the perpetrators. Such a thing can be achieved, for example, by:
 - a/ constructing memorials, monuments and commemorations in public spaces, creating public ceremonies and by being appreciated both by the leading representatives of the country and by civil society
 - b/ establishing institutions free of party political instrumentalization and routine policy interests and thus – push forward the clarification regarding the previous regime on a safe financial basis by carrying out diverse activities
- It's necessary to create "sheltered" or safe areas where victims receive psychological care and where there are specialized contact persons with whom they can talk about their fate and consequences they suffer from.
- Funds should be established that enable the representatives of the victims of tyranny, war and dictatorships to publish their topics independently and to represent these topics within the political sphere and society.
- The legal obstacles must be kept as simple as possible, including the approach to regional contact persons. This then serves in order to receive legal advice and to put through material and immaterial claims and to keep these processes as transparent and as simple as possible in order to make up at least partially to the victims.

¹¹ www.uokg.de

¹² In English: the International Union of Association of Persecuted People [Translator's note].

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EDUCATION AND PRESERVATION OF SITES OF CONSCIENCE

ANNA KAMINSKY

INTRODUCTION

Apart from the criminal prosecution of the perpetrators and responsible people as well as the rehabilitation and compensation for the victims, the educational and memorial work counts as an important element for historical clarification. By passing on historical wisdom and knowledge about the injustice that has been committed, we may at the same time ensure that society acknowledges the suffering and honors the victims with empathy, also acknowledging their courage to stand up against the dictatorship. The discussions in the early stages following the reunification of Germany were characterized by a climate of fear that was expressed both at home and abroad. This fear referred to the situation that Germany now might try to evade its historical responsibility for the Nazi regime and the crimes that had been committed – trying to portray itself as the victim of two totalitarian regimes. It was especially during the 1990s that many discussions were characterized by the issue to what extent people should deal with the second German dictatorship.

Following almost thirty years of focusing on the communist dictatorship and its impacts on Germany, we can say that the fear of the Nazi crimes being relativized didn't manifest itself. Rather, and in a parallel to the communist dictatorship reappraisal, people started considering the Nazi dictatorship more as well. In 1996, January 27th became the official National Holocaust Memorial Day. Following an extensive public discussion, the central Holocaust Memorial was built in the center of political Berlin, in the vicinity of the German parliament – the Reichstag – and the Brandenburg Gate. It was the Inquiry-Commission entrusted with the communist (SED)-dictatorship reappraisal that recommended providing for the stable state funding of the former Nazi concentration camps in West Germany also known as the "Topography of Terror" that would be organized from the capital of Berlin. The Inquiry-Commission succeeded in formulating a principle that's hitherto been characteristic in relation to reappraising both dictatorships in Germany from the 20th century: "Nazi crimes mustn't be relativized by the acts committed after the war, yet the injustice in the aftermath of the war mustn't be minimized by pointing to the Nazi crimes."¹ This is the Federal Republic of Germany's main motto when reappraising any of the dictatorships.

GDR COMMUNIST DICTATORSHIP REAPPRAISAL INSTITUTIONS

There were numerous institutions founded in the Federal Republic of Germany whose aim was to reappraise the communist past. These institutions cover numerous topics and organizations, including both civil society initiatives and clubs that frequently emerged from former GDR opposition groupings such as, for example, the Robert-Havemann-Gesellschaft (*Robert*

Havemann Society), the Umweltbibliothek Großhennersdorf (*Environmental Library Großhennersdorf*) or the Leipzig Civil Movements Archive. Victims associations were founded that portray the spectrum of repression and persecution by the communist dictatorship. But also state-funded museums such as the Forum of Contemporary History in Leipzig which mainly focuses on displaying opposition and repression within the GDR were founded. Furthermore, regional museums increasingly address recent history in their exhibitions documenting repression and persecution in people's everyday lives.

Institutions were founded both at the level of individual states and at the federal level. They focus on reappraising the second dictatorship. Among these institutions, there were the institutes of the State Commissioners for the Records of the State Security Service of the Former German Democratic Republic and the Federal Commissioner for the Records of the State Security Service of the Former German Democratic Republic (est. in 1991) as well as the Federal Foundation for the study of communist dictatorship that was established in 1998. The reappraisal topics are also being governed by the Federal and State Political Education Headquarters, by adult education centers and many other institutions whose task is to perform political-historical educational work with these institutions coming from the sphere of churches, trade unions or political foundations close to political parties.

Since its foundation in 1991, the largest of these reappraisal institutions has been the office of the Federal Commissioner for the Records of the State Security Service of the Former German Democratic Republic. It has 1,600 employees and a budget exceeding € 100 m. The first act on approaching the Stasi documents already comes from the GDR period and was adopted on August 24th 1990. Each person in question was thus to gain access to the files issued in relation to them. Furthermore, the files were to be used for the criminal and legal as well as the historical reappraisal. Last but not least, people who would be proven guilty according to these documents were to be withdrawn from public life.² The GDR People's Chamber representatives thus laid down the fundamental issues for the Act on the Stasi Documents (*Stasi-Unterlagen-Gesetzes*, hence the abbreviation *StUG*), which was approved by the all-German Bundestag. Retrospectively, Joachim Gauck, the first Federal Commissioner for the Records of the State Security Service of the Former German Democratic Republic summarized the Volkskammer's motivation this way: "These checks are to be carried out because within this part of Germany not a single person has ever had a positive experience since 1933 with the representatives of state power,

¹ See Bernd Faulenbach: Probleme des Umgangs mit der Vergangenheit im vereinten Deutschland. Zur Gegenwartsbedeutung der jüngsten Geschichte, in Werner Weidenfeld, ed., *Deutschland. Eine Nation – doppelte Geschichte. Materialien zum deutschen Selbstverständnis*, Köln: Verlag Wissenschaft und Politik, 1993, 190.
² Act of 24. 8. 1990, a.a.O. (see Fn. 4).

parliamentarians, judges, policemen, officials. (...) We as the representatives figured that the aid of establishing trust into the new democratic structures might consist in removing the Stasi supporters from the offices and parliament.”³

Yet approaching the Stasi files was not quite an undisputed issue both in the Western and Eastern part of Germany. Thus, some spoke in favor of entirely closing the files or even destroying them altogether while others wanted these documents to be comprehensively opened and this legacy of the dictatorship to be preserved. The argumentation lines did not sharply correspond to the former border between the eastern and western part of the country. Looking back, we can say that this discussion was one of the first all-German discussions regarding the future approach towards the dictatorship. Politicians from both the former East and West Germany, such as, Friedrich Schorlemmer or Wolfgang Schäuble, the then Minister of the Interior in the Federal Republic of Germany presented arguments for destroying the Stasi files or at least locking them up in a federal archive for a minimum of several decades. It was a hunger strike and the repeated occupation of the former Stasi Headquarters which in 1990 caused the opening of the files to be codified in the reunification treaty of both German states.

The tasks carried out by the Archive of the Federal Commissioner for the Records of the State Security Service (*das Archiv des Bundesbeauftragten für die Stasi-Unterlagen*, hence the abbreviation *BStU-Archiv*) do not merely refer to the safety and administration of the Stasi files. It also served for providing files that were used in order to check employees in the public service, especially in the former GDR territory. Yet one of its most important tasks was to enable the affected persons to look into the files. The Stasi had collected information on more than six million people.

Influenced by the “fierce debate led in relation to the Stasi file opening during the nineties,”⁴ especially GDR-opposition representatives in the All-German Bundestag argued in favor of establishing an inquiry commission that would focus within the subsequent two legislation periods between 1992 and 1998 on the causes, the history and the impact of the communist dictatorship in the Soviet Occupation Zone and in the GDR. The expertise and eye-witness reports collected in 34 books comprising of more than 30,000 print pages do not merely reflect the then state of knowledge and debates. They also represent the only source for the historical reappraisal. The commission not merely presented far-reaching recommendations on the memorial work regarding both the Nazi- and SED-dictatorships. It furthermore recommended establishing a federal foundation for the study of communist dictatorship that was agreed upon by a vast majority across different political parties. This federal foundation was to support the society, science and political education permanently focusing on the causes, the history and the impacts the dictatorship had on the Soviet Occupation Zone and the GDR. This institution has 25 employees and an annual budget of approximately €5.4m with more than €3m being assigned to supporting third party projects.⁵

RESEARCH AND EDUCATION

On the one hand, the GDR public image during the 1990s appeared to be primarily influenced by revelations regarding the Stasi and the so-called Ostalgy-phenomenon (*i.e. a pun on the words “nostalgy” and “east” that are very similar in German*)

shows; on the other hand, GDR research at universities and research institutions witnessed a real boom. As Ralph Jessen put it in 2010, the comprehensive opening up of the archives and the accessibility of the documents about the dictatorship “(...) placed the historization of the GDR on entirely new foundations (...)”⁶ Almost the entire dictatorship’s archive heritage was available for history research without blocking periods. Although the files of all ministries and administrations in the GDR became accessible, it was especially the secret service documents being opened that created an interest which goes on until today. Until the end of the 2000s, more than 1,500 projects had been carried out. Ralph Jessen found out in relation to his assessment published in 2010 that more than 16,000 contributions appeared during the period from 1990 until 2010 – with 6,000 of these being books. Furthermore, there were more than 900 doctoral theses on the GDR history written between 1990 and 2008.

Apart from the inquiry commissions in the German federal parliament (the Bundestag) whose subject of research was GDR-history, also non-university institutes such as the Center for Contemporary History (*Zentrum für Zeithistorische Forschung*, hence the abbreviation *ZZF*) in Potsdam or the Hannah-Arendt-Institute für Totalitarismusforschung (*HAIT*) in Dresden or research centers such as the Union for researching the SED-country (*Forschungsverband SED-Staat*). The Institute of Contemporary History (*Institut für Zeitgeschichte*, hence the abbreviation *IfZ*) established a branch office of the German Federal Archive in the Berlin district of Lichtenfelde to be primarily focused on GDR research. The Military History Research Office (*Militärgeschichtliches Forschungsamt*) focused on the GDR. The Special Commissioner of the Federal Government for Stasi Documents named in 1990 and transformed into the office of the Federal Commissioner for the Records of the State Security Service of the Former German Democratic Republic established in 1991 received its own research department.

GDR history research has made significant advances especially as far as research into the power structures and the mechanisms for “Durchherrschaft der Gesellschaft” (*i.e. approximately “total governance of society”*) are concerned. Meanwhile, even everyday issues of the SED became more and more important in spite of critiques at the onset saying the investigation of everyday issues would further boost the trivializing and glorifying of the dictatorship. Sabrow stated retroactively regarding the Nazi regime research drawing thus a parallel to dealing with the SED dictatorship that “No suspicion could have proven more false: it was the everyday history which gave us a deeper understanding of the cumulative radicalization of the Nazi-regime.”⁷

3 Joachim Gauck, Akten und Gerechtigkeit. Gedanken zum Umgang mit der Vergangenheit, in *Rostocker Philosophische Manuskripte N. F. Booklet 1* (1994), 10, cited according to Jörn Mothes, Jochen Schmidt, *Die Aufarbeitung der DDR-Vergangenheit. Eine Zwischenbilanz*, in Hans-Georg Wehling, ed., *Deutschland Ost – Deutschland West*, Opladen: Leske + Budrich, 2002; see http://www.buergerimstaat.de/4_00/ostwest03.htm

4 See www.bundestag.de/dokumente/textarchiv/serien/23690862_enquete_serie/22090534_kw34_enquete3/

5 See *Tätigkeitsbericht 2011 der Bundesstiftung zur Aufarbeitung der SED-Diktatur*, Berlin: Bundesstiftung zur Aufarbeitung der SED-Diktatur, 2012, 21.

6 Ralph Jessen, Den Zusammenbruch der SED-Diktatur erklären, in Martin Sabrow, ed., *Bewältigte Diktaturvergangenheit? 20 Jahre DDR-Aufarbeitung*, Leipzig: Akademische Verlagsanstalt 2010, 21.

7 Martin Sabrow, *Erinnerungsorte der DDR*, München: C. H. Beck Verlag, 2009, 7 and recommendations made by the Expert Commission for the Establishment of the History Union “Aufarbeitung der SED-Diktatur” 15. May 2006.

In spite of this vast research activity, there have remained some blank spots in relation to the dictatorship. This refers to the everyday mechanisms that serve in order to stay in power and range from loyalty, inclusion and adaptation on the one hand,⁸ as well as intimidation and repression on the other. Furthermore, the previous years have witnessed a rise in investigations about rebellions, opposition and resistance.

Following the end of this boom and the passing away of people who had been focusing on research for a very long time such as the doyen of communism research, Prof. Dr. Dr. hc. Hermann Weber, the respective professorships and departments were abolished without being replaced. Currently, research facilities focusing on issues such as the GDR, Germany and communism research as such are almost exclusively located in the extra-university area, i.e. at institutes such as the ZZF Potsdam, the IfZ München or the HAIT Dresden.

Although research witnessed a boom that manifested itself especially in the 1990s, educating this topic at universities and colleges became criticized during the 1990s. It was not merely about criticizing GDR history appearing in university curricula too little. Further reproaches were that the approach towards the Socialist Unity Party dictatorship was too uncritical.⁹ Pasternack's first evaluation made in 2001 listed the sobering resumé that "the intensity of teaching GDR history is gradually decreasing." According to him, dealing with GDR history as such was said to have dropped down to the level of 1989/1990 just as the research had done – yet without reaching a top level in between. For example in 2001, 62 % of all German universities didn't offer any course about the GDR.¹⁰ Just as the low number of courses were, also the topics of courses about the GDR offered at universities were critically analyzed. While the researchers especially focused on uncovering the structures because there was such a multitude of sources available from the top governing and power group within the dictatorship, the research was dominated by Stasi topics. On the other hand, the GDR was significantly reflected via literary reflections written by Christa Wolf, Erwin Strittmatter or Stefan Heym. Yet authors who were forced to emigrate such as Rainer Kunze or Sarah Kirsch etc. received significantly less attention. Currently, more recent research regarding "education" is to follow.

The picture of research into the second dictatorship being pushed aside more and more at least within the academic sphere, is completed also by the fact that the renowned German magazine *DeutschlandArchiv* (Germany Archive) that had been the only platform for publications and most recent research on GDR history and German policy, ceased to edit paper versions at the end of 2012 being only available as an online platform since 2013.¹¹

In 2016, the German Bundestag decided to provide €30m until 2021 in order to strengthen university research and courses and thus, bringing especially the younger generation closer to the topic of communist dictatorships and the German partition. It's especially the younger generation that has not experienced life within the GDR dictatorship on its own, yet unfortunately, it's being informed about it by the schools too little. Thus, the known deficits within the sphere of university education are to be counterbalanced.

EDUCATIONAL WORK AS PART OF CURRICULAR AND EXTRACURRICULAR ACTIVITIES

In contrast to the business cycles of research on the communist dictatorship within the GDR, the curricular education activity

has an anticyclical shape. The radical changes of 1989/1990 required "(indispensably) that the curricula be revised (...)", as it had also been stated in a first research paper at the end of the nineties.¹² Already in the middle of the 90s, the curricula in most federal states were adequately adapted and thus, the teaching books were adapted as well.¹³ The actual exchange of the teaching materials took a bit longer. According to research on curricular content and teaching that was carried out at the beginning of the 2000s, the issue of the Socialist Unity Party of Germany's dictatorship and the German partition was hardly mentioned. Many pupils left school, without having reached the topic of post war history in classes. Furthermore, even 15 years following German reunification, "a more holistic approach to German post-war history" was regarded as missing.¹⁴ Later, these findings were confirmed by, for example, Klaus Schroeder's findings in 2008.

Yet these studies revealed positive aspects as well: 80 % of the interrogated pupils indicated that they wanted to get to know more about the second dictatorship. Furthermore, and in spite of the missing factual knowledge, 80 % proved to be aware of the difference between a democracy and a dictatorship. It was proven in this survey that the knowledge of pupils living in the former GDR territory regarding the dictatorship was less developed than that of pupils in the western part of Germany (Schroeder 2008). This corresponds to findings from respective polls carried out among adults. There are manifold reasons for this: On the one hand, the pupils perceive their knowledge from their homes first. Taking the general questions that have been posed as a starting point, the opinion "not everything was bad and now it's also the way that not all that glitters is gold" appears to be reflected directly in the pupils' attitude.

Given this impression resulting from the poll results, curricula and coursebooks in all German federal states have been reworked again and newer research results incorporated into them. At least as far as the framework conditions are concerned, the topics of German post war history have been made more easily accessible. Several didactic materials serve to support teaching in classes.¹⁵ The Conference of Cultural Ministers (*Kultusministerkonferenz*, hence the abbreviation *KMK*) has issued a recommendation for dealing with the SED-dictatorship and called for a so-called

8 Christoph Klessman, *Überforscht? Verklärt? Vergessen? Zwanzig Jahre nach dem Mauerfall ist die DDR-Geschichte noch immer ein Streitthema, in Die ZEIT Geschichte. 1989. Die geglückte Revolution*, 2009, (2), 86.

9 Ulrich Arnsward, *Zum Stellenwert des Themas DDR-Geschichte in den Lehrplänen der deutschen Bundesländer. Expertise im Auftrag der Stiftung zur Aufarbeitung der SED-Diktatur*, Berlin: Bundeszentrale für politische Bildung, 2004.

10 Peer Pasternack (with Anne Glück, Jens Hüttmann, Dirk Lewin, Simone Schmid und Katja Schulze), *Gelehrte DDR. Die DDR als Gegenstand der Lehre an deutschen Universitäten 1990–2000*, Wittenberg: HoF Wittenberg – Institut für Hochschulforschung an der Martin-Luther-Universität Halle-Wittenberg, 2001.

11 See <http://www.bpb.de/geschichte/zeitgeschichte/deutschlandarchiv>.

12 Karl-Heinz Holstein, *Die Schulbuchuntersuchung aus der Binnenperspektive der Schulbuchverlage*, in *Buchstab*, 1999, 15.

13 In: 1990 Bavaria, 1994 Baden-Württemberg, 1993 North Rhine Westphalia etc. Ibid; Arnsward, *Zum Stellenwert des Themas DDR-Geschichte in den Lehrplänen der deutschen Bundesländer*.

14 Peter Lautzas, Vorwort, in Ulrich Arnsward, Ulrich Bongertmann, Ulrich Mählert, eds., *DDR-Geschichte im Unterricht. Schulbuchanalyse – Schülerbefragung – Modellcurriculum*, Berlin: Metropol Verlag, 2006, 9.

15 See *Bildungskatalog der Bundesstiftung Aufarbeitung mit über 120 thematischen Angeboten*.

project day to be organized on each November 9th – this project day would be about democracy and dictatorship in the schools in order to encourage the people to deal with German 20th century history.

Furthermore, there have been several initiatives during the past few years that have served for the pupils dealing with German and European post war history more in the classes. This strategy includes that this topic was included as one of the final exams topics with this change being initiated by the Cultural Minister Conference. It's natural that only topics which could become part of the tests were taught at school. The educational reforms put through during the previous years, according to which the so-called MINT subjects (i.e. mathematics, IT, natural sciences and technology) are being extended at the expense of teaching history proved to be another complicating factor. Also the fact that the educational reform in many federal states actually led to cutting school time from 13 to 12 years significantly limited the space available for shaping history lessons. Furthermore, the fact that the education of teachers in teacher training courses now has to include the topic of the time of communism, is an additional factor. Also in this context, the following becomes valid: The teachers will hardly be able to teach the pupils what the teachers themselves don't learn as students in teacher training courses.

EXTRACURRICULAR EDUCATIONAL OPTIONS

The curricula offer is being supplemented by extracurricular offers provided by e.g. memorials and museums providing information at historical places such as the former Stasi headquarters, camps or prisons or along the former German-German border or the Berlin wall about repression, political injustice and partition. These historical places have been witnessing new visitor records in recent years. By now every federal state capital in the former East Germany territory has its own memorial at a history-relevant location which makes up for the frequent deficits in the offer provided by schools through offering project days for children and the youth.¹⁶ Furthermore, the State Centers for Political Education, the Evangelic and Catholic academies as well as political foundations are focusing on topics such as the Socialist Unity Party dictatorship, on the German partition and its impact. In comparison to this, East German institutions are devoting one fifth of their offer to these tasks, whereas in the case of West German ones, it's about 6 %.

ARRIVAL AT THE CENTER OF SOCIETY?

What does the resumé following almost 30 years of reappraising and dealing with the second dictatorship now look like? Lately, Martin Sabrow has stated that there is a "Processing consensus" in Germany due to which the "historical burdens from the time after 1945 are being shifted to the center of attention (more and more)".¹⁷ There are actually numerous offers. Cinema movies such as "The Lives of Others", "Good bye Lenin", "Sonnenallee", "We Wanted To Go To the Sea" or "Barbara" became hits. Best-selling candidate books that have been awarded prizes such as Uwe Tellkamp's "The Tower" influenced the picture of the collapsed state from the literary point of view. Renowned

theatre stages such as the Maxim Gorky Theater in Berlin focus on GDR topics in several productions as was the case, for example, at the occasion of the 60th anniversary of the uprising of June 17th – there was a whole theatre festival planned here.¹⁸ Also music bears some steps of this reappraisal such as, for example, the song "Little Paris" made by the young band "Meisterdeep" from Leipzig.

On the one hand, formal political acts organized at the top level on the occasion of memorial days such as the uprising of June 17th 1953 or the construction of the Berlin wall and that have a manifold shape prove that there is a broad political support provided for dealing with the communist dictatorship. On the other hand, they are a proof of the fact that the collective commemoration of the second dictatorship is on its way to gaining ground in the all-German memory and becoming part of the way the united Germany perceives history, although polls regarding the communist dictatorship reveal a partially different result. On the one hand, there are still differences between the East and West. Life in the dictatorship is perceived more critically by West Germans than by East Germans. Thus, 75 % of West German respondents in a poll answered the poll question whether "the GDR was a country of injustice" positively, whereas in the East, only 37 % shared this view.¹⁹ Furthermore, the East and the West still show differences in their interest in dealing with the second dictatorship in Germany. Most reappraisal institutions are located in the former East Germany.

LESSONS LEARNT AND RECOMMENDATIONS

Transitional Justice processes do not merely serve for answering questions arising with respect to the criminal prosecution of the perpetrators on the one hand, and for rehabilitating and compensating the victims on the other hand. Moreover, they also serve for making the awareness of the crimes that had been committed, of the perpetrators and the victims but also of different forms of resistance, courage displayed in the public and courage in general a part of the national culture of memory.

Doing this, the different actors and civil society need to be supported in carrying out educational work independently on the political parties. This includes, among others.

- Establishing institutions which promote educational work regarding the previous regime on a safe financial basis through various activities, doing so independently of everyday political interests and in a manner independent of party-political instrumentation.
- It is especially important to support research and scientific activities that build up on a factually based approach on the structures as well as the responsible people within

16 See Anna Kaminsky, *Orte des Erinnerns. Gedenkzeichen, Gedenkstätten und Museen zur Diktatur in SBZ und DDR*, Berlin: Ch. Links Verlag, 2016. This volume contains more than 900 places of remembrance, memorial places and museums across the whole of Germany. These places focus on repression and resistance against the communist dictatorship.

17 Martin Sabrow, Reiner Eckert, Monika Flacke u.a., eds., *Wohin treibt die DDR-Erinnerung? Dokumentation einer Debatte*, Göttingen: Vandenhoeck & Ruprecht, 2007, 15.

18 See <http://www.gorki.de/spielplan/und-das-beste-zum-schluss-ein-abschluss-spektakel>

19 Thomas Petersen, "Auch die 'Mauer in den Köpfen' fällt", in *FAZ.net* on 25. 11. 2009, 5.

the repressive mechanisms and on their representatives as well as the committed injustice and the crimes.

- This represents the basis for passing on knowledge at schools, at universities systematically as an obligatory curriculum topic and within teacher training and it also forms the foundation for working at extracurricular educational facilities.

All this repeatedly requires societal and political negotiation processes to be carried out; knowledge can't be ordered, but needs to be understood as an inclusive subject of formation of opinion through education, through dialogues and the willingness to listen to an opposing opinion. Yet this does not mean that one would admit any kind of topic.

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TIMELINE OF THE MAJOR EVENTS

September 9, 1989	Founding appeal “Aufbruch 89” (<i>Start 89</i>) and establishing the “Neues Forum” (<i>New Forum</i>) as the first GDR state-wide opposition movement
October 9, 1989	70,000 people peacefully demonstrate in Leipzig against the communist dictatorship and for political changes. The state authorities don’t deploy the troops and policemen assembled in Leipzig
November 9, 1989	Following a misleading press conference led by politburo member Günther Schabowski regarding the new GDR act on travelling, hundreds of thousands enforce that the Berlin Wall checkpoints and the checkpoints along the whole border between East and West Germany are opened
November 28, 1989	Federal Chancellor Kohl presents a “10-point-plan” for German reunification
December 1, 1989	The GDR constitution is changed and the leading role of the state party SED is canceled
December 4, 1989	Civil rights activists occupy the Stasi headquarters in Leipzig in order to stop the destruction of files. Further locations follow
December 7, 1989	Establishment of the Central Round Table according to the Polish example. Here, representatives from the opposition and the civil rights movement negotiate together with government representatives about reforms and democratic transformations of the country as well as about preparing free elections
March 18, 1990	The only free elections in the GDR take place. The parties that promise a fast unification with the Federal Republic of Germany emerge as the winners
May 18, 1990	Agreement concluded between the Federal Republic of Germany and the GDR about creating a monetary and economic union on July 1st 1990
July 1, 1990	The monetary and economic union becomes effective. From this date, GDR citizens use the Deutsche Mark (or “DM”) as their currency
August 23, 1990	The East German parliament, the Volkskammer declares the accession to the Federal Republic of Germany according to article 23 of the Federal Republic of Germany’s “Grundgesetz” on October 3rd 1990
August 24, 1990	Act on Securing and Storing the Personal Data at the Ministry for State Security/Office for National Security 24. 8. 1990, GBl. d. DDR 1990, p. 11419ff
September 6, 1990	1. Rehabilitation Act of 6. 9. 1990. GBl. d. DDR I, p. 1459
September 12, 1990	Conclusion of the “Two Plus Four Treaty” concluded between the GDR and the Federal Republic of Germany on the one hand and the victorious powers from WWII on the other
October 3, 1990	GDR accession to the Federal Republic of Germany. Germany is reunited again following 41 years
November 14, 1991	The Act on Stasi Documents (<i>Stasi-Unterlagen-Gesetzes</i> , hence the abbreviation <i>StUG</i>) is adopted and the office of the Federal Commissioners for the Records of the State Security Service (<i>der Bundesbeauftragte für die Stasi-Unterlagen</i> , hence the abbreviation <i>BStU-Archiv</i>) is established by the German Parliament
January 1, 1992	The BStU commences its work
March 12, 1992	The German Parliament decides to establish an inquiry commission “For the Reappraisal of History and the impacts of the Socialist Unity Party dictatorship in Germany”
November 4, 1992	Adoption of the 1st Act on Socialist Unity Party Injustice Settlement for criminal law rehabilitation
November 13, 1992	Start of the 1st East German Border Guard Law Suit led against the people responsible for the deaths on the border between East and West Germany and at the Berlin Wall. Altogether, 246 persons were charged in 112 trials, including 10 Socialist Unity Party leadership members such as Erich Honecker, Günter Schabowski and Egon Krenz as well as 42 leading military officials and 80 former border guards. 132 persons are sentenced, most of them being given suspended sentences
November 20, 1992	Establishment of the offices of the State Commissioners for the Records of the State Security Service of the Former German Democratic Republic (<i>der Landesbeauftragte für Unterlagen des Staatssicherheitsdienstes der ehemaligen Deutschen Demokratischen Republik</i>) as a contact partner for the victims and affected persons of the Socialist Unity Party dictatorship at the level of the five East German federal states that the former GDR territory is comprised of

December 31, 1992	Closure of the Central Registration Office of the State Judiciary Administrations in the town of Salzgitter that documented more than 40,000 violent crimes in the GDR and at the Berlin Wall and along the rest of the border between East and West Germany
June 23, 1994	Adoption of the 2nd Act on Socialist Unity Party Injustice Settlement for professional and administrative legal rehabilitation
June 22, 1995	Establishment of the 2nd inquiry commission “For overcoming the Socialist Unity Party Dictatorship within the process of German unity”
April 2, 1998	Adoption of the Act on the Federal Foundation for the study of communist dictatorship
July 24, 1999	Adoption of the memorial concept for memorial places of national and international importance
December 31, 2005	End of the criminal reappraisal of injustice in the Soviet Occupation Zone and in the GDR; end of the last legal processes against the former perpetrators
August 29, 2007	Adoption of the 3rd Act on Socialist Unity Party Injustice Settlement, “Act on Special Allowance for victims of imprisonment”, the so-called “victim’s pension” amounting to € 250 per month for prisoners that have spent more than 180 days in prison due to political reasons and who can prove their neediness
November 5, 2010	Prolongation of the rehabilitation period until 31. 12. 2019
December 22, 2014	5th Amendment to the Criminal Law Rehabilitation Acts and increasing the pension to € 300 per month

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MEMORY OF NATIONS

Democratic Transition Guide

[The Polish Experience]



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AUTHORS

FRANCISZEK DĄBROWSKI

Main Specialist in the Digital Resources' Branch of the Archive of the Institute of National Remembrance in Warsaw (since 2006). Lecturer at the Academy of Warfare in Warsaw.

RADOSŁAW PETERMAN

Lustration Expert, Director of Human Resources Department at the Ministry of National Defence in Poland (since 2016). Deputy Director of the Vetting Office at the Institute of National Remembrance in Warsaw (2010–2016).

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TRANSFORMATION OF THE POLITICAL SYSTEM (1988–1991)

FRANCISZEK DĄBROWSKI

INTRODUCTION

The democratic transition in Poland ended a 40-year long communist dictatorship. The most important factors of the political change were economic crisis, popular rejection of the communist dictatorship, and withdrawal of Soviet support for the ruling communist party.

The country's communist-controlled economy was inefficient, ideologically biased, and was generally directed at fulfilling the military obligations of the Soviet overlord rather than the needs of nation. The so called "economy of planned deficiency" suppressed private enterprises and property. Foreign trade structure drained the country of the most needed resources. The continuous austerity of life periodically worsened, and two such low points marked the last two decades of dictatorship in the years 1976–1983 and 1987–1988. Foreign debt was an additional burden for the economy.

The Solidarność trade union, established in the summer of 1980, was a major, peaceful, anti-regime organization (8 million members in a nation of 37-million). The movement was mostly crushed by martial law declared by the militarized communist government on 13th December 1981. Repression followed to suppress the trade union and to break its structures; however, the potential resistance in Polish society was still significant.

The Soviet Union in the '80s was on the verge of collapse, caused by economic crisis and military competition with the West. By the end of the decade USSR was not able to efficiently control and support its satellite states, Poland included. Gorbachev's solution was to rearrange the policies in satellite countries to maintain pro-Soviet forms of government with minimal engagement; this meant that USSR was unable to directly control its local proxies, and left them to manage themselves.

All of the abovementioned factors combined to contribute to the start of the political transition in Poland.

POLITICAL SYSTEM AT THE DAWN OF TRANSITION

THE LEGAL FRAMEWORK OF THE POLITICAL SYSTEM

The communist dictatorship in Poland was the result of the Soviet occupation which began in 1944. The basic laws concerning the form of government were formally democratic, but some features of the legal system were designed to keep the communist party at the helm of state. The 1952 constitution stated that a leading role in the country's rule belonged to the working class; the other clause stated, that Polish People's Republic (Polska Rzeczpospolita Ludowa, PRL) is to be "organized as planned economy", "contains, disowns and liquidates social classes living on the expense of workers and peasants". Formally the 1952 constitution shaped the government's as a democratic republic, where the highest powers were allocated to parliament, with a separate

judiciary, and executive power. Amendments to the 1952 constitution in 1976 formally acknowledged the actual state of affairs; that the PRL is a socialist state, the leading role in the state's life belongs to the communist party, PZPR, and the country's social and political life is organized in the syndicate body called the Front Jedności Narodu (FJN, "Front of the Nation's unity"), in fact PZPR-controlled facade organization. The 1976 amendments also embedded the alliance with Soviet Union in the constitution. The electoral law did not allow registering candidates from outside of the FJN. The parties or movements not under the control of the PZPR were not allowed to register and were considered illegitimate. From 1947, all of the elections were rigged.

POSITION OF THE COMMUNIST PARTY BEFORE THE REGIME CHANGE

The country's communist party, Polska Zjednoczona Partia Robotnicza (PZPR, "Polish United Workers' Party") was the sole ruler of state. The party's apparatus (central and local committees) effectively controlled the government, local, social and industrial institutions and other bodies. The legally allowed political parties (Stronnictwo Demokratyczne, SD, and Zjednoczone Stronnictwo Ludowe, ZSL), state-organized and controlled trade unions (Ogólnopolskie Porozumienie Związków Zawodowych, OPZZ) and some minor organizations were in fact subordinated as members of FJN and treated as puppets for the "national unity".

NUMBER OF POLITICAL ENTITIES IN 1989

After the 1981–1982 PZPR membership overview (when a significant number of members resigned or were expelled), approximately 2 million members were counted. Approximately 120 thousand members were counted for the SD. Approximately 300 thousand were counted for the ZSL. Approximately 4 million members were counted for OPZZ, the state-acknowledged trade union network.

In the years 1988–1989, "Solidarność", in the process of re-establishment, the member's count did not reach that of 1980–1981 (more than 9 million of members). Several hundred "Solidarność" committees were acting openly (although not legally) in 1988. The re-registration of its committees were allowed on April 17, 1989, for the workers' trade union and on April 20, 1989 for the farmers' trade union. The number of "Solidarność" members in the 1989 may be estimated at more than 2 million.

CONTROL OF THE POWER STRUCTURE

The communist constitution did set up a number of judiciary and control bodies: the control chamber (Najwyższa Izba Kontroli, NIK, since 1957), the administrative court (Najwyższy Sąd Administracyjny, NSA, since 1980), the constitutional court (Trybunał Konstytucyjny, TK, since 1982), the tribunal d'état (Trybunał Stanu, TS, since 1982), the ombudsman (Rzecznik

Praw Obywatelskich, RPO, since 1987). In fact, those bodies did not contribute to any effective judiciary or administrative control over dictatorship activities. The abovementioned bodies were only a simulacra of the republican institutions, and served as a façade for party decisions, providing formal cover for the twists of party's policy and as internal system regulators.

Prior to the 1989 transition, the parliament, the judiciary, state controlled government bodies, and local governing bodies were in fact dependent on the communist party structures, and acted as its executives. Units of the central committee of the communist party covered the most important areas of governance, and were the real centres of power. In every institution, an organization or office existed a party committee that effectively controlled the dealings of the unit. The system of "nomenklatura" (nomination of leadership of the organization reserved for the party's decision) was at the core of the personal policy in pre-1989 period.

DEMOCRATIC TRANSITION IN POLAND 1989–1991

REACTION OF THE POLITICAL SYSTEM TO THE CHANGES AND THE TRANSFORMATION OF THE COMMUNIST PARTY

The economic crisis caused by the inefficient communist governance was worsened in 1987 and 1988. This caused two waves of strikes in the spring and summer of 1988, demanding the restoration of the "Solidarność" trade union. On the 25th of August, 1988, at the high point of the second wave of strikes, Lech Wałęsa issued a joint statement from opposition leaders promising to stop the strike action, if the authorities would start talks concerning the free trade union movement. The reaction of the communist leadership was slightly different than in 1981; although the state apparatus was prepared to use force again, the minister of internal affairs, Czesław Kiszczak (head of SB), publicly proposed talks with the opposition on 26th August 1988. The extraordinary meeting of central committee of communist party also agreed to start negotiations. At the start of the talks with the opposition, the communist party simultaneously tried to rearrange itself. The central committee was reshuffled and reorganized, the then head of government Zbigniew Messner resigned, and was replaced by Mieczysław Rakowski. Jaruzelski had the support of Gorbachev, who visited Poland in July 1988 during meeting of heads of Warsaw Pact states.

The initial talks were held in secrecy in September 1988 and next months, as a preliminary step to the wider negotiations held in public.

The public negotiations, the so-called "Okrągły Stół" (Round Table) was held from 6th February to 5th April 1989. The participants were assembled with three "sides of negotiations": the "party and coalition side" (representing the communist party and the minor organizations of the ruling block), the "opposition-Solidarność side" (representing the democratic opposition), and "trade union side" (representing the party-controlled trade union OPZZ). The talks of the three main teams were about political reform, economic reform, social matters, and trade union matters. The numerous "sub tablets" and working teams were established to discuss matters of lawfare reform, media, associations and local government, health service, education and science, agriculture, mining, youth, housing policy, and ecology. The most important agreements concerned parliamentary elections, and freedom

of associations and press. The communist party agreed to elect a new parliament with special provisions concerning the division of seats: 65 % of seats in the lower chamber of parliament were reserved for the candidates of communist party and its minor allies. 35 % of seats in the lower chamber were allocated for "party-less candidates", or free open competition. This solution formally guaranteed the dominance of the communist party. The agreements were signed on the 5th of April 1989. The relevant acts concerning the Round Table core agreements were passed on the 7th of April 1989. The date of election was appointed at the 4th of June 1989. The 4th of June 1989 election was the beginning of the real transition. The landslide victory of the Solidarność candidates (the majority of votes going to candidates of the lower parliamentary chamber, and 99 of 100 seats in upper chamber taken), had a shock effect on the ruling party. The ruling block succeeded in electing former dictator Wojciech Jaruzelski as president of PRL, but the bid to designate his right-hand man Czesław Kiszczak to the seat of prime minister failed. In August of 1989, the solidarity of the ruling block was finally broken, the representatives of the minor allies of PZPR, SD and ZSL agreed to form a government together with Solidarność. On the 24th of August 1989, the new, non-communist Prime Minister, Tadeusz Mazowiecki, was appointed by parliament. Only two seats in government were, for the time being, reserved for the former rulers: the ministry of national defence, Florian Siwicki and ministry of internal affairs, Czesław Kiszczak, the latter in charge of the secret service, SB. The decomposition of former ruling party deepened, and during its 11th general meeting on 28th January 1990, the party dismissed itself. The dismissal of communist party, and the subsequent formation of next-generation post-communist parties had a detrimental effect on the position of communist ministers and president. Kiszczak and Siwicki were finally dismissed in July 1990. The presidential term of Jaruzelski was shortened by a parliamentary act on the 27th of September 1990; the act proclaimed the general election of president. The presidential election had two rounds, and on the 9th of December 1990, Lech Wałęsa won. The counter-candidate, acting Prime Minister Tadeusz Mazowiecki, resigned from the post, and the new government of Jan Bielecki was formed.

The disintegration of the PZPR and its apparatus resulted in the foundation of several successor parties and movements. Formed in 1990, Socjaldemokracja RP (SdRP), then the coalition Sojusz Lewicy Demokratycznej (SLD) were the most important of the post-communist movements, and until 2015 remained major parliamentary parties, in 1993–1997 and 2000–2005 Sojusz Lewicy Demokratycznej (SLD) was the ruling party. The ZSL adopted the name "Polskie Stronnictwo Ludowe" after the anti-communist peasant party dismissed in 1949 and absorbed some independent peasant activists; PSL is still an important political player in Poland. SD's continued its existence without successes: the party never achieved more than several parliamentary seats.

The matter of parliament's reliability as representative body in the new situation appeared to be urgent; the parliamentary term was shortened, and a new general election was announced in the fall of 1991. The new parliament was elected without previous obsolete limitations.

LEGAL FRAMEWORK OF THE CHANGES

The act altering the constitution passed on 7th April 1989, formed an upper parliamentary chamber, the Senat (Senate), and

the institution of State's President, dismissing the former collective head of state office Rada Państwa, State's Council. The Electoral laws on parliamentary elections passed also on the 7th of April 1989, secured the Round Table's agreement concerning the proportions of parliamentary seats allocated to ruling block's candidates and those given to free competition. At least 10 % of seats were guaranteed to the so-called "country's list" (i.e. voted in all constituencies), reserved for candidates of the ruling block. The upper chamber election had no such limitations. Also on the 7th of April 1989, other acts concerning the most important elements of Round Table's agreements were passed – i.e. the act on societies, allowing free associating, concerning political activities, and acts on trade unions, and amendments to the labour code allowing free workers' and peasants' trade unions.

Laws dismissing the coercive socialist economy were passed between 1988 and 1989, for example, on economic activities allowing free trade and enterprises on the 23rd of December 1988, banking law on the 31st of January 1989, laws concerning foreign currencies trade on the 15th of March 1989. and laws concerning the stock exchange were passed on the 22nd of March 1991.

The freedom of movement was empowered by the government's decree on the 7th of December 1988 concerning the issue of passports; the communist passport laws were finally replaced by the parliamentary act of 29th of November 1990.

The surprising outcome of the 4th of June 1989 elections which showed the popular denial of voting for regime candidates and the "country's list" resulted in passing of the 12th of June 1989 decree allowing a new vote in the constituencies where parliamentary seats guaranteed the ruling block candidates were not taken.

The new election code was passed by parliamentary act on the 10th of May 1991, abolished previous guarantees for the former ruling party and their allies, and established fully democratic rules.

An act on the 8th of March 1990 concerning local government ended the existence of the communist-controlled local administration and established democratic local governing bodies.

An act on the 23rd of November 1989 abolished the office for the religious affairs, ending the existence of a state body controlling religious communities.

An act on the 11th of April 1990 abolished the censorship office and amended the press code to support freedom of press.

An act on the 28th of July 1990 on political parties finally allowed the registration of political parties (instead of previous regulations concerning associations). An act on the 23rd of May 1991 amended the former law concerning the matters of trade unions.

The 29th December 1989 adjustment to the constitution changed the name of state from PRL to Rzeczpospolita Polska (RP, Republic of Poland), annulled all of former constitutional provisions concerning the socialist character of state and the role of communist party, and added fundamental civil rights provisions. The amended constitution was the basic law in Poland until the voting for the new constitution in 1997.

ESTABLISHMENT OF THE COMPETITIVE POLITICAL SYSTEM

The provisions of the Round Table agreements were not meant to establish democratic rule. As Jaruzelski allegedly said, the agreements left the "control packet" of power in the hands of former

rulers. However, the political process led to the alienation and demise of the PZPR, and as a result, the deeper changes which enabled the transition to a democratic republic and fully democratic elections in 1991. In the course of the "contract parliament" term, new laws concerning basic civil rights, free market, and abolishing coercive institutions were passed. The first free parliamentary elections in the fall of 1991 marked the end of the first, most important, period of democratic transition in Poland.

LESSONS LEARNT

The Polish transition, after 1989, is seen as a composite of successful changes and unfulfilled wishes.

The conversion from the communist-designed "rationed revolution" to a real democratic transition was the major positive outcome of the Polish experience of 1989. The PZPR plan was to establish the half-dictatorship, with the "control packet" still in the hands of communists, with limited (and possibly the most troublesome) segments of power commissioned to the representatives of nation. The disintegration of the PZPR parliamentary block resulted in real democratic change, and opened the way to a far more advanced reform of politics, economics, and foreign relations in Poland.

The peaceful transition was seen as a value itself, especially in comparison with the events of the Rumanian revolution. The potential reaction of the army and the security services was seen as a possible significant threat to the transition. The reluctant stand of Tadeusz Mazowiecki's government towards the eventual, untimely, settlements of the security services affairs, the liquidation of communist party and its assets, and even movement towards the fully democratic elections are seen as a hesitancy resulting from the assumed incertitude of the political position and the overestimated strength of the communist party and its apparatus. The peaceful change was a smooth way to adapt the former regime functionaries to the new situation. The initial lack of any effective transitional justice, the massive fraud schemes called "endowment of nomenklatura", and the many other flaws of transition were seen as a price for democracy, or as the cost of the power swap negotiated during the Magdalena and Okrągły Stół talks. Mazowiecki's "thick line" policy seemed to be a working option for the transitional government until the moment of visible decomposition of the communist party and the subsequent dismissal or decomposition of its apparatus and ruling schemes. The eventual danger of reaction by the post-communist structures appeared to be overrated. However, the opportunity for deepening changes appeared, it was never taken serious advantage of, and served only as an excuse for the Wałęsa's "acceleration" campaign, and the subsequent divisions in the "Solidarność" movement.

So-called "The Zero Option", the general purge of communist functionaries from the state apparatus or at least from significant segments of it, was never carried out. Also, the key to the eventual transitional justice, the barring of communist personalities and organisations from public posts, was never performed. The lack of general solutions concerning the settlement of communist crimes resulted i.a. in the lack of clear and just procedures for property restitution. Nevertheless, the transition of ex-communists to democratic public life, although flawed and marked by corruption, appeared peaceful and did not result in major threats to the republic, for example, there was no coup-d'états.

One of the results of not barring communists from public life was the relatively quick return to power of post-communist parties in 1993, and the constant impediments in dealing with the past, especially concerning access to the archives of the former regime. The integrity and efficiency of the state was seriously impaired by retaining former regime men in governing and judicial bodies.

The legal system in post 1989 Poland might be described as corrected continuity of the communist legal system. The laws were amended step-by-step to adjust them to the standards of modern rule of law and democracy; nevertheless, the status of laws passed in the period 1944–1990 was only partially challenged. The legitimacy of the communist state was declared inexistent, but the legal consequence of communist lawfare was never summarily questioned. The effect was the permanence of communist legal dealings that were to be challenged in separate legal actions.

RECOMMENDATIONS

Recommendations concerning political transition are highly political in nature and cannot be applied, without adjustment, to local terms and potential of the national and social community. The objective of transition is to establish a stable, lawful, and democratic republic, with fair, independent, open justice system.

Any delays in settlements may cause irreversibility for the injustices committed by the former regime.

Legal system: The legal system of the former regime should be taken under scrutiny to restore the rule of law and to mend the losses suffered by citizens under dictatorship as quick and profoundly as possible. The legitimacy of regime laws cannot be recognized automatically or without examination of their consequences.

Sanitization of the political and governance system: The integrity of the state cannot be undermined by the admittance of former regime members and organizations to public life. The regime organizations, parties, coercive institutions should be abolished and their assets seized by state. The former regime functionaries and collaborators are not fit to serve a democratic republic; the proper procedures (following the “Euration” or “Denazification” proceedings) of assigning criteria and level of responsibility, and eventual punishment or limitations of personal rights should follow open judicial procedure.

Settlement of the regime crimes: The crimes of the regime should be prosecuted without procedural or political reservations. The legal system should guarantee the rights of the victims of the regime, and restitution of property and other lost entitlements first, as far as it is possible in the common interest.

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DISMANTLING THE STATE SECURITY APPARATUS (1989–1991)

FRANCISZEK DĄBROWSKI

INTRODUCTION

POSITION AND STRUCTURE OF THE STATE SECURITY APPARATUS BEFORE THE TRANSFORMATION

The communist security apparatus in communist Poland consisted of several institutions and organisations of different competences and affiliations.

Służba Bezpieczeństwa (SB, security service) (1956–1990) – was the main security force of the communist regime in Poland, acting as a security and political police unit, disguised as a part of **Milicja Obywatelska** (MO, see below), a criminal and public order police, with central units based in the Ministry of Internal Affairs (**Ministerstwo Spraw Wewnętrznych**, MSW). The SB's local units were formally part of relevant districts and local MO commands (since 1983 part of the district and local “Offices of Internal Affairs”). SB continued the activities of its predecessor, **Urząd Bezpieczeństwa** (UB, security office, 1944–1956, central units: **Resort Bezpieczeństwa Publicznego**, RBP, public security department, 1944; **Ministerstwo Bezpieczeństwa Publicznego**, MBP, ministry of public security, 1945–1954; **Komitet ds. Bezpieczeństwa Publicznego**, Kds.BP, Committee for public security, 1954–1956).

In 1989, several departments in the MSW constituted the structure of the SB, or were manned by SB functionaries:

- **Biuro “A”** (**Biuro Szyfrów**): encryption and communications unit
- **Biuro “B”**: surveillance unit
- **Biuro “C”**: registry and archive
- **Biuro “W”**: post control unit
- **Biuro Historyczne**: historical unit
- **Biuro Ochrony Rządu**: personal protection unit
- **Biuro Paszportów**: pass control unit
- **Biuro RKW**: signals counterintelligence unit
- **Biuro Studiów** (formed 1982): special unit in charge of invigilation of prominent former Solidarity members and underground organisations
- **Biuro Śledcze**: investigation unit
- **Department I MSW**: foreign intelligence unit. The main tasks of Department I were: classical politic and economic intelligence, penetration and disintegration of Polish diaspora in the Western countries, scientific and industrial espionage.
- **Department II MSW**: counterintelligence unit. The main tasks of Department II were surveillance of non-communist diplomatic personal in Poland, classical counterespionage, control of relations between Polish citizens and foreigners.
- **Department III MSW**: security and political police unit formally tasked with the “fight against antisocialist activity in the social superstructure”.
- **Department IV MSW** (formed 1962): “Church affairs” unit. The main tasks of Department IV were surveillance, control and disintegration of activities of Polish Roman Catholic

Church (seen as one of the major enemies of socialist state), and to far lesser extent, other religious communities.

- **Department V MSW** (formed 1979 as **Department III-A MSW**): unit in charge of invigilation of independent trade unions.
- **Department VI MSW** (formed 1985): unit in charge of control of agriculture, food processing industry, and forestry.
- **Department PESEL**: unit in charge of the electronic system of population records.
- **Department Społeczno-Administracyjny**: unit in charge of the control of legally acting associations and organisations.
- **Department Techniki** (former **Biuro “T”**): technical measures of surveillance unit (eavesdropping, phone tapping, photo, and video surveillance)
- **Gabinet Ministra**: cabinet of minister of internal affairs, staff and analysis unit
- **Główny Inspektorat Ministra**: main inspectorate of minister of internal affairs (control of operative units)
- **Zarząd Ochrony Funkcjonariuszy** (formed 1985): internal disciplinary and control unit
- **Zespół MSW**: analysis of operative information unit

Departments I–VI and **Biuro Studiów MSW** (and subordinate local units) were the main operatives of units of the SB, the “A”, “B”, “C”, “T”, “W”, and the **RKW** units were auxiliary and operative-technical support.

Milicja Obywatelska (MO, “citizen guard”): was a criminal and public order police. The headquarters of MO **Komenda Główna MO** (KGMO), since 1954, was one of the central units of MSW. Formed in 1944 by the communist government, the MO was a public law and order enforcement agency, with separate central and local units, but formally subordinated to the security police HQ (RBP 1944, MBP 1945–1954). After the dismissal of the MBP in 1954, the MO was subordinated to the newly formed MSW. The reorganisation of the security apparatus in 1956 saw the MO as part of the MSW, together with SB, KBW, WOP (see below) and some civilian administration. Although generally tasked with matters of criminal investigations and public order, the MO was on the first line of duty when containing riots or other unwanted activity was required. The special riot police units, the **ZOMO** (**Zmotoryzowane Odwoły MO**, the MO’s “motorized reserve”, formed in 1957) gained notoriety for its brutal actions against political demonstrations.

Ochotnicza Rezerwa Milicji Obywatelskiej (ORMO, MO’s “volunteer reserve”): formed in 1946, acting as an auxiliary “volunteer” force for the MO, especially for the containment of riots, and social discontent.

Wojskowa Służba Wewnętrzna (WSW, “internal military service”): counterintelligence and security unit of the military (est. 1957, successor of the **Główny Zarząd Informacji**, GZI, the main directorate of intelligence), responsible for containing unwanted political activities in the army.

Zarząd II Sztabu Generalnego Wojska Polskiego (Z II SG WP, 2nd Directorate of the General Staff of the Armed Forces):

military foreign intelligence (est. 1952, as the successor of Oddział II SG WP).

Wojska Ochrony Pogranicza (WOP): border protection troops, formed in 1945, the main force responsible for the securing of the state frontier; its “reconnaissance unit”, **Zwiad WOP**, was in charge of operative activities in the border zone.

Nadwiślańskie Jednostki Wojskowe (NJW MSW, “Vistulan Military Units”): counterinsurgency and MSW’s protection troops, successor of the reorganised 1965 counterinsurgency corps **Korpus Bezpieczeństwa Wewnętrznego (KBW, “internal security corps”)**.

Wojskowa Służba Wewnętrzna Jednostek Wojskowych MSW (WSW JW MSW, “military internal service of the MSW’s troops”): counterintelligence and security unit of the WOP and the NJW (till 1965 WOP and KBW).

Główny Urząd Kontroli Prasy, Publikacji i Widowisk (GUKPPiW): censorship office.

Urząd do spraw Wyznań (Uds.W, Office for Affairs of Religious Nominations): office responsible for legal and political contacts with churches and religious communities (primarily with the Roman Catholic Church).

Although not a security or law enforcement agency, the **Ministerstwo Spraw Zagranicznych (MSZ, Ministry of Foreign Affairs)** was one of the main “cover institutions” for the foreign intelligence unit of the MSW, Department I. Stations of foreign intelligence were placed in embassies and consulates, the agents and officers of the MSW had a great number of posts in the ministry. The other central government body, the **Ministerstwo Handlu Zagranicznego (MHZ, Ministry of Foreign Trade)** was an office supervising the trade missions abroad: another important “cover institution”.

NUMBER OF MEMBERS: THE SERVICE APPARATUS AND SECRET COLLABORATORS

In February of 1990 the SB counted 12,400 functionaries in local branches (in 1984, 18,400). On the 31st of December 1989, the central units of the SB counted more than 6,200 men (on the 31st of December 1988, more than 7,100 men). It is estimated that in the summer of 1989, the SB counted 24 thousand functionaries.

The number of SB informants (“secret collaborators”, TW) since 1981 constantly soared, and in 1988 reached approximately 98 thousand; considering that number of unregistered sources is estimated to be approximately 15 thousand, the whole number could have significantly exceeded 100 thousand. The count sank acutely in 1989, due to the the SB’s response to political transformation; informants and agents were withdrawn from activities, their entries were also withdrawn from the registry.

In 1990, the military secret services, after the fusion of military foreign intelligence (Zarząd II SG LWP) with the internal military service (WSW), counted 496 officers and employees.

The operative assets of military foreign intelligence in 1989–1990 can only be estimated after the number of sources in 1985. The Zarząd II SG LWP had 494 informants in the country with 366 auxiliary sources (couriers, connection men, contact addresses), and 156 sources abroad.

The number of collaborators of the military secret service (WSW) is estimated to be 10 thousand men; it should be noted, that approximately 10 % of collaborators were so-called NP, “nieoficjalny pracownik”, “unofficial employee” (officers and

NCOs secretly tasked with operative work, mainly running of minor informants). It should be also noted, that although the total number of informants and NPs of the WSW was rather stable (soaring in the ’80s), the constant flow of conscripts to the army and the release of reservists caused the need for permanent recruitment of new informants in the ranks. The informants released from the army were withdrawn from the active network of the WSW, while new informants were recruited; there was a constant flow of informants (it should be noted that in ’80 the total number of WSW informants soared, i.e. the recruitment of new informants was higher than withdrawal of released). The data concerning released informants were handed to the SB, and some were “re-recruited” in civilian life.

The censorship office employed more than 400 people in 1989; this institution did not run networks of informants or collaborators.

POWERS OF THE SECURITY APPARATUS

In the 1980s, the powers of SB were partially embedded in the legal system; an act on the 14th of July 1983 concerning the office of the minister of internal affairs (MSW) tasked the SB and the MO with “protection of state security and public order”. The SB (as well as the MO) was entitled to conduct the operative, investigative, administrative, and legal proceedings. The other source of legal power of the SB was the criminal proceedings code; the SB, acting as a part of the MO, was entitled to conduct investigative activities on behalf of the public prosecution office (formally, only when ordered, but practically it never happened; political or state interest cases were rarely or never investigated by the prosecution office itself). The 1983 act of office of the MSW and the criminal proceedings code entitled the MO and SB men to conduct arrests and searches and to use the direct duress (use of fire weapons included) to “enforce the public order” or in the presumption of a crime. The activities of the foreign intelligence branch of the SB (as well as military foreign intelligence) were not legally based.

The activities of the military security services were only partially legally based on military criminal proceedings code (and partially the act on border protection), enabling the WSW and WOP to conduct investigative proceedings.

The operative and auxiliary activities of the security services were subject to internal regulations. The vast number of regulations concerned matters of recruitment, use and rewarding operative sources (informants, agents, other categories of contacts), terms, rules and aims of operative proceedings, the terms of registration proceedings, use of information gathered in the registry, terms of conducting surveillance, setting up wiretapping and eavesdropping, post control operative proceedings and use of the materials gathered, passport control proceedings. The number of methods used by the security services included the use of blackmail, “compromising material”, during the recruitment of informants, tapping of phones and flats, post control, covert entries, was in fact illegal, but authorized by superiors of functionaries involved without any judicial or independent review.

The 1956 decree on border protection was the legal basis for the security enforcement activities of border protection troops (WOP).

The censorship office’s activities were based on the 1981 act on censorship (following the 1946 decree). The act demanded compulsory presenting all text and images before publishing,

exhibiting or performing, and entitled the censorship office to prevent the publication of materials “claiming independence or territorial integrity” of the state, “encouraging the overthrow or the denigration” of the state’s rule, “threatening the constitutional basics of the state’s foreign policy and its alliances,” containing “war propaganda,” disclosing official secrets, “encouraging crime,” disclosing details of investigations and court proceedings held in secret, threatening “religious feelings and the feelings of people of no religion,” spreading “national and racial hatred” and “noxious contents,” that is, encouraging alcoholism, narcotics addiction, cruelty, and pornography. Actually, all of the provisions were quite formal, and the censorship banned the publication or disclosure of materials of any unwanted character (primarily political and religious) due to the instructions obtained from the communist party leadership.

COMMUNIST SECRET SERVICES IN TRANSITION 1989–1991

REACTION TO POLITICAL CHANGES

The reaction of the communist secret services in Poland to the transformation of political system had three parallel layers: the staged reorganisation, the mass weeding of operative documents and archives, and the influencing of the political changes to control extra-parliamentary movements.

Existing paperwork hints, that during the weeks after the 4th of June election the SB gathered information on “opposition members of parliament”. It clearly suggests that the SB leadership initially attempted to gain influence on the Solidarity members in parliament. The failure of the parliamentary bid to establish Czesław Kiszczak as prime minister, and the subsequent decomposition of the post-communist parliamentary coalition led the SB to a reaction concerning its own structure; disposing of compromising materials, securing operative assets (functionaries and informants), and disguising its own structure as “apolitical state security guards”.

FORMS OF TRANSFORMATION OF THE SECURITY APPARATUS

The impact of political changes in the summer and fall of 1989 made the the SB leadership uncomfortable about their perspectives. The answer was to get rid of sensitive files, and staging a reorganisation of the SB. In the spring of 1989, the unit in charge of postal control, Biuro “W” MSW, was formally dismissed; the activities of the unit, the covert opening and control of correspondence were contradictory to the essential human and citizen rights. The eventual disclosure of the Biuro “W” MSW existence and its dealings would be catastrophic for the communist party and especially for the SB. The structures of “W” units were transferred to the II directorate of the SB, the “counterintelligence” unit, which hid the real scope of “»W« work” (as the postal control was called in MSW) under the cloak of presumed “counter-espionage”.

On the 24th of August 1989, the day of the swearing in of the first non-communist Prime Minister, Tadeusz Mazowiecki, the then minister of internal affairs, Czesław Kiszczak, ordered the reorganisation of MSW departments. The central units of the SB were merged building new structures. Department III MSW, the unit in charge of invigilation and containment of political opposition,

was renamed “Department Ochrony Konstytucyjnego Porządku Państwa” (“the department for the protection of the constitutional state order”). Department IV MSW, the unit in charge of the invigilation of Church was dismissed, its structures and assets were merged with the former Biuro Studiów MSW (also an operative unit) to the new Department Studiów i Analiz MSW (“the department of study and analysis”). Departments V and VI were merged into the new Department Ochrony Gospodarki (“the department for the protection of the national economy”). The SIGINT unit (Biuro RKW) was merged into Department II. The reorganisation intended to simulate the transformation of the SB to the “state political police”. The 11th section of the 1st department MSW (Wydział XI Department I MSW), the unit in charge of “countering ideological diversion”, which acted against Polish émigrés, was dismissed on the 1st of September 1989. In the October of 1989 the SB officers’ school (Wyższa Szkoła Oficerska im. F. Dzierżyńskiego, WSO) in Legionowo (named after Cheka founder and chief of Polish descent, Feliks Dzierżyński) was reorganised, formally dismissed, and merged into the MSW academy (Akademia Spraw Wewnętrznych, ASW) as a “state security department” (Wydział Bezpieczeństwa Państwowego ASW).

Similarly, in November 1989, ZOMO was renamed to “Oddziały Prewencji MO” (“MO prevention units”). The internal political unit of MSW, Służba Polityczno-Wychowawcza (“political-educational service”) was dismissed in the November 1989. Departments I (foreign intelligence) and Department II (counterintelligence) and the technical-operative units were allegedly excluded from the structure of the SB (although those units were mentioned in December 1989 as parts of the SB).

The internal reorganization of the MSW followed a new concept for a security service; operations against the parliamentary opposition and Church were to be ceased, and the new aims of activity would be countering economic crime, terrorism and subversive dealings (as Kiszczak understood the activities of extra-parliamentary opposition).

The “volunteer” police force ORMO was dismissed by a parliamentary act on the 23rd of November 1989, although it appeared, that ORMO members anticipated the ensuing dismissal, and formed “Stowarzyszenie Wspierania Porządku Publicznego” (“association for support of public order”), that quickly acquired some significant permissions from the MSW enabling it to act as security contractors and a paramilitary force. Shortly after, these circumstances were made public, and ultimately in December of 1990 the Highest Court abolished the SWPP.

The changes in the MSW were not only to the SB. The handlers of the SB had foreseen the ensuing overhaul or even dismissal of the service, and did everything possible to get rid of compromising materials and move their functionaries to secure posts, outside of the structures of the SB. Also, the personnel of the SB were transferred to the other branches of MSW, mainly to the criminal police (MO), and significant numbers of SB officers retired. Other members found work at newly formed private security companies. In effect, in the end of January 1990, the central units of the SB in the MSW formally counted 3, 500 members.

The staged reorganisation of the MSW aimed to build some kind of “stay-behind” structures for the stranded SB members, and to keep control over the remaining security service units. Making a “leap forward”, Kiszczak suggested to Mazowiecki to form a political advisory committee in the MSW that would control the dealings of the security service, but did not plan to grant the committee access to operative information and procedures.

Between 1989 and 1990, the parliamentary coalition prepared a series of acts abolishing the SB and separating the police force from future security services. The acts were voted on the 6th of April 1990, transforming the MO into a new police force, dismissing the SB and forming a new security force, Urząd Ochrony Państwa (UOP, Office for the State's Protection).

An act on 6th April 1990 of the UOP stated, that the SB is to be dismissed on the 31st of July 1990; the new deputy minister of internal affairs ordered the immediate cessation of SB activities on the 10th of May 1990 (excepting the communication units). The former SB functionaries were permitted to apply for employment in the UOP, although under a compulsory overview of their dealings in the SB. Of the more than 14 thousand former SB officers who applied to the UOP, 5 thousand were rejected during the initial overview in local "verifying committees". From the 4.5 thousand former SB members that appealed the ruling to the central verifying committee, 1.8 thousand succeeded in the appeal. Departments I and II personnel (foreign intelligence and counterintelligence) came through overview practically untouched, the technical-operative units ("T" and communications branches) and surveillance units ("B" branch) were exempted completely from the overview. The new UOP was formed from 10 thousand former SB employees, with intelligence, counterintelligence and auxiliary units practically intact; only the former leadership of the SB was excluded from further service. Only one unit of UOP, Biuro Analiz i Informacji (analysis and information bureau, an OSINT unit) was formed from scratch; it's personnel consisted of former opposition activists.

The MSW's academy, Akademia Spraw Wewnętrznych, was dismissed by the government decision of the 10th of September 1990; the ASW formally ceased to exist on the 31st of March 1991, part of was used as a new Higher School of Police (the ASW's buildings were allocated to Warsaw University).

The reorganisation of the military security services proceeded similarly, but with one important difference; there was no overhaul of the army's security services; its personnel was almost entirely transferred to the new agencies. Only a handful of commanders were dismissed. Apparently the dismissal of the SB took a greater part of politicians' and lawmakers' attention, and the military services were not on their radar. The parliamentary subcommittee for the scrutiny of the WSW dealings was formed in 1990, but the outcomes of its dealings were practically unknown at the time; only a handful of information on the subject was published in 2008.

The internal military security service, the WSW, was formally dismissed in April of 1990; the military police branch of the WSW was reformed into a separate unit, Żandarmeria Wojskowa (ŻW, military police), the security branch of the WSW was merged with Zarząd II SG WP (foreign military intelligence) into Zarząd II Wywiadu i Kontrwywiadu SG WP (2nd Directorate for Intelligence and Counterintelligence of General Staff). This unit was reformed in August 1991 and renamed Szefostwo Wojskowych Służb Informacyjnych (WSI, military information service). The separate MSW's WSW unit (in charge of control of MSW's military units) was dismissed in July 1990, and a separate ŻW unit for MSW troops was formed in September 1990.

Border protection troops (WOP and its security unit, Zwiad WOP) were formally dismissed by a parliamentary act on the 12th of October 1990; formally ceasing to exist on the 16th of May 1991. The personnel and assets of the WOP were transferred to the newly formed border guard force, Straż Graniczna.

The NJW MSW troops survived the first stage of transition, and were used as a diplomatic and government protection unit. In the years 1998–2001, the units of NJW MSW were dismissed; it's personnel and assets partially transferred to Straż Graniczna and the government's protection office.

The Censorship office was dismissed by a parliamentary act on the 11th of April 1990.

CONTRIBUTION OF CITIZENS TO THE TRANSFORMATION

The impact of public opinion, especially the to the reinstated by the 1989 Solidarity press, "Gazeta Wyborcza" and "Tygodnik Solidarność" was one of the crucial factors in the control and subsequent dismissal of the communist security services. The free press informed the public about the alleged attempts to destroy the regime archives, the transition of the ORMO into a privileged security association, and the failed government plans to sustain the institution of censorship.

The main factors of the dismissal of the security services were the political transformation and forming of a new government between the summer and fall of 1989. The then former democratic opposition gained, initially limited, insight into the dealings of the "power ministries". The forming of a parliamentary coalition led by the Solidarity faction enabled the forming of the government and the voting of acts dismissing the former security services. It should be noted, that without the constant public demand for the abolishing of the SB, and the efforts of members of parliament to explain the dubious dealings of the security services, the government would remain reluctant to move forward with a fast transformation.

The popular reaction to the disintegration of communist party included the demand for the dismissal of the SB. The decomposition and then self-dismissal of PZPR were met with a series of rallies in numerous cities, from January until March of 1990; the demonstrators demanded resignation of Wojciech Jaruzelski (then president of Poland), dismissal of the PZPR and the SB. In Poznań, Szczecin, Kraków and Gdańsk demonstrators tried unsuccessfully to storm the buildings of the SB, the buildings of the SB in Warszawa and Rzeszów were blocked by rallies. However, the demonstrators were not numerous enough to occupy the SB buildings, or cease the activities of the secret service or to seize the archives.

The demand for change in the security authorities came from an unexpected direction; the political transition enabled the forming of an independent trade union in the MO units; the loosening of political control let some the MO functionaries demand the separation of the MO from the SB and the forming of the criminal police. Nevertheless, the demonstrations and dissent inside the MSW were not the decisive factors of change; the cause of the transformation of the security services was the political transition. The security services, just like the whole state apparatus, lost their communist handlers and Soviet support (the official KGB station in Warsaw was closed in summer 1990), and the establishment of a connection to CIA in May 1990, might have significantly contributed to the developments in the matter.

LEGAL AND POLITICAL FRAMEWORK OF CHANGES TO THE SECURITY APPARATUS

The initial changes in the structure of the SB, in the second half of 1989, were of a dubious legal nature. The structure of the MSW

according to the 1983 act concerning the office of the minister of internal affairs, was to be decided by the government. On the 22nd of August 1989, two days before the swearing in of the new, non-communist prime minister, Tadeusz Mazowiecki, the departing communist prime-minister Mieczysław Rakowski authorized the then minister of internal affairs, Czesław Kiszczak, to reorganize the ministry. Although such delegation of power was illegal, it was not immediately objected to. The subsequently announced parliamentary plans to arrange the matters of security services were met with a ministerial initiative. Kiszczak and his apparatus submitted to parliament their own proposals concerning the organisation of future security services. The controversy matters concerned the subordination of the future office of state protection (UOP) to the office of the ministry of internal affairs, or to the office of prime minister, relative to the office of the republic's president; the separation of the criminal police from the security service, and the ensuing overview of SB personnel. Ultimately, parliamentary bodies dominated by former Solidarity activists decided the future organization of the UOP and police.

The dismissal of the communist ministers of internal affairs (Czesław Kiszczak) and of national defence (Florian Siwicki), and the subsequent appointment of new non-communist ministers led to the effective dismissal of communist services, and forming of the new ones; although manned almost completely by old personnel. The employment of former SB functionaries was allowed after mandatory overview by special committees, as described in the government's decree of the 21st of May 1990, it concerned the employment of former SB officers in UOP.

The SB was dismissed by a parliamentary act on the 6th of April 1990, it concerned the formation of the UOP.

The MO was reorganised and transformed into the Police by parliamentary act on the 6th of April 1990, it concerned the forming of Police.

The ORMO was dismissed by parliamentary act on the 23rd of November 1989.

The Akademia Spraw Wewnętrznych was dismissed by government decree on the 10th of September 1990.

The military political academy (Wojskowa Akademia Polityczna, WAP) was closed by a government decree of the 21st of May 1990. It's supervisory unit, Główny Zarząd Polityczny WP (main political directorate of the army, GZP WP) was dismissed in December of 1989 by the ministry of national defence.

The censorship office was dismissed by parliamentary act on the 11th of April 1990 regarding adjusting press regulations.

The border protection troops WOP were dismissed on the 16th of May 1991 due to the stipulations of a parliamentary act on the 12th of October 1990, it concerned the forming of the border guard agency Straż Graniczna. The personnel and assets of the WOP (and of the maritime brigade of the border protection vessels – unit commanded by the ministry of national defence), were transferred to the SG.

The military security services and its political units were transformed by order of the military supervisors.

NEW SECURITY SERVICES AND LAW ENFORCEMENT AGENCIES IN POLAND 1990–2017

The security services were initially controlled by parliamentary permanent committees of the administration, and internal

affairs and national defence. The separate permanent committee for the supervision of the security services (Komisja do spraw Służb Specjalnych, KSS) was formed by parliamentary act on the 27th of April 1995, it concerned the parliamentary proceedings regulation.

Urząd Ochrony Państwa (UOP, “office for the state's protection”), intelligence, counterintelligence, antiterrorist and security agency was formed by parliamentary act on the 6th of April 1990 and started its activities on the 1st of August 1990. The UOP was reformed by parliamentary act on the 24th of May 2002; the agency was split into Agencja Wywiadu (AW, intelligence agency) and Agencja Bezpieczeństwa Wewnętrznego (ABW, internal security agency).

Wojskowe Służby Informacyjne (WSI, “military information service”), military intelligence and counterintelligence agency was formed as a branch of the ministry of national defence on the 22nd of April 1991, its existence was legally recognized by parliamentary act on the 25th of October 1991, it concerned matters of national defence; and subsequently by the special parliamentary act on the 9th of July 2003. The WSI was dismissed in 2006 by parliamentary act on the 9th of June 2006. The dismissal of WSI was followed by overhaul of its personnel and the forming of the new agencies, Służba Wywiadu Wojskowego (SWW, military intelligence service), and Służba Kontrwywiadu Wojskowego (SKW, military counterintelligence service) by parliamentary act on the 9th of June 2006.

The criminal and public order police (Policja) was formed by parliamentary act on the 6th of April 1990; the personnel of the former MO were transferred to the new police force (with the exemption of those MO functionaries who until the 31st of July 1989 were SB functionaries).

The military police (Żandarmeria Wojskowa, ŻW) was separated from the dismissed WSW in April of 1990 by order, of the then, minister of national defence, Florian Siwicki, and formed officially on the 1st of September 1990. The existence of the ŻW was legally recognized by parliamentary act on the 25th of October 1991, it concerned matters of national defence (as well as the existence of the WSI).

The border guard agency Straż Graniczna (SG) was formed on the 16th of May 1991 by the parliamentary act on the 12th of October 1990.

The Polish republic has two law enforcement agencies, not directly preceded by similar institutions under communist rule, fiscal intelligence (since 1991 various units of the ministry of finance, today it is the Department Zwalczenia Przestępczości Ekonomicznej, the department combating economic crime in the country's revenue service), formed by parliamentary act on the 28th of September 1991, it concerned fiscal control, and the country's anticorruption bureau (Centralne Biuro Antykorupcyjne, CBA), formed by parliamentary act on the 9th of June 2006.

LESSONS LEARNT

The functioning of the new security services was under limited public scrutiny due to the secret character of their duties. However, the matters of state security remain secret; some significant features, mainly flaws, of the new security services were revealed.

The effective parliamentary supervision over the security services was vital for the lawful activities of the latter, the permanent parliamentary committee however, was, and is, significantly

dependent on the flow of information from the services involved. The impact of public opinion and the free press seems to be one of the most important factors for public control over the activities of secret services (especially when the oversights, and errors, or inaction of the services are made public).

The flaws of the decision to retain former SB functionaries (and to follow SB methods) in the new republic's services became apparent when some landmark scandals broke out.

In March 1993, the leader of, the then, opposition party Porozumienie Centrum, Jarosław Kaczyński announced that the UOP issued a secret instruction (called after it's number "instruction 0015/92"), it concerned the operative invigilation and disintegration of the opposition parties and movements. The UOP denied the allegations of its operative dealings against the opposition, nevertheless the notorious instruction was withdrawn after the revealing of its contents.

In December 1995, the then, acting Prime Minister, Józef Oleksy, was accused by minister of internal affairs, of being a secret agent of Russian foreign intelligence, codenamed "Olin". In the course of the subsequent investigation and parliamentary examination, it was revealed that almost all of the UOP commanding officers involved in the case were SB functionaries, and one of the acting UOP operatives was a notorious former MSW foreign intelligence agent.

In 1997, the newly formed post-communist government announced that in the in the years 1991–1997, a cell tasked with operative invigilation and disintegration of opposition parties and movements existed in the UOP, which recruited and handled agents, forged documents, and conducted disinformation campaigns. The leader of the cell, Jan Lesiak, was a former SB officer, engaged in high-profile operations against the opposition prior to 1990.

In 2006, the continuous rumours about the allegedly illegal and criminal activities of the WSI were met with a parliamentary motion to abolish the whole military security service and to form a new military intelligence and counterintelligence agencies from scratch. The subsequent examination of WSI dealings revealed, that the service was as inefficient as the counterintelligence agency, its officers were trained by Soviet intelligence and maintained highly suspicious contacts with Russian intelligence operatives, (the agency was involved in illegal international weapons trade and criminal dealings at home and overseas; the most significant case was the WSI involvement in the so-called Fundusz Obsługi Zadłużenia Zagranicznego/FOZZ affair, a massive fraud scheme concerning foreign debt handling agency), invigilation and disintegration of opposition parties, ran disinformation campaigns in the press by its agents. The leadership of the WSI consisted almost exclusively of former Zarząd II SG LWP and WSW officers.

Private security companies were the hideouts of dismissed former SB and MO functionaries. The general opinion on the sector, that such companies were necessary as police in the early 90s, was seen as inefficient, but the clandestine links of security contractors with the criminal underworld, the police and the secret services was seen as a threat to common security. However, the connections of security contractors seemed to be substantial

in some criminal cases, the presumptions of the ensuing major threats to the state's security appeared to be exaggerated.

The special services established in the first years of new Polish republic were to be reformed or even dismissed (as WSI), partially because of their limited capacity to protect national security. The reluctance of the first non-communist governments to radically abolish the communist security system, and to penalize its men, created a relative lack of resistance (as a communist apparatus was also in crisis), but resulted in serious impediments for the settlement of the crimes of the regime. In fact, in early 1990, communist crimes were not properly investigated and prosecuted. The communist security services' members even retained their pensions privileges (abolished partially in 2009, and on wider scale in 2016). The presence of the former SB functionaries in the new secret services caused significant – and well-founded doubts about the reliability of the service as institutions of a democratic state.

RECOMMENDATIONS

Recommendations are highly political in character. The dismissal of the secret services of the regime is always a serious risk to public order. Continued activity, superficially reforming, or simply not touching the old secret services is a serious threat for a democratic transition, and for transparency in public affairs and national security. The men of the former regime's security services may, and usually do, have clandestine connections, and loyalties to external powers (as in communist states, with USSR and other services), and the criminal underworld. The secret services are a segment of the state with efficient control of key national resources. On the other hand, the interruption of these activities, especially in the counterintelligence area, may be, although temporarily, harmful for national security. It should be noted that the real purpose of the regime's secret services was the protection of the regime itself, with profound detriment to the citizens and their fundamental rights. The former security services as a structure, and its members (although skilled in secret activities) are not fit to protect the democratic state and a sovereign nation. The painful and effort-consuming solution is to dismiss regime's secret services, and to build a national security services from scratch. The next step should be a systematic vetting and replacement of the military and police officers, as well as and NCOs, and a systematic vetting and replacement of the civil service (especially the foreign service).

A resolution of the former regime's security service problems is also a settlement of the former regime crimes. The relevant laws concerning criminal responsibility for the dealings of the former regime should also cover a strict examination and punishment of the former security service functionaries, with the extraordinary use of amnesty in exchange for vital evidence and a *common design* scheme for proving guilt.

Parliamentary supervision of the security services, although dependent, on the services' information and on camera acting, is an efficient and lawful measure for the control and examination of the actual dealings of security system.

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REGIME ARCHIVES (1989–2017)

FRANCISZEK DĄBROWSKI

INTRODUCTION

In the popular view, the “regime archives” are seen as the archival resources that were kept secret from the public during communist rule. This popular view often focuses on the most secret archives of the regime, i.e. archives of only the party and the security police. There were other institutions running relevant sectors of the totalitarian state, but the dealings of the communist party leadership and the security services built the core of the system and were most hidden – and therefore seen as most important.

The institutions most concerned (and it's relevant collections) were as follows: the communist party (Polska Partia Robotnicza, PPR 1943–1948, Polska Zjednoczona Partia Robotnicza, PZPR 1948–1990), the ministry of foreign affairs (Ministerstwo Spraw Zagranicznych, MSZ), the Committee for the Defense of the Country (Komitet Obrony Kraju, KOK), satellite parties, networks of the secret services and coercive institutions consisting of the security service (Resort Bezpieczeństwa Publicznego, RBP 1944, Ministerstwo Bezpieczeństwa Publicznego, MBP 1945–1954, Komitet ds. Bezpieczeństwa Publicznego, KdsBP 1954–1956, Ministerstwo Spraw Wewnętrznych, MSW 1956–1990), the military security service (Główny Zarząd Informacji, GZI 1943–1957, Wojskowa Służba Wewnętrzna, WSW 1957–1990), the military foreign intelligence (Oddział/Zarząd II Sztabu Generalnego 1944–1990), the border guard security and reconnaissance unit (Zwiad Wojsk Ochrony Pogranicza, WOP 1945–1990), counterinsurgency troops (Korpus Bezpieczeństwa Wewnętrznego, KBW; Nadwiślańskie Jednostki Wojskowe MSW, NJW MSW), military political bodies (military political directorate: Główny Zarząd Polityczno-Wychowawczy, Główny Zarząd Polityczny, military academies), military HQ (Sztab Generalny WP), censorship (Główny Urząd Kontroli Prasy, Publikacji i Widowisk), other repressive institutions (Komisja Specjalna do Walki z Nadużyciami i Szkodnictwem Gospodarczym, the committee for suppression of the black market and private enterprises; Urząd ds. Wyznań, authority responsible for policy towards religious communities), judiciary bodies, including special military courts (Wojskowe Sądy Rejonowe, Najwyższy Sąd Wojskowy – district military courts, supreme military court) and the special military prosecution service (Wojskowe Prokuratury Rejonowe, Najwyższa Prokuratura Wojskowa – the district military prosecution service office, the supreme military prosecutions service office), and other various government bodies. The number of institutions and organisations engaged in coercive policy comes from the totalitarian character of the state (only the most important bodies were listed above, as decisive centres of power).

The main question for the former regime regarding records were: the threat of destruction (or transfer to the foreign power) of records, the transfer of the archives from regime organisations and institutions to state controlled institutions, and access for researchers and the general public (connected to questions of the legal status of the archives and its declassification).

REGIME ARCHIVES: SITUATION ON THE BEGINNING OF DEMOCRATIC TRANSITION

On the dawn of the transition of archival resources, the main regime body's documents were held in separate archives, and were in principle not accessible to the general public – with some remarkable exemptions granted to the regime-approved researchers. The communist party records, as well as records of the preceding communist organisations, were kept in the archive of the party's Central Committee (Centralne Archiwum KC PZPR). The secret police (Służba Bezpieczeństwa, SB whose central units were part of the Ministry of Internal Affairs, Ministerstwo Spraw Wewnętrznych, MSW) ran its own archive and registry unit, the so called “Bureau »C«” of the Ministry of Internal Affairs (Biuro “C” MSW, in local units: Wydział “C” – “C” Division), some units had their own registries. Bureau “C” kept the files of operative procedures, informants' and agents' case-files, employees' personal files in separate and secret collections. Even the existence of Bureau “C” was hidden from the public: it was named “Centralne Biuro Adresowe” (Main Address Bureau – only for the “address information” purposes) or “Centralne Archiwum MSW” (Central Archive of MSW; only in cases of research on the files of the WW2 and pre-war provenience); the dealings of the main operative archive and registry of the security police were kept secret, as well as all actual dealings of the secret police. The military security services had their own secret registries and archives, separated from the military archival service. As the governance of the state was in fact secret, the archives were of key significance, not only for historians, but also for politicians – as a primary source of information about internal affairs. The opening of the archives was not considered a matter of the so called “Round Table” settlements in 1989; political reform and other reforms were discussed with the assumption that the communist party would stay in power. The landslide victory of Solidarność in the June 1989 election and the first events of the political transition did not profoundly change the situation.

CONTENTS OF THE REGIME ARCHIVES

The archives of the former regime central bodies are very large and contain a vast number of different categories of documents concerning matters due to its competence or jurisdiction and internal organisation of those institutions.

The former communist party archives consisted of several archival fonds. Sectors and secretaries' offices of the party's central committee were in control of the state's central ruling bodies, the documentation of those units mirrored the most important governance matters. The minutes of the party's central committee's (and other party's central bodies) proceedings are one of the most important collections. The other main parts of the former party's central archives were the historical archives (containing records of the communist party from the mid-war period and files of proceedings of the party's historical research

unit), central registry (containing personal files of members affiliated to the party's central bodies), control committee records (containing files of disciplinary proceedings), and records of the party's school.

The contents of the former security services are similar in general; the collections consist of several separate archival fonds containing case-files of agents and informants, operative and investigative files, object files, personal files of members of the service, administrative documentation like minutes of proceedings, operative guidelines, instructions and orders, information reports and evaluations, financial and accountancy records. The important part of the every security service archive was the registry, containing several card indexes, registration and archival logs, finding aids and archival protocols.

ATTEMPTS TO DESTROY THE REGIME ARCHIVES

On the brink of the transformation, the archives of the regime's institutions were still in possession and use by them; this situation led to the imminent threat of the "cleansing" of the politically sensitive documents. When the downfall of the communist share in rule became visible, the heads of the PZPR, the SB and the WSW apparently ordered the destruction of crucial materials; the minutes of the sessions of the central committee of the PZPR from '80s were destroyed, as well as a great number of documents of the security police and military services. The key preparations for this action were already made in 1980 (during the first Solidarity period, when foreseen martial law measures could lead to unwanted developments).

The files of the secret police were destroyed in formal accordance with, or in open defiance of the internal rules of document weeding: in fact, SB officers were engaged in the destruction of nearly all current operative case-files as "of no operative value"; the SB archives were extracting and weeding closed case-files and relevant cards from registries. The preserved weeding protocols from that period seem to be irrelevant. Apparently (as secondary sources indicate) the destructions of "all documents concerning illegal structures" and clergy, as well as object-files were ordered verbally in the summer of 1989. A report from July 1989 exists, stating that "according to the minister's order" the archive started to "analyse" and "separate and specially secure" documents of special importance in four categories: informants' case-files closed after 1975 (especially of those used against the opposition), operative and investigative case-files concerning opposition members (especially those who entered parliament in 1989), case-files concerning bishops, cardinals, and priests engaged in opposition, and all documents concerning polls and elections since 1946. At the same time (summer 1989) the leadership of the communist party archive sector and the SB were consulting the transfer of some records from the MSW archive to the party archive.

It seems to be enough to suggest that "analysing, securing and separating" of files were in fact preparation for the mass weeding of documents that could compromise covert actions and crimes of the regime, or compromise its active agents and informants.

On 26th August 1989, the deputy minister of internal affairs accepted the proposal made by the directors of Department IV of the MSW (in charge of Church surveillance) and Biuro "C" MSW (archive and registry) to destroy all of the operative case-files of Department IV (and its subordinate units), including those in

the archive. On 1st September 1989, the former director of Department IV (the unit was formally dismissed) ordered former units of this department that all operative case-files concerning priests (the old ones in archive either) were to be destroyed. The preserved files, in this case paperwork, show how the weeding process supposedly started in other units of the security service.

Apparently, nearly all operative case-files concerning priests and parishes (existing since the 1963 in the system of the "permanent invigilation" of Roman-Catholic Church) were destroyed, with only a few accidental exemptions; this action was meticulously done – even the old case-files were withdrawn from the archive and weeded. Also, the records of the MSW's 4th Department (Department IV) from the last 10-year period of activity, and the operative case-files were almost completely destroyed. Other divisions of the SB were also weeding their resources, with apparent priority given to active informant's case files, but in a much more clumsy manner. During the process, some of the internal rules were observed: the operative units informed the registry unit of the weeding of the relevant file; some important case-files that were already archived were withdrawn from the archive and then declared "weeded as of no operative importance". These reports and weeding protocols were however, not in every instance accurate: some (although not numerous) case-files were reported as weeded, but reappeared later untouched; weeding protocols were also unreliable, or not written at all. Unexpectedly (and luckily for the sake of future research and legal proceedings) the main registry tools, i.e. registration and archiving logs remained untouched (perhaps they were not seen as important). The card indexes were damaged only a bit less than archives; the registry cards were probably seen as "statistics paperwork", secondary to the case-files. The weeding of case-file should be followed by the weeding of the relevant registry card – but in many cases those cards were only prepared for weeding. Now, the existing card indexes are, in some cases, the only evidence documenting (with other instruments: registration, archival logs, and operative fund accountancy) the proceedings run by the former communist secret service.

As the entire process was done in a rush, there were also rumours about "privatisation" of files, i.e. theft of documents committed by SB officers awaiting dismissal, or passing of files to informants. The landmark case the "privatisation" emerged in February 2016 when the widow of late Czesław Kiszczał (former communist minister of internal affairs) proposed selling the case-file of the informant "Bolek" to the Institute of National Remembrance (Instytut Pamięci Narodowej, IPN); the case-file contained compelling documentation pointing to Lech Wałęsa (historical leader of Solidarity) as an SB informant, active in 1970–1975.

Information of the mass weeding of SB documents soon leaked to the public, and became a theme of parliamentary intervention in the MSW. The reaction of the MSW was contradictory; on 31st January 1990, the communist minister of internal affairs, Czesław Kiszczał, ordered all weeding of all documents to be strictly prohibited; three weeks later, the deputy minister assured the general prosecution service office that no action of the mass weeding of documents was ever ordered or conducted by the MSW. Actually, the weeding of SB files continued, although not in previous extent (for example, a significant part of the main operative card-index was prepared for weeding, but was saved when found in "evacuation sacks" months later), and

was stopped only when the SB was finally dismissed by parliamentary act. The remnants of the SB archives and registries were taken over by new state security police, Urząd Ochrony Państwa (UOP), and were partially reconstructed. Nevertheless, the report of the analysis unit of the ministry of internal affairs published in July 1992 pointed out that the clandestine weeding of SB documents started in the Summer of 1989, and continued to the January 1991.

The size of the loss of the operative archives and registries of the SB cannot be ultimately established. It appears that a majority of case-files of active agents and informants, key operative case-files concerning leading personalities of the opposition, almost all case files concerning priests, parishes, and higher clergy, and a significant number of foreign intelligence case-files were destroyed. The destruction of the files was mirrored by the extracting and weeding of relevant cards from the operative card indexes. "Separated card-index" (assembled in 1989–1990) contained approximately 525 thousands cards; about 55 thousands were weeded by 1990. The remnants of "separated card-index" were also prepared for – but unfinished – weeding. The main operative-archival electronic database (Integrated System of Operative Card-Indexes, Zintegrowany System Kartotek Operacyjnych, ZSKO) was also the subject of data cleansing; the preserved database was reconstructed from the back-ups made in 1988 and 1990. Another example of the weeding of significant documents concerned the SOUD registry; the Polish branch of the SOUD organisation was a part of the SB archive, and from the beginning of the activities of the system, accumulated a significant volume of documents. At the turn of 1989 and 1990, the collection was destroyed; a KGB connection officer took the main normative Russian acts and relevant agreements away in the spring of 1990.

The military security service (WSW) was far more effective than the SB in getting rid of its archives, probably thanks to the deeper secrecy of its dealings. In November 1989, Gen. Edmund Buła ordered the weeding of almost all of the documents of the WSW and the former military security service, the Stalinist Informacja Wojskowa (Head Directorate of Military Information, Główny Zarząd Informacji, GZI). As an extraordinary parliamentary subcommittee for the examining of the dealings of former WSW stated, the destruction of the military security service archive continued until the end of July 1990, when the Chief of Army HQ ordered control of the archives (there were also instances of document weeding after the order). The destruction was described as "total". As the military control body stated in 1991, the weeding of informants' and operative case-files had already started in 1982, but the most profound damages were made in the first months of 1990. Approximately 77 % of all of the resources of the WSW archive were destroyed, and its section containing the files of the GZI suffered an 84 % losses. The action was considered "dealings attempting to destroy compromising evidence". The losses of the WSW archives in the local branches were even higher.

REGIME ARCHIVES IN TRANSITION

The records transfer process of the regime institutions and organizations from the original handlers to institutions of public trust was painful, long, and full of difficulties.

The content of both the party's and the secret service's archive was seen as extremely politically sensitive; as they contained the documents compromising regime policy and dealings

about a great number of citizens involved in the maintaining of totalitarian rule.

The self-dismissal of the communist party (PZPR) on 29th January 1990 enabled the seizure of party's assets – i.e. The archives. On 23th January 1990, the government (although reluctantly) ordered the forming of a committee responsible for the examining of party property and restitution of the state's assets (the decision was approved by parliament on 26th January 1990). One of the committee decisions was that the party's archives should become a part of the state archival network. The relevant parliamentary act on 9th November 1990 declared that all former communist party's assets (as it were on 24th August 1989) were to become state property. These acts were crucial for the seizure and transfer of the records of the communist party from its archives to the national archival service.

In 2000, the commissioner responsible for the restitution of state assets was admitted to see some of the party's records in AAN, he stated later that the documents were in disorder, and pointed out that the extent of missing records, indicated that a deliberated destruction of files had occurred. The Commissioner focused on records concerning the party's financial affairs (and therefore – as they concerned the assets that could be seized – a subject of destruction). The abovementioned statement is contradictory to the general description of the PZPR's archive as seized "by order".

Although the central archive of the PZPR had already been transferred to the AAN in 1990, the records were not accessible for a very long period. Access to the PZPR's archive (as "fonds in the process of ordering") was granted only to a handful of researchers despite the huge interest by historians and the public. However, those obstacles were seen as an impediment, the resources were not declared secret. Access to the PZPR resources was gradually widened.

Initially, the archive of the MSW was a subject of very peculiar scrutiny; in the beginning of 1990 the minister of public education formed a committee tasked with getting insight into the SB archive (but without clear aims or powers); the committee consisted of several public personalities, i.e. Prof. Andrzej Ajnenkiel and Prof. Jerzy Holzer, renowned historians, Bogdan Kroll, then head of AAN and Adam Michnik, former opposition activist (then MP). The dealings of this committee remain unclear, there is no record of the files that were presented to the body, its final report was very brief and mainly stated that the contents of the MSW archive are "incomplete". It should be noted, that abovementioned committee was granted, apparently, direct and significantly wider access to the MSW archive than the parliamentary special committee for the examination of activity of the MSW (already formed on 1st August 1989); the latter committee complained of numerous impediments and the lack of cooperation by the ministry.

After its dissolution, the archives of the former communist security services became part of the new republic's civil (Urząd Ochrony Państwa, UOP) and military (Wojskowe Służby Informacyjne, WSI) services' operative archives – and for a long time were practically inaccessible to the public or press, with a few exemptions granted for researchers in the UOP archive. The range of access was also carefully limited; the case-files of agents and informants were not released at all, the researchers were not granted access to the finding aids and the registry. The resources were treated as secret, and relevant security classifications (dating from pre-1989 period) were deemed still valid.

The significance of information from the former security services archives for domestic policy and for the public was clearly recognized. In June 1992, the matter became a subject of political discussion, when a parliamentary resolution ordered the minister of internal affairs to disclose file information concerning MPs and leading government personalities recorded by the communist security services. The subsequent developments had a catastrophic effect for the, then, government; on the night after the information concerning the MPs was found in the registry and the archive of the MSW were circulated, a parliamentary coalition of fear emerged and voted to form a new cabinet. Two weeks later, the constitutional court declared the "lustration act" unconstitutional and void. The list (called "Lista Macierewicza" after the name of Antoni Macierewicz, then minister of internal affairs in charge of the implementation of parliamentary resolution), although originally secret, was published by some newspapers a few weeks later, revealing that a number of leading political personalities were mentioned in case-files and card-indexes as registered informants; the information held in the archives appeared to be a key factor of any settlements concerning secret liaisons with former communist security services. It appeared later that similar list (called "Lista Milczanowskiego" after the name of Andrzej Milczanowski, then deputy head of UOP) was secretly prepared by the UOP before the 1991 parliamentary election.

The matter of any dealings of the former communist security services became one of the most important issues in Polish politics; the contents of the regime archives also became the focus of public interest. The archive was still deemed secret for several, more or less, legitimate reasons. The secrecy classifications from the communist period were not made summarily void; communist regulations and laws concerning public secrets were upheld as valid. The secret security archive was declared as containing documents still important for national security (especially concerning matters of foreign intelligence) and of extreme personal sensitivity. In the public discussions ignited by the events of 1992 the following matters were considered: state security interests connected to the contents of the security services archives, the protection of dignity and personal data of people affected, and possible threats to the political stability of the country. The subject of the debate quickly became controversial; some emotional arguments were raised, principally describing eventual settlements as a "witch-hunt". The fact that the sole handler of the former security service archive was the UOP; although formally a new service, it was manned and commanded by old SB-men. Also, the fears of politically motivated misuse of documents from the SB archive emerged, as well as for the integrity of the resources.

As the former secret services archives were practically closed, anxieties about its presumed misuse emerged, as well as the general assumption that the government still was using the assets of the former communist security service, i.e. both its functionaries and informants, possibly also its operative networks, and vast collections of documents containing sensitive information. This led to the general assumption, held by numerous post-Solidarity circles, that this particular sector of government, i.e. secret services, got through the democratic transition with only little ruffle of feathers, and can still seriously influence policy and economic life with its clandestine connections – without the control of lawmakers or the public. The existence of clandestine informant networks was seen during the communist rule as a threat to the basic social bond: mutual trust. Keeping records of the former security

service secret, after the democratic change was seen a limited continuity of social technology, contrary to public interest and the democratic rule of law. The fact that someone was a functionary of the communist secret service or its informant was (and still is) seen as a profoundly compromising to persons and their dealings, and makes the person affected vulnerable to blackmail or recruitment. Nevertheless, as long as the former security archives were kept closed, the public was denied the knowledge of such people. The records "privatised" by former SB-men were another matter; former SB circles leaked or even forged documents and information in an attempt to compromise some political personalities, as it happened in cases such as Zbigniew Najder and Jarosław Kaczyński. The missing records could have been smuggled to Russia or sold to foreign powers security agencies.

The popular demand for legal action concerning the crimes of the former regime led to few investigations and trials. There were also opposing attitudes towards the opening of the archives and the releasing of secret information to the public: it could cause public unrest and violent settlements, create a "atmosphere of a witch-hunt", incite victims to revenge (nobody mentioned the eventual revenge by former communist security service men), and also undermining Polish foreign intelligence. The possible resettlements were seen by many as contrary to the "spirit of 1989 reconciliation". It should be noted now, that the lack of access to the regime archives by the public and researchers caused the emergence of populist attitudes and shallow opinions.

The formal examination of records of former regime was only held in few proceedings. In the beginning of '90, the Ministry of Justice – thanks to special entitlements granted by a parliamentary act on 23rd February 1991, launched the judicial review of numerous sentences concerning people "engaged in activities for an independent Polish state". Nevertheless, the proceedings were only based on the contents of the courts' records, secondary to the operative case-files; the latter were not examined and were still kept secret. A parliamentary inquiry concerning the fates of approximately 100 people killed by authorities during the martial law period (1981–1983) was focused on particular cases, and did not lead to the assumption of general rules or acts concerning the settlement of communist crimes. The few trials – concerning massacre in Wujek coal mine (16th December 1981), massacre in Lubin (31st August 1982), murder of Grzegorz Przemyk (12th May 1983), tortures in the detention prison of Ministry of Public Security (MBP) in the '40s and '50s, supervision over the conspiracy to kidnap and murder of Rev. Jerzy Popiełuszko (19th October 1984), introduction of Martial Law in 1981 – were prolonged and only a handful of perpetrators were sentenced. The examination of documents needed during abovementioned proceedings was extensive, and revealed a number of aggravating circumstances, but the outcomes were particular – connected to the specific proceeding. Numerous legal obstacles caused by the natural resistance of the culprits also affected the proceedings.

The rather unsatisfactory outcome of the legal proceedings concerning communist crimes was a significant factor influencing the popular demand for the open access to the regime archives – as a resource of legal evidence and fund of information needed for a healthy social and political life.

The governing of sensitive data by a secretive institution seen as a post-communist organization raised concerns about its information handling; it led to calls for the transfer of the abovementioned resources to an independent institution. The settlements held in the former GDR influenced public opinion and

some political circles demanded the forming of “Polish Gauck-Behoerde”. Another matter was the screening of public personalities for ties with the former communist security service; post-Solidarity movements declared the need for such an arrangement.

Matters dealing with the regime archives were only disputed after the abovementioned disastrous 1992, first attempt to screen MPs was abandoned; the next government and a parliamentary majority were not prone to disclose any information from the archive. The return of the post-communist coalition to power in 1993 halted any possible movement on the issue; social democrats and their agrarian allies, both from former regime provenience, were not interested in disclosing the records of the former communist secret service. The matter was unresolved until the 1996 landslide victory of the post-Solidarity coalition. The subsequent voting of the parliamentary act on 11th April 1997 concerning vetting of public personalities (“lustration”), parliamentary declaration condemning communist totalitarianism of 18th June 1998, and the parliamentary act on 18th December 1998, forming the Institute of National Remembrance cleared the way to the open access to the archives of the communist security services and the legal use of records from those archives. Abovementioned acts formed two new institutions commissioned to deal with the archives of the former communist secret services: Biuro Rzecznika Interesu Publicznego (BRIP, Bureau of the Public Interest Advocate) – in charge of vetting public personalities, and Instytut Pamięci Narodowej (IPN, Institute of the National Remembrance) – in charge of archives, research, and prosecution of communist crimes.

BRIP started its activity in 1998, and in the first years of work it relied on the cooperation of the archival unit of Poland’s security services, the UOP (in 2002, divided to two separate agencies: Agencja Bezpieczeństwa Wewnętrznego, ABW – Agency for Inner Security, and Agencja Wywiadu, AW – Intelligence Agency) and the WSI. Forming of the IPN and the following transfer of archives meant, that “lustration” proceedings run by the BRIP were assisted partially by the archives of the secret services and increasingly of the IPN’s archive. BRIP was abolished in 2007, and its tasks were transmitted to the IPN – since then the use of records for the vetting proceedings were joined into one institution.

Although the Institute of National Remembrance was formally formed of the former Head Commissioner for the Prosecution of Crimes against the Polish Nation (GKŚZpNP, Główna Komisja Ścigania Zbrodni przeciwko Narodowi Polskiemu), in fact the IPN was starting from scratch. An act in 1998 was vetoed by, then, Poland’s president, A. Kwaśniewski, a prominent former member of the communist party. Nevertheless, the presidential veto was overturned by parliament, and finally the IPN started its activity in 2000. The main task of the newly established Institute was to secure the transfer of the records of the former communist security services from the archives of the Ministry of Interior, secret services, courts, police, military archives and many other institutions. In the first year of activity, i.e. until 30th June 2001, the IPN took charge of approximately 13 kilometers of files, of the, then, estimated number of 95 km to be seized. In 2003, the archive of the IPN contained about 77 km of files. In 2016, the archival resources of the IPN reached 91 current km of files and 10 meters of card-indexes.

Additional agreements and protocols were needed for the transfer of the records and registries from the archives of the secret services (still rendered secret), and getting security clearance for the employees of the IPN. The transfer, elaboration,

and even housing of the files were a serious challenge; the IPN initially did not have buildings to house the archives.

The reason for the forming of the IPN was to enable access to the files for citizens affected, and to the press, boost research on the communist reign, and enhance the investigations concerning communist crimes. All of these fields of activity relied on efficient archival management. In brief, the task of the IPN was the disclosing of the, then, secret documents to the people lawfully entitled. In subsequent years, the legal use of the regime archives significantly widened, covering the analysis of decoration motions, pensions equality proceedings, compensations applications, research concerning the recovery of regime victim bodies. The IPN education and research branches crucially benefited from the archival research too.

However, the act forming the IPN provided provisions for people affected by the communist regime, and also for researchers and the press; there were also security clauses included: security services were entitled to establish a so called “restricted resource”. “Restricted resource” contained files seen by the security services as still important for national security (supposedly containing information important for their post-1990 operations or revealing identity of their officers and informants). The existence of such a resource was stipulated in the act forming the IPN, and as such was known to the public, inciting numerous rumours towards its alleged contents. One of the most important features of the “restricted resource” was the fact that the operative card-indexes and registry tools (like registry and archival logs, operative databases) of former communist security service were restricted.

The files handed to the IPN (all of them, not only those “restricted”) were listed in protocols that were also given secrecy clauses.

These circumstances led to numerous obstacles in the access to files; there were no other open archival aids. Every inquiry needed procedures for checks in card indexes and additional declassifying proceedings. The elaboration of archival fonds (ordinary element of archival work) in such circumstances was not enough; a need to compose a number of un-classified finding aids (listing not only archival funds or collections, but in every single file) emerged as indispensable and urgent. The restrictions imposed on the part of the archival resource led to some legal cul-de-sacs, for instance barring the decryption and declassification of huge volumes of tapes containing SB encrypted operative databases.

The lawmaker’s decision to fit the access proceedings into the rules of administrative code (that formally guaranteed the judicial review for rejected applications) contributed to the relative complication of the access proceedings (in comparison with access proceedings in state archives).

The declassification and sanitizing of records was a complex issue; the pre-1990 classification clauses were still deemed as valid. The inaccuracy of the official secrets act was a serious impediment to further activities at the IPN; initially the secrecy clauses were interpreted according to formal entitlements of a non-existing communist security service; only secrecy classifications issued before 1983 (when the communist parliament pronounced an act of the office of ministry of internal affairs, formally recognizing the existence of the security service) were abolished. The relevant secrecy laws were gradually changed, allowing declassifying secret documents issued before the dismissal of the SB (31st July 1990) and the military secret services (31st December 1990). An initial clash with the state’s personal

data protection office was dismissed by exempting the IPN from the country's personal data protection rules; lawmakers considered the disclosure of information concerning the communist rule of greater public interest, than an individuals' personal data protection. Finally, subsequent changes in the official secrets act declared all records open, which were to be transferred to the IPN archive – except the “restricted resource”. The existence of the “restricted resource” was terminated in the last enactment of the act forming the IPN (2016): the security services were obliged to conduct an ultimate overview of the resource, release unnecessarily classified files, and submit well-founded requests for the preserving of secrecy classifications of remaining records – till 15th June 2017.

The initial rules of access to the files and data in the IPN's archive followed a very strict German pattern; clauses of the BStU Act were mirrored in the first enactment of the IPN-Act. Subsequent changes in the act relaxed those rules step-by-step; today there is no compulsory sanitizing (“anonymization”) of data in disclosed documents; other terms of access were also loosened. The only important restriction was introduced in favour of people affected by persecutions; they have the right to file a demand for restrictions to access data concerning their personal life.

The development of the terms of access was primarily shaped by the country's policy. The demands for broader access to files, widening of the vetting proceedings (that influenced also archival proceedings), general support for IPN's activities (and relevant expectations) were parts of the political program of post-Solidarity parties, and were mirrored in several major adjustments and changes in acts concerning the IPN and vetting (“lustration”) proceedings. There were also other circumstances that heavily influenced the activities of the IPN and the raised public awareness concerning matters of the regime archives.

Possibly the most important of these incidents was the serious leak of data concerning informants and officers of the SB and the KBW. In the beginning of 2005, one of the databases compiled in the IPN (and accessible to researchers in the IPN's archive reading room) was leaked and broadly disseminated on the Internet. The list was soon named “Lista Wildsteina”, i.e. “Wildstein's List” after the name of journalist, Bronisław Wildstein, who initially admitted that he was the person responsible for leaking the database. The data-sheet was compilation of about 162 thousand entries consisting of names and signatures, without additional information – but an accompanying (apparently true) rumor stated, that the database contains signatures of case-files of SB's informants, personal files of the SB and military security services' officers. The database covered only Warsaw's IPN's resources, and did not contained data concerning operative case-files, records of foreign intelligence and military security services. The “List” attracted great publicity and raised a lot of questions about the contents of the IPN's archive and, above all, about the vast amount of information previously unknown to the general public. The immediate effect of the leak was an adjustment to the IPN Act, forging a “fast lane” for people who wanted to check whether the case-files listed in leaked database with names identical as their own refer in fact to them.

The dismissal of military intelligence and counterintelligence agency (Wojskowe Służby Informacyjne, WSI) in 2006 – following the apparent dysfunction of service and serious criminal allegations against it's officers – unveiled the deceitful conduct of the WSI towards the IPN. The WSI was in charge of numerous records of former communist military intelligence

and counterintelligence agents, directly listed in the IPN Act as belonging to IPN's archive – and therefore under mandatory transfer. Those records were not transferred to the IPN and not even reported. The WSI purposely hid those files in their documentation repositories as “non-archival paperwork” prepared for weeding, in order to pretend that those records were not files required by the IPN, and to avoid putting them into their own archival unit (where such files could be identified and requested by the IPN). The WSI also restricted a great number of former communist military security service's files that already been seized by the IPN, practically rendering them inaccessible for people affected, the press and researchers.

CURRENT STATUS

The main archives holding the collections (collection holding institutions, CHI) of the former communist regime in Poland are:

- Archiwum Akt Nowych (AAN, Central Archive of Modern Records) – the main state archive holding the records of the central institutions existing after 1918, i.e. holding the archives of the communist party, central government bodies, censorship office, and other institutions of country-range importance.
- Instytut Pamięci Narodowej (IPN, Institute of National Remembrance) – holding archives of the former security services (security service, military security services, military foreign intelligence), counterinsurgency troops, border troop reconnaissance unit files, and selected files of the judiciary and penitentiary bodies.
- Wojskowe Biuro Historyczne (WBH, Military Historical Bureau) – the body supervising the military archives holding resources of Army HQ, Committee for the Defence of the Country, military political directorates, military political academies.

The records of local party committees, local government branches, especially district censorship offices are held in local state archives. Records are accessible according to state archives regulation, in a simple and unaffected way (information about rules for access to the AAN is available at address: <http://aan.gov.pl/p,62,zasady-udostepniania>). Information on records kept in the state archival net is available on the Head's Office of State Archives database internet search engine “SEZAM”: <http://baza.archiwa.gov.pl/sezam/sezam.php>. Another search engine of the state archival net (with access to the digital repository) is also available on internet: <http://www.szukajwarchiwach.pl/>. Detailed finding aids kept in the AAN and other state archives are available in reading rooms.

The records of the former communist security services are available at the IPN's central archive in Warsaw and in 17 local branches. Access to the files is granted to people affected (and their relatives), journalists, researchers, and – with some restrictions – for functionaries of the former regime. The files of public personalities are accessible – by a separate proceeding – for every citizen. Access to files are provided after filing a formal application. Information on the access proceedings and application forms are available on internet: <http://ipn.gov.pl/pl/archiw/udostepnianie/rodzaje-realizowanych-w>. Information about the IPN's resources is published in the internet archival inventory: <http://inwentarz.ipn.gov.pl/>; although the internet inventory contains only a part of archival database (constantly updated), the full version of the database is available for researchers in IPN's reading rooms. A brief information about the resources

of the central branch of the IPN' archive is available on internet: <http://ipn.gov.pl/pl/archiw/zasob/31562,Informacja-o-zasobie-archiwalnym-Archiwum-IPN-w-Warszawie-Centrala.html>. Another tool that provides the information to the public about the contents of the IPN's archive, are the Internet catalogues of the IPN's vetting unit (Biuro Lustracyjne, BL, Lustration Bureau). Accessible on-line database (<http://katalog.bip.ipn.gov.pl/>) consist of four lists ("catalogues"): the catalogue of leading functionaries of state and party during communist rule, the catalogue of security services officers, the catalogue of the vetted public personalities, the catalogue of people affected by dealings of the communist secret services. All of the catalogues contain information about files and registry entries concerning the people listed.

The WBH is a body supervising military archival network, i.e. the most important archives are: Centralne Archiwum Wojskowe (CAW, Central Military Archive) in Warszawa-Rembertów, Military Archives in Nowy Dwór Mazowiecki (Archiwum Wojskowe, former Archiwum Ministerstwa Obrony Narodowej, AMON, Archive of Ministry of National Defence), Toruń, Oleśnica and Archive of the Navy in Gdynia. Both the CAW and the AW in Nowy Dwór have published their inventories, and finding aids are available in the reading rooms. Information concerning access, rules for the CAW are available on-line, as well as brief information about the CAW resources. A brief directory of finding aids for the AW in Nowy Dwór Mazowiecki is also available on-line.

The records of the Ministry of Foreign Affairs from communist period are available in the archive of the ministry (Archiwum MSZ). Inventories are not accessible on-line, A brief descriptions of resources is published on the Ministry's website.

The private papers of some of the prominent communist personalities are kept in the Archiwum Dokumentacji Historycznej PRL (since 2011 governed by Akademia Humanistyczna in Pułtusk); a brief description of the contents of the archive is available online.

One of the most important collections of documents concerning communist rule in Poland is kept by the non-profit organization Ośrodek Karta (est. 1984 as underground documentation center). Karta runs the Opozycji (Opposition Archive) and Archiwum Historii Mówionej (Oral History Archive) collections, containing a huge volume on Solidarność records, MSW documents, opposition activists' papers and recordings of history witnesses' testimonies. The description of the collections and detailed finding aids are available online.

Nearly two decades of open archives policy resulted in the boosting of research and a broad use of data from the archives in public life. Since 2001, the IPN has published more than 1700 books, and publishes the editions of three scientific and two popular-scientific journals. The information from archives is still widely used in the vetting ("lustration") proceedings. Archival research has been irreplaceable for the recent efforts in identifying mass graves and the bodies of the victims of the communist regime.

LESSONS LEARNT

The conclusions from the Polish experience concerning dealings with the communist regime archives may be divided into two categories: conclusions concerning the legal system, and conclusions concerning practical solutions.

One of the flaws of the Polish legal system concerning the democratic transition period was the respect for the formal rules of communist law. The communist legal system was illegitimate, in its core; its norms were promulgated in the form of laws by unelected (or "elected" in falsified or mock elections) bodies. In fact, the communist regime, although very committed to the formal shape of its dealings, was in fundamental denial of the concept of the rule of law, and its legal system and laws were only a facade for the party's dictatorship. Communist "laws" and "acts" should be applied in the transition period with regard to their existing and presumable consequences, and their pre-1990 results should be judged after their impact on national, social, and individual interest, and respectively declared void, temporarily valid or valid. The post-1990 Polish praxis did not contain such procedures or evaluations; the validity of laws and acts of the communist period were sustained or judged in accordance with the then binding constitution (also communist, and promulgated by an illegitimate body). The possible adjustments to the legal system were consequently and intensively voted, but the consequences of communist rule were to be challenged as legally binding. This circumstance refers not only to matters of the former regime archives, but also to a vast number of social issues, i.e. restitution of property seized by communist authorities. The main problem that emerged due to respecting the legality of communist activities, and the regard for the archives of the communist regime institutions, was the matter of the validity of the secrecy classifications. It took more than a dozen years of transition to lawfully declare the secrecy classifications from communist period void – and only in relevance to the records seized by the IPN. The positive lesson was that even in such an unfriendly legal environment, institutions and laws needed to deal with the communist past were established, and former regime regulations were successfully overran. The lawmakers in the series of acts and enactments clearly decided that the settlement of communist rule must prevail regarding the particular interests connected to the respect of the secrecy classifications or personal data protection. The core reason for such achievement was the political will to remove the impediments to free speech, to challenge the legacy of former regime, and to change the state's system from post-communist to democracy.

The practical experiences of the Polish dealings with the archives of the former regime were followed legal and political circumstances. The precautionary policy of the first non-communist coalition (1989–1991) and of prime minister Tadeusz Mazowiecki (summarily called "policy of a thick line", dividing the communist past from the democratic present and future, but was also widely understood as an informal amnesty for the former, led to the keeping of the communist generals Czesław Kiszczak and Florian Siwicki, as ministers of internal affairs and national defence. They had apparently ordered or protected the mass destruction of documents of the security services. The parliamentary intervention, subsequent deposition of abovementioned ministers, and the dismissal of the communist secret services in 1990 stopped the destruction of archives. In the beginning of 1990, the government was also very reluctant, or self-restricted, towards the process of the disintegration of the communist party; the lawful measures allowing the takeover of party's assets (archives included) were issued, but only the self-dismissal of the party enabled the seizure of its archives and other property. However the archives were seized quickly and successfully, the forfeiture of party's other property became long, difficult and inefficient process.

A rather unsatisfactory experience concerning the regime archives was the result of the process of the forming of the new security services. Two agencies were in charge of the archives of the dismissed communist secret services, and assumed its contents were of secret operative assets. This led to the long-term restriction of access to the archives. The security services, as collection holding institutions, practically, unilaterally decided on the sequence, contents, legal status, and description of records transferred to the IPN. Another result was the creation of the “restricted resource” in the IPN’s archive – that wouldn’t probably have existed, if former security services archives were not treated as operative assets of the new security services. The cases of continued use of some registry tools, or records and card-indexes resulted in the restriction of its contents, that required sanitization before declassification. The case of the WSI dismissal in 2006 shows that the military security agency hid some records from the IPN and restricted access to many of the records already transferred. In the years 2010–2017, a great number of files initially placed in the “restricted resource” were reviewed, and finally released and declassified. The activities connected to the abolishment of the “restricted resource” revealed a vast amount of records that apparently were restricted without any important reason, and subsequently withheld from access for a number of years.

The secret services passed the records to the IPN’s archive in a number of separate series. The IPN’s archive was then shaped after the sequence of transfers (the transfer protocols were treated as internal finding aids, and its numbers became archival signatures); the original structure of the former communist security services archives was not reconstructed.

The mass destruction of the former communist security services archives (including the erasing of entries in the electronic databases) resulted in a lack or deficiency of evidence concerning numerous crimes by the regime and damages suffered by people affected. The subsequent investigations, access and vetting proceedings were thwarted, or needed additional effort to reveal the activities of the communist secret services. The sustaining secrecy of archives meant that people affected by communist crimes were denied access to vital information.

Another experience is connected to the governing of the archives. The seizure of the archives by an independent institution is not identical with instant access. The legal terms of access are vital for the general public; limitations of access to the files caused by prolonging proceedings, restrictions caused by sanitization (“anonymisation”) or secrecy clauses are significant impediments for people affected and public opinion.

The recognition of contents, and the structure and history of resources is key to efficient access proceedings. The “elaboration of archival fonds”, i.e. arranging of files in the fonds, conservation work, preparation of finding aids and indexes, research of fonds structure and history, digitization needs time, skilled personal, equipment, and money. The secret services run their archives with a strict connection to the card-indexes or electronic databases – which should be used as an independent sources of information and indexes for the archival fonds until the moment of the preparing of the proper finding aids. The IPN’s experience with providing access to the files for numerous applicants in the course of elaboration of the acquisitioned records are generally positive, i.e. the IPN archive managed to provide access to the claimants, researchers and the press; nevertheless, the priority for providing access and acquisition of archival fonds required a substantial effort by the employees (especially those working

with the card-registries), and intensive declassification proceedings slowed down the elaboration of archival fonds.

One of the most important issues of the archival work, especially when a part of the resource or its original finding aids are restricted, or partially unavailable is digitization of the archival resource. The term includes the arranging of electronic finding aids and indexes, and the scanning of the original finding aids, indexes, card indexes, registry instruments, single documents, and whole files and collections. The IPN and the state archival network constructed these databases, although not inter-operative, and in the case of the IPN, only partially available for the general public (although much more detailed). The IPN’s efforts to integrate the digitized original card indexes with the electronic finding aid system provided a powerful archival tool, significantly boosting the efficiency of work.

The general risk related to the use of the former security services archives is the disclosure of information of a sensitive nature. The IPN was exempted from general rules concerning personal data protection; however, these matters are considered significantly important. The employees of the IPN are obliged to keep secret everything they are acquainted with, except for matters of scientific research. The responsibility for the disclosure of sensitive information lies with the people (victims, researchers, journalists) who were granted access to the files; it is assumed, that the Institute bears no responsibility for the contents of records made by the former security services.

In a difference to the BStU, the IPN has only limited experience with the reconstruction of destroyed or damaged records. There is no virtual reconstruction program similar to the German one (it must be noted, that such program is very expensive). The IPN’s branch in Katowice leads the advanced effort of manual reconstruction to a significant number of restored files.

RECOMMENDATIONS

The general recommendations and expectations towards dealing with the archives of former repressive regimes were covered in the so-called Quintana Report of 1995 (redacted in 2009), which also covered the Polish experience (see: Further reading).

Some legal solutions should be recommended:

- Dealing with the regime archives in a democratic transition needs a stable legal environment, providing in the first place the right to free, unrestricted access to the archives for victims of the regimes, parliamentary and judicial bodies, and researchers and the press.
- The seizure of the archives of the former security services, government bodies, military units, courts and penitentiary institutions, coercive and repressive institutions, and other organisations, especially parties, companies, paramilitary groups, must be legally secured.
- The security classifications concerning the documentation of the former regime must be declared void. Access to archives cannot be restricted due to the security classification without independent review and without important reasons.
- The rules concerning personal data protection regarding the contents of regime archives should be relaxed to maximum reasonable extent. The limited right to protect sensitive personal information should be granted to victims of the regime only, provided that it would not harm eventual investigations and judicial proceedings.

- The regime archives should be held in a separate institution, independent from executive powers (especially law enforcement and security agencies), possibly under direct parliamentary control.
- The legal system should provide penal measures against people who destroy, hide or withhold, damage, records, registries, and assets of the former regime secret services and other organisations.

Practical recommendations and observations:

- at the early stage of the transition, the documentation of the regime institutions, i.e. current office paperwork, registry tools (as diaries, logs), archives, registries, card-indexes, microfilm and microfiche collections, and data systems should be carefully secured, at the original premises when possible. Any attempts to steal, burn, flood, scatter or damage the records, registries, data carriers should be prevented. When possible, photographic coverage of *in situ* situation should be provided.
- How to find the secret archives? The archives and card indexes are usually kept in cellars and attics, in rooms without windows (or with windows secured with dense grill and blinds), and with fire-resistant doors. Additional fire and flooding protection devices, as well as air conditioning (files should be kept in stable temperature and in low humidity) are often seen there. Vital IT installations are often housed in rooms without windows, with additional power supply and special fire protection systems. Pay close attention to metal lockers, locked single rooms, and caches.
- Former regime functionaries should not gain access to the premises where records are secured. The theft or destruction of any part of the registry or data system might be fatal to the whole collection. Conceal vital evidence against harm for later investigations and judicial proceedings.
- The remains of shredded, torn, damaged or scattered documents, data carriers, computers must not be disposed of, but should be preserved and described with regard to the exact place of recovery: building, room number, locker, possible unit of origin; Shredded, torn, partially damaged or mixed documentation (data carriers) can be reconstructed or arranged later (with use of technical measures unavailable on spot).
- Wet, fragile or fungus infected records should be kept separately (wet frozen) and as soon as possible undergo conservation, disinfection.
- The electronic data carriers should be technically secured. The carriers' contents (data, metadata and software) should be backed up to a second or multiple safety data carriers. Written manuals, handbooks, notes, instructions for handling data systems and printouts should be secured as well as the computers, data carriers, and other devices.
- Microfilm/microfiche should be secured, as well as the readers, and other reading devices, registry and archival machines

(i.e. rotomats, index-lockers, perforation readers), communication, and encryption devices. Those devices may be unique, or very difficult to replace.

- Secure the seized records, indexes, books, logs in their original state and form. It will later help to attribute the seized documentation to the proper part of archival fonds, unit of origin, and connection to other records and registry aids.
- Do not rearrange or mix the secured card-indexes and document collections – even if such rearrangement (for example, in alphabetical order) would provide some practical gain. Do not dispose of file covers or envelopes, binders, tags, labels.
- Even seemingly the most inferior documentation (untitled logs, officers' personal diaries, minor card-indexes with anonymous data, accountancy records, attendance lists, deployments documentation) might be of vital relevance, especially when other parts of the archive or registry were damaged or destroyed. The complexity of the secret services and government bodies means that important information was noticed in numerous places. The registry systems were often compilations of numerous data sub-systems, card-indexes, and logs that provided full information only when complete. Securing of office paperwork is vital for later investigations concerning the dealings of regime functionaries, and the fate of victims (and even their place of burial).
- The records of the former security services cannot be handled solely by the new security services; it may lead to a merging of old and new registries and case-files and the subsequent continuous secrecy of the archive. Resources important to the new secret services can be separated, when needed, but it should stay under independent control and be catalogued (even if the secrecy of resource would be required).
- Access to the regime archives should be provided as soon as possible. Limitations or restrictions to access will inevitably raise suspicions about the contents of the resources or its presumed mishandling.
- The arranging of seized resources and archival research should be started as soon as possible. The restoration of the original scheme of the archive and registry should ease access proceedings and enable the assessment of eventual losses and damages. The research of contemporary instructions, manuals, internal norms (concerning operative proceedings, registry, secrecy measures, and organisation schemes) of the former security services is key to the reconstruction of the resource scheme, and for explaining the documentation's contents to people granted access to the files (especially investigators).
- Simultaneously to the arranging of the resource, an independent digital finding aid should be completed, enabling efficient inquiries and analysis of the resource structure. The digital finding aids should be accessible on-line.

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LUSTRATION

RADOSŁAW PETERMAN

Reckoning with the totalitarian past is one of the fundamental elements of the political transformation of every country going out of a totalitarian dictatorship. This issue was also faced by Poland, once the communist era ended. Janusz Kochanowski, Polish Ombudsman [*Rzecznik Praw Obywatelskich*] (2006–2010), noted that since the beginning of the Third Republic of Poland, i.e. from the early 1990s, in the public debate, what was weak “... were voices calling for decommunization, delegalization of the communist party, and the punishment of those guilty of communist crimes was an issue that was rarely raised. What was much louder was the slogan of the ‘thick line’¹ or the idea that ‘one should support the logic of reconciliation rather than the logic of justice’” (J. Kochanowski, *Rzeczpospolita samorządna*, published by LexisNexis, p.128). This type of attitude was represented not only by the political commentators but also by the so-called “Solidarity” decision-makers, especially within the Ministry of Internal Affairs. It was often said that an attempt to clarify the past could start a new wave of mutual accusations and allegations. For those people, trust and forgiveness was more important than seeking the truth. It is significant that such views as to the logic of reconciliation rather than the logic of justice refer only to communist crimes.

Reconciliation with the past in Poland has encountered various obstacles and resistance from some backgrounds. Lustration arouses particularly resistance. Lustration, which can be understood both as:

Firstly – a procedure intended to disclose the fact of working or cooperating with the security authorities of the communist state;

or, secondly, a system of legal remedies used by state authorities to prevent persons related to the communist regime from occupying important public posts.

In Poland, what was advocated was lustration as a procedure of disclosing the service, work or cooperation in the security authorities of the communist state of the People’s Republic of Poland.

In the summer of 1991, during the preparation for the first free elections to the Sejm, the Parliament began a discussion on lustration. As a result thereof, on 19 July 1991, the Senate of the Republic of Poland adopted a resolution calling on the Government of the Republic of Poland to “*make the Minister of Justice (the Attorney General) verify whether candidates running for the Sejm or the Senate are included on the lists of employees or associates of former public security authorities or special military services, and to make this fact public in relation to those candidates where this was the case.*”

The first legal act introducing the lustration was a resolution of the Sejm put forward by MP Janusz Korwin-Mikke on 28 May 1992, which instructed the Minister of the Internal Affairs to disclose the names of MPs, senators, ministers, regional governors, judges and prosecutors who used to be secret agents of the Security Bureau [*Urząd Bezpieczeństwa (UB)*] or the Security Service [*Służba Bezpieczeństwa (SB)*] between 1945–1990 (MP 1992.16.116). The resolution did not apply to military

collaborators of the special services.² On the very same day, a group of deputies filed a complaint with the Constitutional Tribunal [*Trybunał Konstytucyjny*] for the resolution. On 4 June 1992, Antoni Macierewicz, the existing Minister of the Internal Affairs, presented a list³ of persons registered in the archives of security intelligence as secret agents of UB and SB in the Sejm. Contrary to the Sejm resolution, the list did not include the names of regional governors, judges and prosecutors.⁴ The list included the names of the then President of the Republic of Poland, Lech Wałęsa and the then Speaker of the Sejm, Władysław Czarzanski and about 60 Members of Parliament from almost all parliamentary groups. On the very same day, on the initiative of the President of Poland Lech Wałęsa, the Sejm adopted a resolution to dismiss the government of Jan Olszewski.

The Constitutional Tribunal ruled that the activities of Minister Macierewicz, in connection with the resolution adopted by the Sejm, were not in compliance with the Polish legal system, i.e. the Constitution of the Polish People’s Republic, which had been in force since 1952. The Constitutional Tribunal had no doubts that the obligation to disclose persons who were secret agents concerned those who wanted to perform or perform public functions, however, it was not specified what is and what is not a public function. Nor was the term of “cooperation”, essential for the whole process of lustration, defined. The adoption of the resolution was suspended pursuant to the *Announcement of the President of the Constitutional Tribunal of 19 June 1992 on the suspension of the resolution of the Sejm of the Republic of Poland of 28 May 1992* (M.P. 1992.20.157) with effect from 19 June 1992, while it was repealed on 20 October 1992 by virtue of *Announcement of the President of the Constitutional Tribunal of 20 October 1992 on the effectiveness of resolution of the Sejm of the Republic of Poland of 28 May 1992* (M.P. 1992.34.245).

1 The expression “thick line” – a political slogan derived from the Prime Minister Tadeusz Mazowiecki’s speech delivered at the Contract Sejm on 24 August 1989. He said: “The government I will create shall not be liable for the mortgage it inherits. It does, however, affect the circumstances in which it shall act. We shall draw a thick line between the past and the present. We will only be liable for what we have done to bring Poland out of the present state of collapse.” At present, the term “thick line” is associated in the social consciousness with tolerance for former political leaders of the People’s Republic of Poland and the security services reporting to them.

2 At the time of the drafting of the resolution, the military special services were omitted as a result of the rapid work concerning the parliamentary resolution on lustration

3 The prepared list was not the first one. Already in July 1989, just after the June parliamentary elections, under the command of Undersecretary of State of the Ministry of Internal Affairs, General Henryk Dankowski a list of agents elected to the Parliament was created at the Ministry of Internal Affairs. This archive (numbered 560) was soon lost. One of the inspectors thereof was the head of the Ministry of Internal Affairs Andrzej Milczanowski, the other one was the subsequent Minister of the Internal Affairs Henryk Majewski. Both had publicly questioned the credibility of the documents of the former SB

4 The short time of the drafting of the Sejm resolution made the team responsible for preparing the information about regional governors, judges and prosecutors have no time to prepare it.

On 17 June 1992, the Senate began work on a new bill on the conditions of occupation of certain positions in the Republic of Poland, which was adopted by the Senate on 28 July 1992. The Senate's bill contained a catalogue of positions which required the lustration procedure to be conducted (Article 1)⁵ and defined obstacles preventing some positions from being occupied (Article 3).⁶ The procedure essentially relied on the appointment of a para-court body, a Board of Appeal by the President of the Supreme Court, who would review appeals to certificates issued by the Ministry of Internal Affairs in the manner regulated by the Polish Code of Administrative Procedure. In September 1992, five other lustration bills were sent to the Sejm, which were delegated to the Sejm committees, where they quietly waited until the end of the term, i.e. 31 May 1993, and ended their life. The issue of lustration case was abandoned for several years because the post-communist party – SLD – won the parliamentary election and was not interested in lustration and decommunization.

Between 1994–1996 five bills concerning lustration were submitted to the Sejm. These bills were considered in 1996 by the Extraordinary Committee to consider lustration bills. It was only on 11 April 1997 that the first Polish lustration law was passed. This Act was entitled “The Act on Disclosure of Work or Service in State Security Authorities or Cooperation with State Security Authorities between 1944–1990” (Journal of Laws 1997.70.443). This happened one year after Resolution 1096 of the Plenary Assembly of the Council of Europe on measures to dismantle the heritage of former communist totalitarian systems. The Polish lustration law of 1997 was based on the following assumptions:

- lustration was limited to persons performing public functions; the persons performing public functions within the meaning of the Act included, among others, the President of the Republic of Poland, MPs, Senators, Members of the European Parliament, persons appointed to the leading positions of the State, the Head of the Civil Service, General Directors in ministries, central offices or regional offices, judges, prosecutors and lawyers, rectors, deputy rectors in state and non-state universities, the directors of channels and directors of the regional centres and agencies of the Polish Television and the Polish Radio;
- the persons covered by the lustration were to submit so-called lustration declarations in which they were to declare possible service, work or cooperation with the security authorities of the People's Republic of Poland from 22 July 1944 to 10 May 1990;
- the lustration declaration was made at the time of granting consent to standing for election or to accepting a public function;
- the declarations were not to be made by persons born after 1 August 1972;
- the content of the declarations in which the person admits to working, cooperating or service was to be made public by being posted in the Monitor Polski [Official Gazette of the Government of the Republic of Poland];
- the declaration's disclosure of information on the service, work or cooperation with security authorities was not to result in any negative effects on the person subject to lustration;
- in order to verify the lustration declarations, the position of the Commissioner for Public Interest [Rzecznik Interesu Publicznego] was created, and Bogusław Nizieński, Supreme Court Judge Emeritus was the first person appointed to hold this position;

- the obligations of the Commissioner for Public Interest included conducting investigative proceedings and, if necessary, submitting motions to the Court for a lustration lie to be ruled;
- should a declaration be ruled to be a false one, this information was to be made public – it was to be announced in Monitor Polski. The result of such a lustration judgment was also the loss of moral qualifications relevant for public positions. The person submitting a false declaration was to be called a lustration liar.

Almost from the very beginning the judges tried to paralyze the lustration since the General Assembly of Appellate Courts in Poland did not select 21 judges who, according to the law, should hear lustration cases. As a consequence of this attitude of the judges, the Sejm had to amend the law and, as a result of this amendment, the Court of Appeal in Warsaw was established as the lustration court.

In the end, the Commissioner for Public Interest began his activities from 1 January 1999. At that time, about 26,000 lustration declarations were received at the Commissioner's Office. 200 declarations in which their signatories admitted to service, work or cooperation with security authorities were to be published as positive ones. The Commissioner for Public Interest submitted more than 150 lustration declarations to the court to initiate lustration proceedings. In the period 1999–2004 the lustration court ruled that 63 declarations included the so-called lustration lie, which resulted in the ban on holding public functions.

The passing of the 1997 Lustration Act also resulted in the creation of the Institute of National Remembrance – the Commission for the Prosecution of Crimes against the Polish Nation by virtue of the Act of 18 December 1998, which, by law, had taken over archival documents produced by the communist security intelligence – both civil as well as military ones – from the Polish security intelligence. This solution enabled the documentation of communist security intelligence to be gathered in one place in an institution not dependent on the government and subject exclusively to parliamentary control.

This lustration act remained effective until the end of 2006.

Following the parliamentary elections in 2005, the Sejm passed a new Act of 18 October 2006, entitled “*on the disclosure of information on the documents of the state security authorities from 1944–1990 and the content of these documents*” (Journal of Laws 2007.63.425 as amended). The preamble to the act reads as follows:

“We declare the work or service in the security authorities of the communist state or the aid given to these authorities [by the personal information source] consisting in combatting the democratic opposition, trade unions, associations, churches and religious associations, violation of the freedom of speech and assembly, violation of the right to life, liberty, property and security of citizens, to be permanently linked to the violation of human and civil rights for the benefit of the communist totalitarian system.

5 The catalogue of positions included, among others, the following functions: MP, senator, local councillor, executive positions in the leading, central and local administrative bodies, judges, prosecutors, notaries public, lawyers, legal counsellors, soldiers and officers of the rank of colonel and generals in the Armed Forces, the Police, the Fire Service and the Prison Service.

6 The obstacles preventing a position from being occupied included service in the security authorities of the communist state, cooperation with these authorities, taking up positions in the Polish Workers' Party [Polska Partia Robotnicza, PPR] or the Polish United Workers' Party [Polska Zjednoczona Partia Robotnicza, PZPR].

Bearing in mind the above, as well as the need to ensure that the functions, positions and professions that require public trust should be held by persons who given their past conduct give and have given the guarantee of honesty, nobility, sense of responsibility for their own words and deeds, civil courage and righteousness, and in view of the constitutional guarantees ensuring that citizens are entitled to information on persons performing such functions, occupying such posts and performing such professions (...)"

This act expanded the list of public functions holding of which involved the lustration obligation. The persons who perform public functions within the meaning of the Act include, among others, the President of the Republic of Poland; Members of Parliaments, senators, Members of the European Parliament, top state officials, Members of the Monetary Policy Council, members of the Management Board of the National Bank of Poland, members of the Council of the Institute of National Remembrance, President of the National Health Fund and the deputies thereof, President of the Social Insurance Institution and the deputies thereof, President of the Agricultural Social Insurance Fund and the deputies thereof, Chairman, Deputy Chairpersons and members of the Financial Supervision Authority, members of the foreign service, persons appointed or nominated to the positions by the President of the Republic of Poland, the Sejm, the Presidency of the Sejm, the Senate, the Presidency of the Senate, the Sejm and the Senate, the Speaker of the Sejm, the Speaker the Senate, or the President of the Council of Ministers, Presidents of Courts; judges and prosecutors; heads of the public prosecutor's office or military unit of the prosecutor's office, members of local government, rectors and deputy rectors of state or non-state higher education institutions, directors of channels and their deputies, editors or authors of news or political shows and directors of local branches and agencies of "Telewizja Polska – Spółka Akcyjna" [*Polish Television*], "Polskie Radio – Spółka Akcyjna" [*Polish Radio*], director general of the Supreme Audit Office and the staff of the Supreme Audit Office supervising or performing inspections, persons holding managerial positions: in offices of public authorities, including central and central authorities of state administration: director of a department or an equivalent unit, deputy director and head of a department or an equivalent unit, in governmental administration in the regions: the director and deputy director, the head of the service, inspectorate, the deputies thereof, the staff of the Institute of National Remembrance, treasures of a region, county or municipality, secretaries of a county or municipality, the general director of Poczta Polska [Polish Mail] and the deputy thereof and member of the Council of Poczta Polska, members of the management board, members of the supervisory boards of state banks, directors and deputy directors of state enterprises, academics and higher education staff, state and non-state school directors, lawyers, legal counsels, notaries public; court enforcement officers, professional soldiers occupying positions of colonels (commanders) and generals (admirals).

Pursuant to the original version, the new lustration act required persons who applied for the aforementioned functions or held them at the time of the act becoming effective to submit an officially certified statement on the existence of documents of security authorities in the Institute of National Remembrance archives. The certificate was to be issued solely on the basis of documents. In addition, criminal proceedings in the manner of criminal proceedings were not to be conducted as regulated by the 1997 lustration law. The certificate could be appealed against to the court. The court was to conduct proceedings

based on the provisions of the Polish administrative procedure and not the provisions of the criminal procedure as previously provided for. However, this version of the law did not enter into force because the then President of the Republic of Poland Lech Kaczyński disagreed with this model of lustration and as a result of his own legislative initiative the law was amended in 2006.

The lustration bill, put forward by the President of the Republic of Poland Lech Kaczyński, the lustration model was yet again based on the criminal procedure. For the purpose of its implementation the prosecutor's lustration section was established in the structures of Institute of National Remembrance. The criminal departments of the common courts of law retained the right to adjudicated the non-compliance with the truthfulness of the lustration declarations. On the other hand, the scope of the persons obliged to submit a lustration declaration remained the same as in the original version of the lustration act of 2006. The amended lustration law was still subject to the review of the Constitutional Tribunal, which did not raise objections to the essential form, i.e. the necessity of such a law being in force (Judgement of the Constitutional Tribunal of 11 May 2007, case file K 2/07). This law came into force at the beginning of 2007.

The current balance of the 2006 Lustration Act 2006 (as at 31 December 2016) is as follows:

More than 375,000 lustration declarations were submitted to the Lustration Bureau from 2007 to the end of 2016. Approximately 2,500 people admitted to work or cooperation. Approximately 60,000 declarations made by public officials or applicants as to their cooperation (or work) with the security authorities of the communist state or lack thereof were verified. Of these verified declarations, prosecutors questioned the veracity of almost 850 lustration declarations which were submitted to courts with a request that the courts rule that the persons referred to in these requests have filed untruthful lustration declarations by concealing their cooperation or service in the security authorities of the communist state. In more than 500 cases the courts validly and finally ruled that the persons subject to lustration concealed the fact of their cooperation (or work).

It should also be stressed that, in view of the lustration in Poland, the body of judicial decisions (of the Constitutional Tribunal and the Supreme Court) worked out the standards still in force, according to which, in order to accept that one's conduct could be classified as cooperation with the communist security intelligence, it should be proven that:

- 1/ the person in question contacted with the state security authorities and provided them with information;
- 2/ the contact of such person with representatives of the state security authorities had to be a conscious one, i.e. the person was aware of contact with a representative of the communist security intelligence;
- 3/ the contact of such person with security intelligence had to be of secret nature;
- 4/ the person's actions were to consist in operational acquisition of information;
- 5/ the conduct of the person could not be limited only to the declaration to cooperate, but should be materialized in particular actions for the benefit of the communist security authorities.

An additional new element introduced by the 2006 Lustration Act and the amendment to the Act on the National Remembrance Institute (IPN) of 2006 (Journal of Laws 2006.63.424, as amended) is the necessity to publish, on the website of IPN, electronic catalogues containing information on the retained public records

of persons holding such positions as: President of the Republic of Poland, MPs, senators, MEPs, ministers, judges of appellate courts and the Supreme Court, appellate prosecutors, mayors. This catalogue refers to almost 5 500 posts.

In addition, the Lustration Bureau prepares and publishes thematic catalogues: of persons subject to surveillance and repressions (currently a list of almost 10,000 people subject to surveillance by state security authorities), of officers and soldiers of state security authorities (currently including entries for more than 62,000 persons) and of persons holding managerial positions in the party and state of the former People's Republic of Poland (more than 24,000 persons included).

Finally, it is worth reciting the arguments of lustration opponents:

- the dubious quality of the archives given their partial destruction;
- the threat of destroying political, cultural, religious authorities (e.g. the case of Lech Wałęsa);
- lustration as political adventurism in the use of files.

The then President (in 2006) of the Constitutional Tribunal, Jerzy Stępień, justified the reluctance to disclose the archives of former security intelligence of the People's Republic of Poland by saying: *"A man can be destroyed with real information much more effectively than with firearms. (...) The truth as such is not the highest value in our constitutional order (...) the highest value is dignity, not truth."*

One should, however, bear in mind Resolution 1096 of the Plenary Assembly of the Council of Europe *on measures to dismantle the heritage of former communist totalitarian systems* which reads in point 12: *"The Assembly emphasizes that in general, if several criteria were met, these measures [i.e. lustration and decommunization] may be considered compatible with the standards of a law-abiding democratic state."*

In conclusion, the following question remains to be answered:

Is lustration understood as a procedure for disclosing information about materials created by former security authorities of the People's Republic of Poland on persons performing public functions today a good instrument to reconcile with the totalitarian past? Or would it be more appropriate, as some advocate, to pour the archives of the Institute of National Remembrance with concrete for 50 years and forget about the past and thus give the opportunity for gossip, allegations and blackmail to arise.

LESSONS LEARNT

- Thanks to the lustration in Poland, many people who intend to take public offices resign from these positions due to their past.
- The lustration prevented public persons from being blackmailed with archival materials that were preserved in the Institute of National Remembrance.
- The lustration continues to be perceived by many of its opponents only as an element of political struggle.
- The hearing of lustration proceedings before criminal courts makes judicial proceedings continue for years, and the judgments issued by these courts are debatable. In such cases, there is talk of "court truth" which deviates strongly from "historic truth".

RECOMMENDATIONS

- The most important public functions of election and appointment should be subject to lustration.
- The lustrated persons should be able to verify their statements before the common courts of law.
- The lustration procedure should be public.

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INVESTIGATION AND PROSECUTION OF THE CRIMES OF THE REGIME

RADOSŁAW PETERMAN

After the collapse of communism in Central and Eastern Europe, new democratic governments had to handle the issue of reconciliation with perpetrators of repressions and human rights violation. Due to the complexity of the emerging problems, reconciliation with the past means adopting a deliberate policy with regard to the past, that is, planning and arguing a consistent catalogue of state activities relating to the history of public institutions, society and the legal system. The policy with regard to the past should strive to accomplish five basic goals: determination of the truth, imposition of punishment, moral condemnation, reparation for harm, cultivation of memory.

In Poland, prosecution of Stalinist crimes began in 1991. This was possible thanks to the transformation of the Main Commission for the Investigation of Nazi Crimes in Poland, which prosecuted Nazi crimes as of 1945 (initially under the name of the Commission for the Investigation of German Crimes in Poland) in the Main Commission for the Investigation of Crimes against the Polish Nation. It broadened the scope of action to include the prosecution of Stalinist crimes as crimes against individuals or groups committed by the authorities of the communist state until 31 December 1956 (Journal of Laws 1991.35.195). However, until 1998 the activities of the Institute of National Remembrance (IPN) did not produce tangible results. The reason for this was that the criminal proceedings followed a long way procedure, i.e. first the Institute of National Remembrance – the Commission for the Prosecution of Crimes against the Polish Nation prepared the case and then the prosecuting authorities prepared it again before referring the case to the court. The prosecution of Stalinist crimes got significantly prolonged. It was only after the amendment to the Act on the Institute of National Remembrance in December 1998 that IPN was able to be prosecute the cases more swiftly as IPN was then granted prosecution powers.

In spite of the passage of time, some officers of the Stalinist regime have been brought before the courts. In 1994, the Sejm condemned the “criminal activity” of Security Bureau [*Urząd Bezpieczeństwa (UB)*] and the Military Information [*Informacja Wojskowa (IW)*], responsible for the suffering and death of many thousands of Polish citizens. The most prominent trial of UB's officers was the case of col. Adam Humer, former head of the investigative department of the Ministry of Public Security [*Ministerstwo Bezpieczeństwa Publicznego (MBP)*]. In 1996 the Warsaw court sentenced him to 9 years of imprisonment for mistreatment of political prisoners between 1946–1954. In 1998, the court dismissed Humer's appeal, though for a formal reason the sentence was reduced slightly from 9 years to 7.5 years. Officials of the Military Information also stood trial. The first judgement against the IW officer was issued in 1998. The Military Garrison Court in Warsaw sentenced Wincenty Romanowski, 75, to 1.5 years of imprisonment for mistreatment of a prisoner in 1946. The court found the methods of the defendant not to have been nothing different from the methods of the Gestapo.

On the other hand, there has never been a judge issuing judgments as ordered by UB and IW or the Security Service [*Śłużba Bezpieczeństwa (SB)*] that has been sentenced in a final and binding manner. Having remembered court judgements of the 1980s, and especially of time of the martial law, after 1990 voices were raised that all judges who had shamelessly disobeyed the principle of judicial independence in those times should be disqualified and have the right to practice the profession revoked. The disciplinary law applicable after 1990, however, could not be applied to the so-called *flexible judges* as disciplinary offenses are barred by limitation after just one year. Hence, legislative intervention was required. The first attempt to regulate the possibility of dismissing a judge for court crimes or servility towards communist authorities was made in 1993. On 15 March 1993, an act on the system of common courts of law was passed. Under the act, the President, at the request of the National Council of the Judiciary of Poland [*Krajowa Rada Sądownictwa (KRS)*], could dismiss a judge found by the disciplinary court to have disobeyed the principle of judicial independence. It was assumed that judges unable able to resist external pressure have mental deficiencies that prevent them from performing the profession. However, this solution was recognized by the Constitutional Tribunal as incompatible with the Constitution.

As a result of the reluctance of the judicial environment, another attempt to purge it was made only after four years. On 17 December 1997, the Sejm passed a law amending the act on the system of common courts of law and certain other acts. This time, yet again, due to formal shortcomings in the procedure of passing the amendment, the Constitutional Tribunal considered the law unconstitutional. This notwithstanding, the Constitutional Tribunal pointed out the validity of the final regulation of the problem consistent with the procedures: “By restricting the deliberations only to the period closed by 1989, it must be borne in mind that such abuses of independence occurred at that time, that there is still a need for their disclosure and clarification”, while “the general rules of the judge's liability, adjusted to the conditions of the democratic state, are not a sufficient mechanism.”

Ultimately, the problem was statutory resolved on 3 December 1998, when the law on disciplinary liability of judges who disobeyed the principle of judicial independence between 1944–1989. BY virtue of the provisions of the act, with regard to a judge who disobeyed the principle of judicial independence between 1944–1989 when adjudging in trials that constituted a form of repression for independence activity, political activity, defence of human rights or the exercise of basic human rights, the application of the statute of limitation was excluded in disciplinary proceedings concerning judges. This exclusion was not indefinite – it was determined that it would end on 31 December 2002.

In the period between the date of this law becoming effective until October 2001, 30 cases were submitted, 28 of which were

filed by the Minister of Justice, and only two were submitted by Disciplinary Proceedings Representative. The National Council of the Judiciary of Poland made no request. In all the cases as requested by the Minister of Justice the Disciplinary Proceedings Representatives clearly distanced themselves from the cases, indicating that they acted as instructed by the minister. All the cases concerned only about 50 judges, mostly retired, of whom only one was not a penal judge. In the course of proceedings as many as 41 judges had already been released from the charges they faced. Four cases were immediately returned to the Disciplinary Proceedings Representative, and in the case of the others, as a result of the investigation, it was not proven that the judge had disobeyed the principle of judicial independence.

The whole verification process showed shameless corporate solidarity, which undoubtedly was the main cause of its failure. The farce was enhanced with was the decision of the Supreme Court in 2010, which replaced the legislator by providing the statutory concept of communist crimes with a sense that in fact denied the existence of court crimes throughout the times of the People's Republic of Poland, including the Stalinist times. This resolution, criticised even within the Supreme Court, was issued against IPN's request to waive the immunity of former SN judge Zdzisław Bartnik, who showed full dependence with regard to communist authorities during the martial law.¹ The Supreme Court held that IPN's request was clearly unfounded and entered the resolution in the so-called book of legal principles, a remnant of the law of the People's Republic of Poland, disciplining other courts and thereby violating the principle of their independence.

The aforementioned resolution put an end to the verification of the justice system of the People's Republic of Poland, but it is not surprising if all the scandalous actions of the judges of the People's Republic of Poland in today's justice system are analysed, if one unveils the "dedication and determination" of the judiciary and the prosecutors' – which refers primarily to the older staff – with which they began to verify their ranks and purge them to remove judges compromised by their dependence with regard to the communist regime.

The results of the verification of the justice system of the People's Republic of Poland showed that all the judges of the communist period acted ethically and were independent. The activities of disciplinary courts showed something different than what was known in society. Disciplinary courts proved, in spite of the facts, the innocence of the judges. The negligence and omissions of the disciplinary courts while handling of the abovementioned cases were evident.

Another form of justice for those who used repression was the so-called "dezubekizacja" [*anti-security intelligence activities*].² The first attempts were made in the 1990s to reduce pension benefits provided to former officials of the repressive apparatus. The first law passed by the Sejm in December 1992 was vetoed by President Lech Wałęsa. The second act, dated December 1997, was vetoed by President Aleksander Kwaśniewski. Finally, the *Act on Amendments to the Pensions Act of Professional Soldiers and Their Families and to the Pensions Act of Officers of Police forces, Internal Security Agency, Foreign Intelligence Agency, Military Counterintelligence Service, Central Anticorruption Bureau, Border Guard, Government Protection Bureau, State Fire Service and Prison Service and their families* (Journal of Laws of 2009, No. 24, item 145) was passed in 2009. The law entered into force in 2010.

This law was first appealed against to the Constitutional Tribunal (TK) by a group of left-wing (SLD) MPs. The MPs alleged that the law made use of collective responsibility, punishment without trial and determining guilt, breach of the principle of trust in the state and protection of acquired rights, the principle of equality and the right to social security. TK expressed the belief that the withdrawal of uniformed pensions would constitute of the removal of the unfairly acquired privilege. In 2010, a group of former security officers of the communist state filed a complaint with the European Court of Human Rights (ECHR) on the aforementioned act. In 2013, in its decision, the ECHR considered that the reduction of the pension did not imply "excessive burdens on the applicants who did not lose their means of subsistence or total deprivation of benefits, and that the scheme was even more beneficial than other pension schemes". The ECHR reminded that the Security Service (SB) officers worked for a security apparatus modelled on the Soviet KGB, it compared the services of the People's Republic of Poland to the Stasi and the Securitate. Judges of the ECHR explained that working in the SB, designed to violate fundamental human rights protected by the Convention, should be considered as an important factor for the definition and justification of categories of persons to be subject to reduced pension benefits. The aforementioned act reduced the pension of about 25 thousand former civil security intelligence officers of the People's Republic of Poland and former members of the Military Council of National Salvation [*Wojskowa Rada Ocalenia Narodowego* (WRON)].

In addition, it should be noted that according to the Act on Institute of National Remembrance, all political killings committed in the People's Republic of Poland shall be subject to the statute of limitations in 2030 while all other communist crimes shall be subject to the statute of limitations in 2020. In 2010, the Supreme Court considered those crimes, which are punishable by imprisonment for up to 5 years, barred by the statute of limitations.

At this point it is worth pointing out that the Main Commission for the Investigation of Crimes against the Polish Nation, operating within the Institute of National Remembrance, completed more than 14,000 investigations, over 60 percent of which refer to communist crimes. Most of the investigations were conducted from the beginning with the knowledge that it would be impossible for the perpetrators to be brought before the court because of their death. But it is important to identify all the circumstances of the crime, the symbolic and legal dimension, as well as important reference materials for further historical research. IPN prosecutors submitted 326 indictments with regard to 508 people. Pursuant to these indictments courts have so far convicted 137 people.

1 Martial law in Poland between 1981–1983 – state of exception introduced on 13th December 1981 in the territory of the People's Republic of Poland in violation of the Constitution of the People's Republic of Poland. It was suspended on 31 December 1982, and was abolished on 22 July 1983. Throughout its course, a total of 10 131 Solidarity activists were imprisoned and about 40 people lost their lives, including 9 miners from the Wujek mine during the strike pacification.

2 Dezubekizacja – The concept of reducing pension benefits of former officials of the repressive apparatus. Dezubekizacja is a term colloquially called to refer to the *Act on Amendments to the Pensions Act of Professional Soldiers and Their Families and to the Pensions Act of Officers of Police forces, Internal Security Agency, Foreign Intelligence Agency, Military Counterintelligence Service, Central Anticorruption Bureau, Border Guard, Government Protection Bureau, State Fire Service and Prison Service and their families* (Journal of Laws of 2009, No. 24, item 145).

However, it must be stated that, due to the lack of a reliable and comprehensive reference of the legal system to the past, no thought-out policy with regard to the past was created in Poland at the beginning of the political transformation. Polish politics at the beginning of the 1990s lacked the will to accomplish the five basic goals with regard to the past: determination of the truth, imposition of punishment, moral condemnation, reparation for harm, cultivation of memory. They were gradually implemented, which is why it is not fully understood in society. On the other hand, former officers and their principals often argue that they acted in accordance with the then generally applicable law, which consequently excludes the possibility of holding them liable, including criminally liable, in any way. In addition, there are problems related to the statute of limitations, resulting in the discontinuance of criminal prosecution or the ineffectiveness of civil law claims. Another issue is the reluctance of law enforcement agencies to take action which is not only of legal but also political nature. Despite these reservations, it seems that the democratic state of law has an obligation to prosecute at least the worst crimes committed in the past. It also turns out that the actions taken repeatedly by officers of the state apparatus were acts which were not only contrary to the basic principles of human rights or international law but also to the law in force at that time. Unfortunately, in Poland no

decision has been made to adopt any of the models of treating the past accepted in the world.

LESSONS LEARNT

- Poland has started to prosecute Stalinist crimes fairly quickly.
- In order to effectively prosecute the crimes, a special body was created bringing together prosecutors appropriately prepared to conduct such cases.
- Undue pension benefits were taken away from people involved in political repression against citizens.
- In Poland, the judging environment failed to purge itself.
- Newly created security intelligence and law enforcement agencies heavily relied on people involved in the repressions against citizens.

RECOMMENDATIONS

- The countries in which democracy is restored should first verify the judicial environment and the prosecution authorities.
- What is important is also the effective prosecution of persons who committed crimes in the context of political repression.

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REHABILITATION OF VICTIMS

RADOSŁAW PETERMAN

Despite the lack of major controversy over the rehabilitation of people repressed for political reasons, the restoration of dignity and the redress for the victims through the legislature has encountered resistance until this very day. The Second World War dashed the plans to maintain independence, and after the war, the German occupation was replaced by the Soviet one. In the historical dictionaries of the People's Republic of Poland, the word *independence* was readily replaced by the concept of *liberation*. Admittedly, the Sejm adopted without much opposition in February 1991 a law on nullification of all the rulings granted to persons subject to repressions in the People's Republic of Poland for the activities aimed at the independent existence of the Polish State, and on the granting compensation for damage and redress for the suffered harm (Journal of Laws 1991.34.149). This law initially included persons who were subjected to repression by law enforcement and judicial authorities or out-of-court bodies operating in the present territory of Poland between 1 July 1944 and 31 December 1956 and within the territory of Poland within the limits set by the Treaty of Riga, during the period from 1 January 1944 to 31 December 1956, for activities aimed at the independent existence of the Polish State or because of such activity. The word *independence* used in this act caused controversy when it was decided to extend the law to include the time-limit thereof until 1989. Finally, the amendment of the law covered the activities of the anti-communist opposition until 31 December 1989, including those who were subject to internment as a result of the introduction of martial law in Poland on 13 December 1981. Three possible compensatory measures were introduced:

- compensation for the damage sustained;
- redress of the damage suffered;
- coverage, in whole or in part, of the cost of symbolic commemoration of a person unjustly repressed if his or her death resulted from the execution of a judgment declared invalid.

Article 1 § 1 of the above law considered *"judgments issued by the Polish law enforcement and judicial authorities or out-of-court bodies in the period from 1 January 1944 to 31 December 1956 to be invalid if the alleged or attributed act was related to activities aimed at the independent existence of the Polish State, or if the judgment was issued because of such activity, as well as judgments issued against resistance to collectivization of agriculture and compulsory agricultural supplies."* However, this law requires a person harmed by the communist authorities to prove in a lengthy trial that the acts attributed to him/her, not constituting a crime, were a form of activity aimed at the independent existence of the Polish State. This situation often humiliated those people. The law enacted at the time constituted a specific legal prosthesis in the face of the assumed continuity of statehood between the People's Republic of Poland and the Third Republic of Poland, both from the point of view of international law and of internal law, resulting, for instance, in that in spite of the political transformation, the verdicts given by courts of the People's Republic of Poland did not lose their legal force and thus continue to function in legal transactions today.

Despite the fact that the law has been in force, not all the people have applied for the annulment of judgements given during the People's Republic of Poland for political reasons. Therefore, the Institute of National Remembrance together with the Supreme Bar Council undertook an action entitled "You have the right" under which lawyers provided free legal counselling to victims of the communist authorities.

Originally, the Act established only the obligation for the State Treasury to pay compensation and redress for the damage sustained as a result of repressions for the activities aimed at independent existence of Poland. The 2007 amendment added the decision of internment during martial law as a basis for these benefits to be paid out. This decision was the consequence of the need for consistent action of the law maker, as the law regulates the state's attitude toward citizens fighting for its independence and should cover the broadest possible range of forms of conducting independent activity.

The martial law introduced in December 1981 is one of the most important events in the history of modern Poland. It aroused great controversy and political-historical disputes. The founders of the martial law, led by General Jaruzelski, justified its necessity with the economic situation of the state and threat of an armed intervention from the neighbouring countries of Poland, of the so-called real socialism block. A thesis was proclaimed that martial law had been introduced in accordance with the law effective in the state and that it had been implemented in a humanitarian manner and without much loss to society. He was considered so-called a "less evil" solution protecting the public from the tragedy of a civil war or an armed intervention of foreign countries.

Those repressed during the period of martial law in Poland (1981–1983) rejected these justifications and found that martial law had been introduced in violation of the law in force contrary to the opinion of society, that it had been introduced not in the interest of Poland but of the USSR, that it had been a "war with the nation", that it had been introduced in a very brutal way and had caused great personal and moral losses. After the election of the new parliament on 5 December 1991, the Parliamentary Club of the Confederation of Independent Poland [Konfederacja Polski Niepodległej] led by L. Moczulski accused the so-called authors of martial law and requested the Sejm to bring them before the State Tribunal under the charge of the martial law and its consequences. The motion included 9 senior officers of the Military Council of National Salvation [Wojskowa Rada Ocalenia Narodowego (WRON)] and 15 members of the 1981 Council of State [Rada Państwa]. The Sejm established the Constitutional Responsibility Committee to examine the validity of the motion. On 19 September 1993, new elections were held which brought the victory of the left-wing parties. The new Sejm changed the composition of the Constitutional Responsibility Committee. On 13 February 1996, the Commission decided, by means of the majority of 12 to 5 with 1 abstained vote, to request that the Sejm should discontinue the case. On 24 October 1996,

the Sejm approved the Committee's motion. It was not until more than ten years later that the Ombudsman [Rzecznik Praw Obywatelskich] requested, in a letter of 12 December 2008, that martial law be considered to have been introduced unlawfully. In its motion to the Constitutional Tribunal, the Ombudsman argued that the assessment of the constitutionality of the introduction of the martial law in 1981 was not irrelevant to social consciousness. Due to the fact that the victims of the actions of the communist oppressors had encountered obstacles and sometimes even blockage on their way to pursue their freedoms and rights in a democratic state of law, the Ombudsman decided to make it easier for victims of the totalitarian repression of the totalitarian state to pursue moral and legal redress and to render justice. It was also necessary, in the Ombudsman's opinion, to officially declare the unconstitutionality of these decrees, in view of the protection of constitutional rights and freedoms, as well as significant from the trial perspective for the judicial authorities to rule as to the possible liability of persons whose actions led to the issuance of these decrees. It should be noted, however, that the Ombudsman did not dispute the Decree of 12 December 1981 on the forgiveness of certain offenses and crimes (Journal of Laws, No. 29, Item 158), since the decree contained amnesty provisions which were beneficial for individuals within the scope of its activity. The Constitutional Tribunal stated that issuing a judgment on the constitutionality of the decree on martial law and the decree on special proceedings was necessary to ensure the protection of constitutional freedoms and rights.

After hearing the case, the Constitutional Tribunal, in its judgment of 16 March 2011, case file no. K 35/08, stated the unconstitutionality of the decree on martial law and the decree on special proceedings because of the lack of the Council of State's competence for the issuance thereof. The Constitutional Tribunal established that the adjudication as to the martial law decrees was necessary for the protection of constitutional freedoms and rights. It was aware, however, of the fact that many of these rights and freedoms could not be restored and their violations could not be redressed. The Tribunal, did however, recognize that the judgment in this case was important for the consolidation of the rule of law and, irrespective of its limited direct effect, served to safeguard the principle of citizens' trust in the State and its institutions. Recently, the Act of 20 March 2015 on the activities of the anti-communist opposition and on people victimized for political reasons which grants cash benefits and financial aid to them, was recently adopted.

In Poland, there are still many burial places of victims of communist terror between 1944–1956 yet to be discovered. Probably one of the most notorious cases is the fate of Gen. August Emil Fieldorf aka "Nil" and captain Witold Pilecki. The enforcement of harsh law was carried out by military courts, which took over the jurisdiction over civilian population accused of so-called state crimes. Military courts operated from January 1946 until the turn of July and August 1955. During this period, they issued 3468 death sentences, of which 1363 were carried out. The communist authorities did not inform families about the sentences and the burial sites. For decades communists strive to erase the memory of the soldiers of the resistance underground from the social consciousness. They tried to obliterate all the traces thereof. The existing legal acts treated the prisoners' bodies as state property and gave prison authorities the power to decide as to their burial. In most cases, the bodies of the executed prisoners

were not given to their relatives. The bodies of the people who dies during the investigation or in the course of the penalty was less harsh. Usually it was agreed to provide the bodies to the relatives. However, it was ordered that during the funeral the coffin was to remain closed to hide traces of beating.

To keep everything most secret, burials took place at night, in specially designated sections of the cemeteries. Often the victims were buried without coffins. Some reports indicate that sometimes the corpses were sprinkled or poured over with special corrosive substances to prevent any identification. The prisoners' tombs were not marked, and burials were rarely recorded in the cemetery books.

It was not until the IPN was created that exploration work was started. Only in 2011 did the IPN launch a national research project "Searching for unknown burial sites of victims of communist terror between 1944–1956." The partners of the Institute in this undertaking include the Ministry of Justice, the Council for the Protection of Memory of Fight and Martyrdom [*Rada Ochrony Pamięci Walk i Męczeństwa*], the Pomeranian Medical University of Szczecin, the Medical University of Wrocław, the Polish Genetic Database of Victims of Totalitarianism [*Polska Baza Genetyczna Ofiar Totalitaryzmów*], the Institute of Forensic Studies [*Instytut Ekspertyz Sądowych*] in Kraków. This project aims to establish the location of the burial sites of those who were executed and murdered in the Stalinist period, the exhumation and identification of the remains. The remains of several hundred murderers were recovered on the grounds of the "Ł" cemetery quarter in Powązki Cemetery in Warsaw and Białystok Detention Centre, and in many other places. So far, about 50 of them have had their identities recovered by means of DNA-based identification. The law on graves and military cemeteries in force until 2014 did not allow or even impeded effective search. As a result of the amendment to this law, it was possible to exhume and to honourably bury the victims of communist terror of 1944–1956.

After 1989, several hundred veterans' organizations were established or formed according to various criteria (nationwide, regional, gathering veterans of all formation or of a chosen period or organization) including from several hundred thousand to several dozen members. At the same time, the Veterans and Persecuted Persons' Office [Urząd do Spraw Kombatantów i Osób Represjonowanych] was established by virtue of the act of 24 January 1991 *on veterans and some people being victims of war and post-war repressions*. The basic legal acts that define the tasks carried out by the Office include: the Act of 31 May 1996 *on the financial benefit of persons deported for the purpose of forced labour and imprisoned in labour camps by the Third Reich and the Union of Soviet Socialist Republics*; the Act of 7 May 2009 *on the redress to families of victims of collective liberation protests of 1956–1989* and the Act of 20 March 2015 *on activists of the anti-communist opposition and persons repressed for political reasons*.

The Veterans and Persecuted Persons' Office is the central government administration authority in Poland the task of which is to undertake actions to provide participants in the fight for Poland's independence and victims of war and post-war repressions with the necessary aid and care and due respect and remembrance. The specific tasks of the Office include, among others, undertaking initiatives related to the cultivation and popularization of traditions of the struggle for independence and sovereignty of the Republic of Poland and the memory of

the victims of war and post-war period. The Office also issues decisions to grant the rights and benefits to veterans, activists of the anti-communist opposition, and victims of repressive totalitarian regimes, as well as the widows and widowers of them.

LESSONS LEARNT

- It is important to invalidate judicial decisions issued in political trials.
- the Persons who were subject to repressions should receive redress for physical and mental suffering.

- People of merit fighting for state sovereignty should be honoured.
- The procedure involved in invalidation of court judgments should be simplified.

RECOMMENDATIONS

- The country rebuilding its democracy should first and foremost invalidate judgments given as a result of political repression.
- The persons repressed should receive immediate assistance from the state and be appropriately honoured.

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EDUCATION AND PRESERVATION OF SITES OF CONSCIENCE

RADOSŁAW PETERMAN

After 1989 very significant changes in the memory of the past in Poland have occurred. Back then the dispute had already arisen over what kind of state Poland was during the years of the communist rule, and what conduct and attitudes at that time should be considered proper or reprehensible. In the 1990s there was much discussion about the balance sheet of the People's Republic of Poland [*Polska Rzeczpospolita Ludowa, PRL*] which was joined by historians, sociologists, economists, and political commentators. Discussions were held in specialist publications as well as in the weeklies and daily journals. The following list of the most important questions surrounding the dispute stems from these debates:

Did the PRL meet the sovereignty criterion so that it could be considered one of the forms of Polish statehood?

Was the PRL a totalitarian state, or did it have such features throughout its duration, or only in the Stalinist period?

Was socio-economic progress achieved during the period of the People's Republic of Poland, or did the system of government suppress modernization?

There are various answers to these questions, both in journalistic discussions and in scientific monographs. However, one can try to extract some regularities, opinions shared almost by all.

Almost everyone agrees that until 1956 Poland's sovereignty was so limited that it resembled the status of a protectorate. This is confirmed by many published reference documents and symbolic facts, such as the results of the first post-war elections (1947) dictated by Stalin, leading the Polish army by generals seconded from the Red Army, Stalin's amendments to the draft of the 1952 Constitution of People's Republic of Poland. Almost everyone also agrees that after 1956 Poland gained significant level of autonomy. However, among the participants of the dispute, there is an outstanding opinion expressed by Professor Tomasz Strzembosz: "Personally, I think that Poland was under a specific occupation, both internal and external, from 1944 to 1990". At the same time prof. Krystyna Kersten emphasizes: "We will not understand the history of the People's Republic of Poland if we do not know the mechanism of dependence on Moscow. Today we do not know how this mechanism worked, what decisions were made first in Warsaw and only accepted (or rejected) by the headquarters, what decisions were taken in Moscow and delivered for execution to appropriate comrades in Poland". In the People's Republic of Poland there were no free elections, freedom of speech, free press or freedom to erect monuments according to the sympathies of individual political movements. Politicians and social activists noticed the potential to build on the images of the past and to create a sense of community around it. The emergence of museums, monuments, associations of history fans, films and books are the result of the renaissance of interest in the past. State institutions, political parties and social associations have their own "historical policies". They take action on the borderline of academic learning, education, propaganda, and sometimes also entertainment, to create a strong group identity.

The fundamental directions of changes in Polish memory after 1989 was determined by the following processes: gradual differentiation of memories and interpretation of the past; introducing events related to the past harm caused by Poles to representatives of other nations and minorities into the public discourse of the past and to the official memory; popularization of this type of approach to the past, in which the relationship of individuals to the past is no longer mediated by the state and nation; increased importance of reference to local and regional traditions and the change in the way they are invoked.

With such a varied perception of the recent past it is difficult to build a uniform historical policy. Under such circumstances the Institute of National Remembrance (IPN) was also created, which in addition to storing archives produced by the security authorities of the communist state and the prosecution of communist crimes by prosecutors of the Main Commission for the Investigation of Crimes against the Polish Nation, also had the task of conducting historical education and research in the history of the People's Republic of Poland.

From the very beginning of the existence of IPN, opponents of this institution often repeated the thesis that the Institute is the tool of a political environment centred around the Law and Justice Party [*Prawo i Sprawiedliwość (PiS)*], which uses it in the ongoing political struggle. This claim was untrue, because politicians representing PiS did not participate in the creation of this institution. It was created on the sole initiative of politicians stemming from the NSZZ "Solidarność" Trade Union. It was in this environment that discussions about the need to establish an institution like the German Gauck's Office were held in Poland from the early 1990s. Indeed, the Institute of National Remembrance was created in 1999 primarily thanks to the involvement of three persons: Minister Janusz Pałubicki, who wrote the bill together with a group of experts, including lawyers – prof. Witold Kulesza and prof. Andrzej Rzepliński as well as historian prof. Andrzej Paczkowski. IPN has always been a thorn in the flesh of the post-communist camp.

In 2001, post-communist politician Leszek Miller from the Democratic Left Alliance [*Sojusz Lewicy Demokratycznej, (SLD)*] stood for the election promising to liquidate the Institute. On the other hand, President Aleksander Kwaśniewski, who also came from the post-communist side, did not find the liquidation of IPN favourable to him. One of the main reasons was the participation of President A. Kwaśniewski in the run for re-election, as well as issues related to the investigation of the murder of the Jewish population of 10 July 1941.

Thus, what was done was to make cuts in the budget, which effectively suppressed the process of creating a material base of IPN, without which it was simply impossible to take over hundreds of thousands of files from the security authorities of the People's Republic of Poland. The work of the Institute in 2000–2006 took place in three divisions, which logically complemented each other and allowed scientific, legal and

moral reconciliation with the past. In 2006 the fourth division – the Lustration Office – replaced the previous lustration authority, namely the Commissioner for Public Interest [Rzecznik Interesu Publicznego].

In terms of structure, the IPN differs significantly from similar institutions operating in Germany, the Czech Republic, Slovakia, Romania, Bulgaria and Hungary and in the Baltic states. The question of whether the assignment of such a variety of tasks to a single institution was deliberate remains the subject of the dispute.

The Educational and Research Division of IPN conducts scientific research and educational and publishing activities. It organizes scientific conferences and collects reports of witnesses of history. It publishes scientific and popular books and journals. It organizes training, lectures, film shows, exhibitions and competitions for various audiences, prepares educational materials, including multimedia and internet materials, for students and teachers. For more than 15 years, more than 2,000 publications have been created, including books and magazines (“Biuletyn IPN”, “Pamięć i Sprawiedliwość”, “Pamięć.pl”, “Aparat Represji w Polsce Ludowej 1944–1989”, “CzasyPismo”). There have been almost 500 exhibitions, which have been presented around 7000 times in Poland as well as abroad. In order to popularize scientific research, more than 800 conferences were held within IPN. If one takes into account all forms of educational activities of the Institute (competitions for youngsters, lectures, teacher trainings, workshops, historical film shows accompanied by lectures, educational rallies, tutoring classes, preparatory courses for high school graduates, etc.), there have been 35,000 of them!

In addition, the Educational and Research Division of IPN has created 30 educational websites. Another area of IPN activity is research carried out in 11 national projects. Documentation projects in the form of competitions for non-governmental organizations are also being implemented.

In order to commemorate the fate of the Poles during World War II and the time of communism, IPN has created an Internet Index of Poles murdered and repressed for aiding Jews and the project “Personal losses and victims of repression under German occupation”. The education activities are equally important – these include the provision of schools with very carefully prepared – also on the basis of archive resources – educational packages, devoted to many important topics of recent history.

Conducting educational and scientific activities and restoring remembrance has allowed the truth about the period of Nazism and communism to be conveyed. For nearly half a century the truth about Polish history was distorted, and the heroes of the struggle for independence were left to oblivion.

RECOMMENDATIONS

- Preserving the memory of the vastness of the number of victims, loss and damage suffered during and after World War II.
- Commemorating patriotic traditions of struggles with occupiers, Nazism and communism.
- The obligation to prosecute crimes against peace, humanity and war crimes.
- The obligation to make sure that all those victimized by the state violating human rights have been redressed.

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TIMELINE OF THE MAJOR EVENTS

February 1, 1988	Government implements drastic rise in prices
April 25, 1988	Strikes in Bydgoszcz and Inowrocław
April 25 – May 5, 1988	Strikes in Bydgoszcz, Inowrocław, at the Nowa Huta ironworks in Kraków, and the ironworks in Stalowa Wola
April 29, 1988	Gen. Kiszczak orders preparations for martial law
May 1, 1988	Anti-government rallies in Łódź, Kraków, Płock, Poznań, Warszawa, Gdańsk, Wrocław, Bielsko-Biała, and Dąbrowa Górnicza
May 2–10, 1988	Strike in the Gdańsk shipyard
May 3, 1988	Andrzej Wielowieyski, council of Solidarność leadership, is informed by the central committee PZPR members, Józef Czyrek and Stanisław Ciosek that Gen. Jaruzelski agrees to negotiate with Lech Wałęsa
May 5, 1988	Strikes and rallies in Szczecin, Wrocław, Bełchatów, Katowice, and Gdańsk; students' rallies in Lublin, Warszawa, and Kraków
June 3, 1988	St. Ciosek suggests to Rev. A. Orszulik (speaker of the Episcopal Conference of Poland) about forming a new government with the democratic opposition
June 22, 1988	Public transport strike in Szczecin
July 11–16, 1988	M. Gorbachev visits Poland; Warsaw Pact summit
July 13, 1988	Ironworks strike in Stalowa Wola
July 21, 1988	Lech Wałęsa passes secret letter to Gen. Kiszczak agreeing to the talk's proposal
August 15 – September 3, 1988	Second wave of strikes in numerous coal mines in Upper Silesia, strikes in the port and factories in Szczecin, the ironworks in Stalowa Wola, shipyards in Gdańsk, and the Nowa Huta ironworks in Kraków; rallies in numerous towns
August 20, 1988	Committee for the country's defence (Komitet Obrony Kraju, KOK, commanding military and security body) orders the start of preparations for martial law
August 22, 1988	Televised speech of Gen. Kiszczak issuing threats against striking workers
August 25, 1988	Statement of opposition leaders promising a cessation of strike action in return for free trade unions
August 26, 1988	Gen Kiszczak, in a televised speech, proposes talks with the opposition; strike committees in Gdańsk, Jastrzębie-Zdrój, Szczecin and Stalowa Wola authorize Lech Wałęsa to negotiate with authorities
August 27–28, 1988	Meeting of the PZPR central committee
August 31, 1988	Gen. Kiszczak meets Lech Wałęsa. Wałęsa issues statement calling for an end to strike action, announces talks at the Round Table with authorities about cooperation for economic, politic, and social reforms
September 10, 1988	The Solidarność organizational committees announce support for Lech Wałęsa as the Solidarność leader for talks concerning Round Table
September 15–16, 1988	Talks in Warszawa and Magdalenka to prepare the scope and character of the Round Table negotiations
September 19, 1988	Zbigniew Messner's government resigns
September 27, 1988	Mieczysław Rakowski appointed prime minister
October 3–11, 1988	Rallies in universities in Warszawa, Kraków, Wrocław, Gdańsk, Poznań, Katowice
October 19, 1988	Authorities issue objections about the participation of several opposition leaders in the Round Table talks
November 1, 1988	Rakowski decides to liquidate the shipyard "Lenin" in Gdańsk
November 11, 1988	Rallies commemorating the Independence Day of 1918

November 18–19, 1988	Meetings between Wałęsa and Gen. Kiszczak. Authorities object to restoration of the Solidarność trade union
November 30, 1988	Televised debate between Wałęsa and Alfred Miodowicz, leader of communist-controlled OPZZ trade union. Public opinion polls show 63 % support for Wałęsa
December 7, 1988	Government decree liberalizing passport laws
December 13, 1988	Massive rallies in Wrocław, Warszawa, Kraków, Lublin, Jastrzębie-Zdrój, Łódź, Płock, Poznań, Toruń, Wałbrzych on anniversary of the 1981 martial law, clash with the MO
December 18, 1988	Komitet Obywatelski przy przewodniczącym NSZZ “Solidarność”, Citizens’ Committee for “Solidarity” Chairman formed
December 23, 1988	Act for economic activity allowing free trade and private enterprises
January 1989	Talks by PZPR representatives with RC Church representatives concerning political reform
January 16–18, 1989	Meeting of the political bureau of the PZPR’s central committee; bureau agrees to legalize “Solidarność”
January 27, 1989	Meeting in Magdalenka, Gen. Kiszczak, Wałęsa, Bronisław Geremek, Tadeusz Mazowiecki discuss terms of the Round Table negotiations
January 31, 1989	Liberal banking law passed
February 6, 1989	Round Table negotiations begin
February 25, 1989	Meeting of opposition organizations protesting the Round Table in Jastrzębie-Zdrój thwarted by the SB, 120 people detained
March 15, 1989	Law concerning foreign currencies trade passed
March 17, 1989	Conflict on the electoral law project; authorities intended to pass the electoral code before agreeing on election matters at the Round Table
March–April 1989	Numerous rallies clash with riot police
April 5, 1989	Agreements by the Round Table signed
April 7, 1989	Series of acts concerning partially free elections, trade unions, and freedom of associations passed
April 13, 1989	Rada Państwa (state’s council) establishes the dates of elections
April 17, 1989	Registration of the Solidarność trade union
April 18, 1989	Gen. Kiszczak and Wałęsa form the Komitet Porozumiewawczy (connection committee) controlling the execution of the Round Table agreements
April 20, 1989	Registration for the farmers’ Solidarność trade union
April 23, 1989	Komitet Obywatelski designates Solidarność candidates to the chambers of parliament
May 1, 1989	Mass rallies by Solidarność, clash with riot police in Gdańsk and Wrocław
May 6–10, 1989	Strike in copper mines in Lower Silesia
May 8, 1989	First issue of “Gazeta Wyborcza”
May 9, 1989	First TV program of the Solidarność election broadcasting team
May 12, 1989	Gen. Jaruzelski announces presidential bid
May 16–18, 1989	Clashes with riot police in Kraków
May 17, 1989	Acts concerning freedom of conscience and the legal status of Roman Catholic Church passed
May 23–24, 1989	Rallies protesting the rejection of the registration of the independent students’ union
May 28–29, 1989	Academics strike in 28 universities
June 1, 1989	The Biuro “W” MSW (postal control unit) absorbed by Departament II MSW (counterintelligence unit)
June 2, 1989	First issue of the renewed weekly newspaper “Tygodnik Solidarność”
June 4, 1989	First round of parliamentary election, landslide victory for Solidarność; 160 seats in lower chamber and 92 in upper chamber taken by Solidarność candidates

June 12, 1989	Act concerning the 2nd round of parliamentary election passed
June 18, 1989	Second round of parliamentary elections; communist block gets 296 seats in lower chamber of parliament. Solidarność has 161 MPs and 99 senators, the PZPR, 173 MPs, the ZSL, 76 MPs, the SD, 27 MPs, and minor regime-block organizations, 23 MPs
June 30, 1989	Rally in Warszawa against Jaruzelski's presidential bid, clashes with riot police
July 19, 1989	National assembly (upper and lower chambers of parliament) elect Gen. Jaruzelski as president of the PRL (votes: 270 "pro", 233 "contra", 34 "withheld", 7 "void")
July 29, 1989	Gen. Jaruzelski resigns as 1st secretary of the central committee of communist party; Rakowski ascends
August 1989	Start of preparations for the mass weeding of the SB and PZPR documents
August 1, 1989	Rakowski resigns as prime minister
August 2, 1989	Lower chamber of parliament appoints Gen. Kiszczak as prime minister; forms the extraordinary committee for examination of dealings of ministry of internal affairs
August 7, 1989	Wałęsa proposes the ZSL and the SD to form a government with Solidarność
August 16, 1989	The SD and the ZSL exit the communist block and agree to form a government with Solidarność
August 19, 1989	Gen. Kiszczak resigns as prime minister, Tadeusz Mazowiecki appointed
August 24, 1989	Gen. Kiszczak, acting as minister of internal affairs, orders the reorganization of the security service SB
August 24, 1989	Lower chamber of parliament appoints Tadeusz Mazowiecki as prime minister
September 1, 1989	Departments III, IV, V, VI, general inspectorate of industry protection and Biuro Studiów MSW are reorganized as Departament Ochrony Konstytucyjnego Porządku Państwa, Departament Ochrony Gospodarki, and Departament Studiów i Analiz
September 1, 1989	The Wydział XI Departamentu I MSW (11th division of 1st department, unit in charge of invigilation and disintegration of Polish organizations abroad) dismissed
September 15, 1989	Biuro RKW MSW (SIGINT unit) absorbed by Biuro "A" MSW (communications HQ)
September 22, 1989	Independent students' union NZS registered
October 1, 1989	The security service academy WSO in Legionowo absorbed by the MSW's academy ASW
November 21, 1989	The Zarząd Polityczno-Wychowawczy MSW (political supervision service) dismissed
November 23, 1989	Acts abolishing the ORMO volunteer police force and office for the affairs of religious communities passed
December 1989	Military main political directorate dismissed
December 29, 1989	Parliamentary act changing the constitution; restoration of the Republic of Poland
September 1989 – January 1990	Mass weeding of documents of security services
January 23, 1990	Government issues decree concerning the seizure of PZPR assets
January 28–29, 1990	The communist party PZPR dismisses itself; anti-communist rally clash with riot police
January 31, 1990	Gen. Kiszczak orders a stop to the weeding of SB documents
January–March 1990	A series of rallies demanding the seizure of PZPR assets and the dismissal of the SB
February 15, 1990	Zarząd Ochrony Funkcjonariuszy MSW (internal control service of MSW) dismissed
March 8, 1990	Act concerning local government passed
April 6, 1990	Acts concerning the police, the ministry of internal affairs, and the state protection agency UOP, and abolishing the SB security service passed
April 11, 1990	Act abolishing the censorship office passed
April 18, 1990	The Internal military service, WSW, dismissed by order of the minister of national defence
May 10, 1990	The security service, SB, activities cease
May 21, 1990	The military political academy, WAP, dismissed

May 27, 1990	Elections of local governing bodies
July 6, 1990	Dismissal of Gen. Kiszczak as minister of internal affairs, and Gen. Florian Siwicki as minister of national defence
July 28, 1990	Act on political parties passed
July 31, 1990	The security service, SB, liquidated, the UOP is formed
September 1, 1990	The Żandarmeria Wojskowa (military police) and the Zarząd II Wywiadu i Kontrwywiadu SG WP (military intelligence and counterintelligence agency) formed
September 10, 1990	Decree abolishing the MSW academy ASW passed
September 27, 1990	Parliamentary act shortens the presidential term
October 12, 1990	Act abolishing the border protection troops, WOP, passed
November 9, 1990	Act concerning the seizure of PZPR assets passed
November 25, 1990	First round of presidential election
November 29, 1990	Act concerning passport laws passed
December 9, 1990	Second round of presidential election, Lech Wałęsa succeeds
March 22, 1991	Law concerning stock exchange passed
March 31, 1991	The ASW academy liquidated
May 10, 1991	New election code passed
May 16, 1991	The dismissal of the border protection troops, WOP; the state border protection agency Straż Graniczna formed
May 23, 1991	New law concerning trade unions passed
August 22, 1991	The military intelligence and counterintelligence agency, WSI, formed
September 28, 1991	Act concerning fiscal control (i.a. matters of fiscal intelligence) passed
October 25, 1991	Act concerning national defence, military intelligence and counterintelligence agency WSI, and military police ŻW matters, passed
May 28, 1992	Act demanding the release of information about the SB's secret collaborators holding public posts passed
June 4, 1992	Minister of internal affairs Antoni Macierewicz releases the list containing former SB records concerning members of both chambers of parliament and government members; governments demise
June 19, 1992	Constitutional court finds the 28th of May act unconstitutional
July 1992	The "Macierewicz's List" published by press
April 27, 1995	Permanent parliamentary committee for the supervision of the security services formed
December 1995	The "Olin" affair
April 11, 1997	Lustration act passed
June 18, 1998	Parliamentary resolution condemning communist totalitarianism
December 18, 1998	Act forming the Institute of National Remembrance passed
May 24, 2002	Act abolishing the UOP and forming the foreign intelligence and state security agencies (AW, ABW) passed
July 9, 2003	Act concerning the WSI passed
January 2005	The electronic inventory of SB informants and functionaries leaked from the IPN
June 9, 2006	Acts concerning the dismissal of the WSI and the forming of the military foreign intelligence and counterintelligence agencies (SWW, SKW), and the forming of the anti-corruption service CBA passed
February 16, 2007	Publication of the report on WSI activities

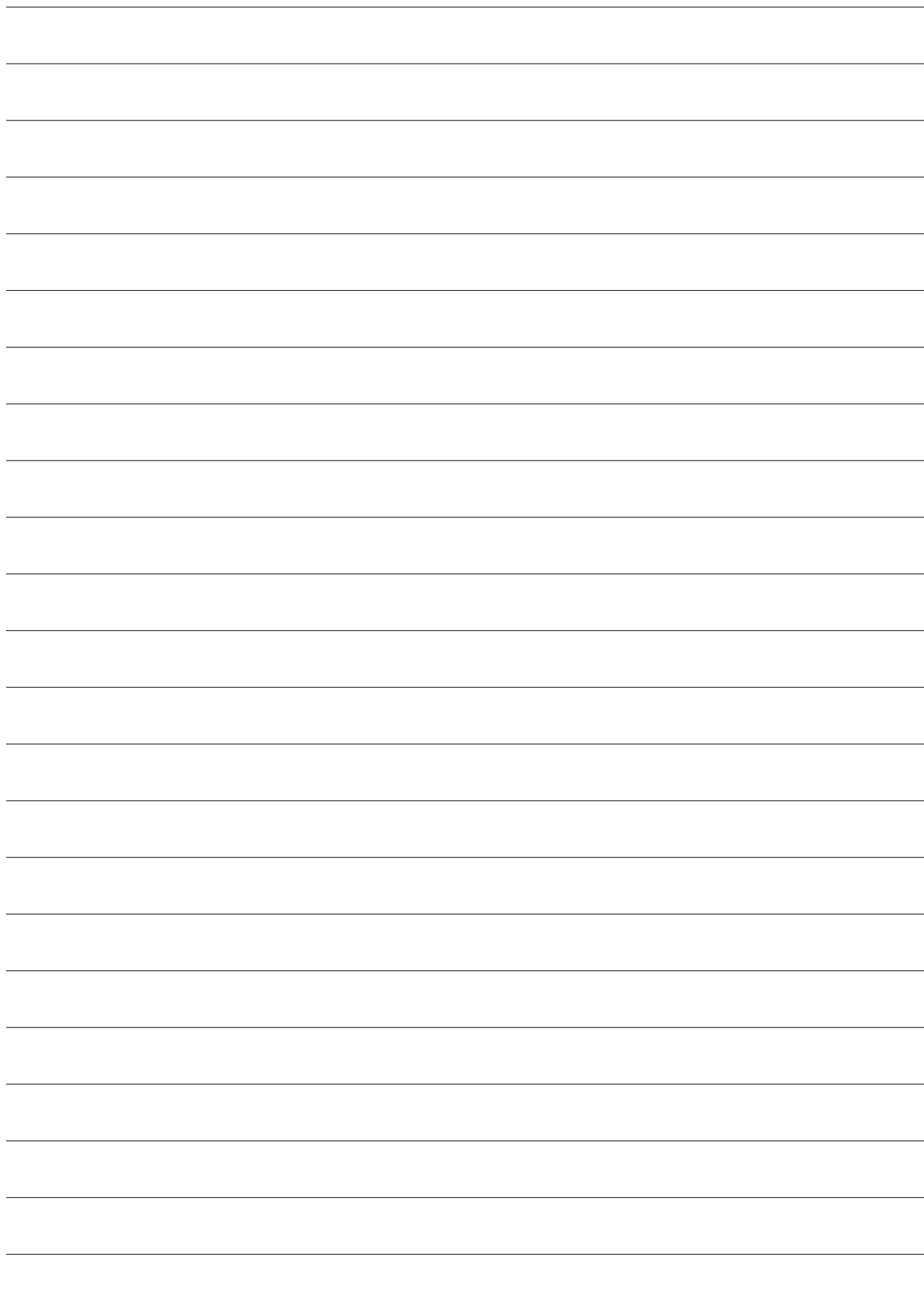
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MEMORY OF NATIONS

Democratic Transition Guide

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AUTHORS

ISTVÁN BANDI

Research Fellow at the Historical Archives of Hungarian State Security (since 2011). His field of research covers the activities of Romanian-Hungarian Secret Service against churches in the second part of the 20th century and the history of Romanian Secret Services in the 20th century.

ȘTEFAN BOSOMITU

Senior Researcher at the Institute for the Investigation of Communist Crimes and the Memory of Romanian Exile (IIC-CMER) (since 2010) and Associate Researcher at the Romanian Institute for Recent History (IRIR) (since 2012).

STEFANO BOTTONI

Senior Fellow at the Research Center for the Humanities, Hungarian Academy of Sciences (Hungary). His main research fields are the communist nationality policy in Eastern Europe and the social impact of state security on the Soviet Bloc countries. He has been a Consultant Member of the Vladimir Tismăneanu-led Presidential Commission for the Analysis of the Communist Dictatorship in Romania (2006).

LUCIANA JINGA

Senior Researcher (since 2007) and Executive Director (2012–2013) of the Institute for the Investigation of Communist Crimes and the Memory of Romanian Exile (IICC-MER). Visiting Fellow at the Centre for Historical Research in Western France (CERHIO) at the University of Angers, France (since 2017).

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TRANSFORMATION OF THE POLITICAL SYSTEM

STEFANO BOTTONI

THE IMPOSSIBLE TRANSFORMATION OF THE CEAUȘESCU REGIME FROM WITHIN

The configuration of the postcommunist Romanian political system was heavily influenced by the abrupt and violent overturn of the Communist regime, led since 1965 by Nicolae Ceaușescu. Romania was the only Eastern European country where the communist system collapsed in December 1989 upon a popular uprising that ended up in a bloody revolution claiming more than one-thousand victims. The peculiarly oppressive and personalized feature of the Romanian communist regime had made it impossible in the 1980s for the emergence of a moderate, businesslike, pro-Western faction within the ruling party. Those who were dissatisfied with Ceaușescu's personality cult did not attempt to modernize the system, but contrived palace revolutions based on the models of the interwar political machinations that had occurred in Romania, or the military putsch that had overthrown Marshal Antonescu in August 1944. Ceaușescu's potential party opponents were marginalized, and even disappeared, while opposition activity among Romania's intelligentsia remained confined to a few individual exceptions, and this also prevented the internal reception of Soviet perestroika and glasnost. Between December 21 and 22, 1989, the active intervention of the Army and the discrete support from the political police (Securitate) played a decisive role in bringing down Ceaușescu's absolute power. The exceptionally closed nature of the Romanian dictatorship predestinated it to a non-negotiated, violent falldown.

THE 1989 REVOLUTION AND THE NATIONAL SALVATION FRONT

According to the database of the Romanian Revolution of December 1989, no less than 1,290 casualties could be identified on December 17–31. Most of them were civilians and were shot dead during the convulsive days between the fall of Ceaușescu's dictatorship on December 22, and the execution of the presidential couple. Nicolae and Elena Ceaușescu faced a drumhead court-martial, created at the request of the Council of the National Salvation Front (CNSF) which happened on December 25, after a short mock trial. The National Salvation Front (NSF) was a transitional power structure created on December 22, 1989 to handle the chaotic situation of the victorious revolution. The first public statement of the new power structure was issued early on the evening of December 11. The communiqué of the NSF was broadcast by the state television and read by Ion Iliescu, a former party apparatchik who had been marginalized by Ceaușescu, but enjoyed the support of both the internal opposition and the Soviet embassy in Bucharest. The crucial text was based on a draft prepared before the flight of Ceaușescu from Bucharest, and amended by Silviu Brucan, a former communist propagandist and diplomat who had

turned into a dissident during the 1980s, and who played a key behind-the-scenes role in the setting-up of the new power structure. The preamble announced the creation of FSN, which was "supported by the Romanian army" by "all the healthy forces". It announced the dissolution of all "power structures": the government and the State Council. The entire executive power was assumed by the Council of the National Salvation Front, formed by 38 members who represented a heterogeneous conglomerate of Army staff, former communist bureaucrats, genuine revolutionaries, artists, and intellectuals. On December 27, Ion Iliescu was elected head of the CNSF. The second part of the proclamation contained ten main objectives, the first of them being the abolition of the one-party system (the PCR was outlawed by decree on January 12, 1990, and on January 18 another decree ordered the nationalization of all party properties) and the establishment of a multiparty and democratic government. The declaration called for free elections in April of 1990, and declared the separation of powers between the branches of government. Other provisions concerned the restructuring of the economy, stopping the destruction of villages, and the protection of civil rights of national and ethnic minorities. The chaotic transition from the personalized dictatorship of Ceaușescu to a pluralist political system went along with the public debate over the "mysteries" of the revolution. The bloody overturn of the Ceaușescu regime had left open questions, the most important of which was the never attempted identification of those "terrorists" who were responsible for the death of hundreds of people. Behind this, the most sensitive issue was around the ambiguous role played by the security forces. How was it possible that the all-powerful Securitate failed to suppress the small demonstration of solidarity with the persecuted protestant reverent László Tórkés in Timișoara, on December 15–16, paving the way for the emergence of a revolutionary movement? From the first moment, the new power structures overemphasized the positive role of the Romanian Army, underlying the beneficent function played by the only political institution that had emerged from the upheaval, the NSF. The logical and factual shortcomings of the official narrative started to emerge shortly after the events, when it became clear that the Army and other state agencies had been involved in mass shootings before changing sides. Anti-communist revolutionaries from Timișoara and those affiliated with liberal right wing (anti-Iliescu), post-communist political parties conceded that the 1989 events started as a genuine popular revolt but ended in a "hijacked" or "expropriated" revolution. Most scholars agree that Ion Iliescu and "Gorbachevist" pro-reform communists coalesced around him seized power on December 22 and expropriated the revolution via the National Salvation Front. Despite its democratic appearance, the CNSF became the expression of authoritarian tendencies because it acted as the only legitimate representative of the newly established democracy. Not surprisingly, the key personalities of the Romanian transition were two former party and nomenclatura members: Ion Iliescu and Petre Roman.

REBRANDING THE OLD ELITE: THE EARLY POST-COMMUNIST POLITICAL SYSTEM

Ion Iliescu (b. 1930) belonged to a group of old-guard Communist activists dismissed by Ceaușescu, and who opposed his personal rule; they were supported by the CPSU first secretary, Mikhail Gorbachev, as an alternative leadership for Romania. After the Timișoara riots, on 22 December 1989, Iliescu took the lead of the CNSF. In February 1990 Iliescu became head of the Provisional Council of National Unity (PCNU), while contrary to the previous promises, the CNSF announced that it had transformed itself into a political party to participate in the impending national elections. Miners from the Jiu Valley attacked participants in the enormous anticommunist demonstrations that the newly reconstituted “historical” liberal and peasant parties organized in early 1990. The National Salvation Front won a landslide victory in national elections held on May 20, 1990, receiving more than two-thirds of all votes cast, and NSF leader Ion Iliescu was elected president for a two-year term with 85 percent of the vote. The weak and scattered opposition tried to challenge NSF revolutionary legitimacy by transforming itself into a permanently mobilized anticommunist force through the students’ protest in Bucharest and in other major cities. The moral rejection of the Iliescu-led semiauthoritarian system marked the birth of the myth of the “unfinished revolution” and entrapped the pluralistic public sphere in the binary logic of “us” against “them.” Starting from these premises, the activity of the unofficial pro-NSF militia culminated in the bloody procession of miners marching through the streets of Bucharest between June 13 and 15, 1990. The first, infamous and violent demonstration, labeled *Mineriad*, claimed dozens of victims and was followed through autumn 1991 by three other episodes of the incumbent use of politics by other means. What made the Romanian situation special in an Eastern European comparative perspective, was the upward spiral of extra-institutional pressure from the streets on systemic transformation.

The fate of the government led by Petre Roman, between May 1990 and October 1991, illustrates well the distressing nature of the institutional transformations in post-communist Romania. Petre Roman (b. 1946) was the son of Valter Roman (b. Ernő Neuländer), a prominent member of the early communist nomenklatura. A trained engineer, Roman spent several years in France during the 1970s, and then entered the Romanian academic sphere. He started his political career at the end of December 1989, when, after the toppling and execution of Ceaușescu, he joined Ion Iliescu and the founders of the National Salvation Front. Roman became a member of the Provisional Council of National Unity, and on 26 December 1989, prime minister of a provisional government. Between 1990 and late 1991, the government, led by Petre Roman, was assigned the impossible task of navigating a heterogeneous coalition of unreformed socialists and nationalists into the unknown realm of Western-type democracy. In the parliamentary elections of May 1990, Roman won a mandate and remained in office until 1 October 1991, when he was forced to step down by striking miners from the Jiu mining region. Leaders of the Jiu strike were suspected of connections with President Iliescu, who had entered into conflict with Roman over leadership and over the rate at which economic liberalization was unfolding (Roman favored an acceleration).

During his first and second term in office (1990–96), president Ion Iliescu relied massively on the former Communist apparatus

and the reshaped the political police to slow down market reforms. In December 1992 he was reelected president, formally resigning from the leadership and membership of the NSF, which, after a split and the departure of its liberal and anti-Communist activists, changed its name to the Democratic National Salvation Front, and then to the Party of Social Democracy in Romania, in 1993. In 1992–96 market reforms were slowly introduced, but Iliescu and the PSDR-based government were reluctant to integrate the country within the European Union and NATO. Until 1995, Iliescu and the PSDR cooperated with the extreme nationalists and took a distinctively pro-Russian stance concerning major security issues, as shown by the appointment of a former pro-Soviet high officer, Mihai Caraman, as the director of the “new” Foreign Intelligence Service. Caraman was dismissed on April 1992 upon strong pressure from NATO general secretary, Manfred Wörner.

A SMALL STEP FORWARD: THE 1991 CONSTITUTION

From 1990 to 1996, the collapse of the communist party structures did not put forward any strong democratic alternatives to the Ion Iliescu-led “original democracy.” The latter was a definition Iliescu repeatedly used to describe Romania’s post-communist political path, as envisaged by the National Salvation Front and by its successor parties. In the creative interpretation of the Western democracy, the multiparty system would have been a mere facade, since genuine competition was jeopardized by the infrastructural and media preponderance of the successor party. The new Constitution adopted by the Romanian parliament on November 21, 1991, and approved by popular referendum defined Romania as a “national, sovereign, independent, unitary, and indivisible state,” and enshrined the return to multiparty democracy and the rule of law. However, the structure of powers and the collective mentality inherited from the communist period made it challenging to effectively make the declared principle of the separation of executive, legislative and judicial powers. Iliescu and its pundits made extensive and often nontransparent use of the administrative resources at their disposal, contributing to the weakening of the freshly adopted system of checks and balances. The French-inspired Constitutional Court operated in Romania until the early 2000s as a mixed juridical-political institution with a marginal impact on the country’s juridical culture. The juridical system inherited the pre-1989 communist-trained staff, and during the 1990s only partially emancipated itself from the legislative and executive power through a gradual accumulation of legal procedures and competences. The Nordic institution of *ombudsman* (literally “attorney of the people”), whose role is to defend the rights of citizens against public institutions, was established in the 1991 Constitution, which only became effective in 1997. The slow progresses toward a full-blown democracy were sanctioned by the Council of Europe, which initially rejected Romania’s application upon its failure to comply with basic European democratic standards (Romania had to wait until 1993 to gain full membership).

THE 1996 “SECOND REGIME CHANGE”: SUCCESSES AND FAILURES

The first major change in the institutional setting and the political culture of the ruling elites was pushed forward by the 1996

presidential and parliamentary elections. Iliescu's post-communist party was ousted from power by a coalition of democratic and anti-communist groups in alliance with the civil society, and the formerly marginalized party of Hungarian minority, Democratic Convention of Romania (DCR), under the leadership of university professor Emil Constantinescu. In November 1996 the DCR won the parliamentary elections, and on 17 November 1996 Constantinescu defeated Iliescu in a dramatic runoff of the presidential election. During his term, which lasted until December 2000, Constantinescu supported steps toward the accession of Romania into the European Union and NATO. He gave his backing to the NATO intervention in Kosovo, causing distress in the pro-Serbian sectors of Romanian society. He tried to introduce structural reforms leading to the strengthening of the market economy and civil society, and he also attempted to come to critical terms with the country's dictatorial past through the establishment of a vetting institution. Nevertheless, Constantinescu failed to lead the country out of economic recession. In the presidential elections of 2000 he backed Prime Minister and National Bank governor Mugur Isărescu, who nevertheless lost to Ion Iliescu and the post-communist left. Constantinescu famously claimed he had been defeated by the former secret services and their intact power system. In fact, the right-wing coalition of 1996–2000 did not possess the administrative capacities and the political skills that the country's catastrophic state would have required.

THE LAST 15 YEARS: BETWEEN EURO-ATLANTIC INTEGRATION AND SKELETONS IN THE CLOSET

The incumbent Social Democratic Party followed, until 2004, a different agenda from the isolationist course of the early 1990s. The central figure in this evolutive process was international lawyer Adrian Năstase, a former scholar with an extensive, albeit shady, Western background. Năstase had spent the years 1980–82 on scholarships in Great Britain and Norway working at the UNESCO Department of Human Rights and Peace in London and at the International Institute of Peace Studies in Oslo, and subsequently served as director of the International Institute of Human Rights in Strasbourg and researcher at the French Society on International Law in Paris. The young talented Năstase was loyal to the Ceaușescu regime after 1989, but then put himself at the service of the post-communist political sphere. In 1990 Năstase began a political career in the National Salvation Front, became an MP, and was foreign minister until December 1992. From 1992 to 1996 he chaired the Chamber of Deputies of the Romanian parliament. When the left lost the elections of November 1996, Năstase was elected, in 1997, to deputy chairman of his party and a member of the Romanian delegation to the Parliamentary Assembly of the Council of Europe. He criticized the NATO air raids on the new Yugoslavia in 1999, as well as to the concessions of the reform government to the Romanian Hungarians. Năstase became prime minister after the 2000 election, in a very difficult economic moment for Romania. His government announced the creation of a “socially oriented” market economy, a struggle against corruption, and efforts toward Romania's integration into NATO and the European Union. During his tenure, Năstase had to face a major scandal linked to the publication in the domestic and international press of a series of anonymous and controversial emails

called the “Armageddon Reports.” The seven releases, apparently produced by persons and/or institutions close to the subject or even involved in internal fighting with the security apparatus, exposed the continuity between the old and the new political elite, especially concerning the secret services staff. The injection of unverifiable, but most probably, classified information about those former Securitate officers and sources who continued to hold key posts in the intelligence services after 1989 happened during the final talks that preceded Romania's integration into NATO. The authors of the leak wanted to demonstrate that former Securitate officers are still in control of the country's intelligence structures, a fact that might have jeopardized the Romanian efforts to convince its Western partners about the contrary. Between 2004 and 2014, Romanian political life had been dominated by President Traian Băsescu, a maverick right-wing politician who has strengthened Romania's Western commitment and gained large, albeit temporary, support among the liberal intellectual elites for his resolute standing for the disclosure and condemnation of communist crimes through the Presidential Commission that operated between 2006 and 2007, under the direction of political scientist Vladimir Tismăneanu. However, historian and civil activist Marius Oprea, who had previously led a fierce battle against the reluctance of public authorities to tackle the issue of communist crimes, denounced in a documented pamphlet the involvement, starting in the 1970s, of President Băsescu with the communist secret service as an undercover officer with the economic foreign intelligence. More recently, a similar case based on newly released archival evidence has been made against former Prime Minister and long-standing respected governor of the Romanian National Bank Mugur Isărescu, who was also exposed as former undercover officer of the foreign intelligence.

LESSONS LEARNT AND RECOMMENDATIONS

The structural and personal intertwining between the political sphere and security structures is not an exceptional feature in the postcommunist power structures. Romania, however, plays a peculiar role for the extreme personalization and the heavy influence of the operative mindset of the former Securitate on the formally democratic secret services. Romanian secret services have been widely criticized for being under the political control of one man or one group, rather than under the control of elected bodies. In any case, they have been continuously useful for political infighting. The internal security agency has also been accused of illegally investigating journalists, media agencies, and politicians. The leadership of the Minister of Interior is a very important factor with regard to controlling the political arena and the business sector in Romania. This point mostly refers to the controversial “secret service” of the security services, the General Directorate for Intelligence and Internal Protection (Direcția Generală de Informații și Protecție Internă, DGIPI), that was partly reorganized in 2016 in order to make it more accountable. Since its creation in 1990, DGIPI has functioned as a “deep state” within the labyrinth of Romanian politics. The leadership of the DGIPI had access to the archives and resources of the institutions and consequently had compromising information about politicians and businessmen, and used this information to either boost or weaken the popularity of a political party. The countless scandals that have exposed the connubial relationship between

the Romanian secret services and domestic political life show that the Communist past still casts a shadow over everyday political practices, and represent a serious obstacle to the emergence of a full-blown democratic culture in Romania. To prevent the ubiquitous secret services from capturing other state agencies

and the political sphere, a more effective supervision of the activities of the secret services would be necessary. This move should be accompanied by a comprehensive reform of the internal security system, aimed at making it financially more transparent and juridically more accountable.

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DISMANTLING THE STATE SECURITY APPARATUS

THE ROMANIAN SECRET SERVICES FROM 1948 TO 2016: PERFORMANCE, LEGALITY, TRANSPARENCY

ISTVÁN BANDI, STEFANO BOTTONI

ABOUT SOURCES

Writing about intelligence services is an extremely difficult scholarly challenge, as the researcher is bound by the professional and moral liability to avoid the accusation of bias. **Basic sources of such a work** might include secondary literature, and a vast amount of legally available online and offline sources like legal regulations pertaining to secret services as well as and the public annual reports that these organs submit to the Romanian parliament. In the case of present-day special services, operational files stored in the internal archives of every institution are not available for scholarly use. News, data and results of domestic or international research published in (or made available to) the media must be treated as different types of sources. A most valuable source for this work has been presented by transcripts and press accounts of penal lawsuits launched after 1989 in Romania, where the discrete involvement of special services has often unraveled to the public. Other useful source have been on the one hand the specialized offline “internal” bulletins produced and/or distributed by media outlets controlled by the secret services, and on the other hand those online platforms which have been created over the last years by individuals or groups linked to the assertive Romanian civil society, and whose main goal is to denounce the growing infiltration of the secret services into the Romanian political and societal life.¹

Managing and retaining secrets are one of the unavoidable consequences of intelligence activity, and an adequate degree of conspiracy is indispensable for the effective fulfillment of the special tasks assigned to intelligence bodies. At the same time, in modern democracies secret services operate in an equilibrium built on legality, compliance with human rights and the division of powers. Their performance is expected to be transparent and measurable. Secret services are a double-edged sword. They are necessary and useful, but may turn into a destructive weapon if they fall into the wrong hands, endangering both themselves and the public. In a democratic system they can prevent hazards and terrorist acts, contributing to protect the national interests of their countries. In a different historical situation or in a different social system, they will likely serve as an instrument of repression and deprivation of fundamental rights. In all cases, secret services must be subjected to societal control. What happened when such control rights were not assigned to the society? How and in what quality this control took shape? And how does this burdening legacy impact the effectiveness of Romanian special services today? These are the main questions this chapter will try to answer.

SECURITY SERVICES BETWEEN LEGALISM AND REPRESSION. A REVIEW OF ORGANIZATIONAL HISTORY FROM 1945 TO 1989

After the political turn of August 23, 1944, the new Romanian government initiated an intelligence cleansing at the intelligence level to remove those staff members who were known to be close to Nazi Germany. The first wave of reform affected **Department II of the Chiefs of Staff**, better known as *Bureau 2*, the military intelligence called *Special Intelligence Service – SSI (Serviciul Special de Informații)*², and the **General Security Unit (Siguranța Națională**, better known as *Siguranța*) which operated within the criminal police. The scope of their work encompassed **foreign intelligence, domestic intelligence and counter-intelligence**. The Police and the General Directorate of Security (*Siguranța*) had been particularly penetrated by Nazi sympathizers. Parallel to this, Soviet-backed communist infiltration began in the realm of protective structures. This trend intensified when Petru Groza’s pro-communist government took office on March 6, 1945. After a short transition period, the *Siguranța*, the General Directorate of Security, the Special Intelligence Service, the police and the gendarmerie were all taken over by the communists. Officers trained in the prewar were gradually replaced by a new staff, selected on the exclusive basis of political loyalty.

The political police, better known as, *Securitate* (first official name: **General Directorate of People’s Security – Direcția Generală a Securității Poporului – DGSP**) was established by Decree No. 221 of August 28, 1948 as the fruit of communist party efforts to set up a strong monitoring and repressive body. This organization was set up a meager eight months after the People’s Republic was proclaimed in Romania.³ *Securitate* exercised profound influence on the personal fate of millions of citizens over four decades. With a development curve far from being linear, the *Securitate* underwent ten reorganizations over this time, but its size and operative duties were always aligned to the political goals of the regime *Securitate* had been called to safeguard.

Securitate’s history in 1948–1989 can be divided into four distinctive periods lasting ten years each:

1 See the most active forums and information sources: www.contributors.ro, a pilot initiative of the *Societatea Online*; www.militiaspirituala.ro, the website of the *Asociația Mișcarea Civică Miliția Spirituală*; and www.romania-curata.ro, website of the civil network *Alianță pentru o Românie Curată*.

2 Special Intelligence Service.

3 The Republic was proclaimed on December 30, 1947.

1/ 1948–1958 were the learning years, the period of violent confrontation with the “enemies of the working class” when the foundation of the Securitate’s operational mood was laid down in terms of methods and tools applied. In the 1950, Securitate officers gained notorious fame as the dreaded Party’s fearful weapon. The organization suffered the highest number of reorganizations in this first period of “identity searching”. Accordingly, their name between September 1, 1948 and April 1, 1951 was **General Directorate of People’s Security (Direcția Generală a Securității Poporului – DGSP)**, then changed to **General Directorate of State Security (Direcția Generală a Securității Statului – DGSS)** between April 1, 1951 and September 20, 1952. From the latter date and resulting from the experimental application of the Soviet model, an independent **Ministry of State Security (Ministerul Securității Statului – MSS)** was launched. The new body soon proved not to be a viable structure. As a consequence, the MSS was merged into the Ministry of Interior on **September 7, 1953**, and the Securitate continued to operate within that ministry. Party leadership was almost constantly busy aligning the Securitate’s organization to the regime’s needs. The next reorganization attempt came in **1956** and aimed at improving Securitate’s operational efficiency. This move was closely tied with the endeavor to keep the repressive institution under the Party’s control and avoid scenarios in which it could become a tool of internal power struggles. In the favorable situation created by the de-Stalinization process, the fear that Gheorghiu-Dej could use Securitate for his own purposes spurred certain members of the Political Committee to desire a change. On 10 July 1956, the Ministry of Interior was reorganized into the Interior Department and the Security Department, removing the latter from the direct control of Alexandru Drăghici, a loyal follower of Dej. After the Hungarian revolution, however, the hardliner Drăghici gained back full control of the political police, and a second wave of massive state violence against all potential opponents started in March 1957.

2/ 1958–1968: This period began with the withdrawal of Soviet troops from Romania in 1958, and ended in 1968, when a comprehensive reform of the security apparatus was implemented. On July 1967, Decree no 710/22 transformed Securitate into the **State Security Council (Consiliul Securității Statului – CSS)** within the Ministry of Interior Affairs. The State Security Department (**Departamentul Securității Statului – DSS**) was given the task “to coordinate, control and direct in a unified manner the efforts of security organizations aimed at preventing, uncovering and eliminating any and all activities against the security of the state”. The department was led by the State Security Council as a “decision-making organ” ensuring that the unit worked in compliance with the “principle of collective work and leadership”. The Council was led by a chairman who was also the first deputy of the interior minister. On April 3, 1968, this Council separated from the Ministry of Interior Affairs and functioned as a central body. The former Minister of Interior, Alexandru Drăghici, was dismissed, put under internal surveillance and expelled from the Party.

3/ 1968–1978: Following the formal condemnation of the so called “authoritarian tendencies” of the 1950s, an attempt was made to modernize the institution by introducing modern standards in respect to human resources, logistics and work methods. Organizational changes took place in 1968; CSS was detached from the Ministry of Interior, and in 1972,

the Securitate rejoined the Ministry of Interior. Further steps were made in 1973, when a separate Foreign Intelligence Directorate (**Direcția de Informații Externe – DIE**) was established, and in 1978, when the formerly abolished DSS was recreated to better define the operative tasks of each unit and avoid overlaps. This ten-year period was also characterized by power struggles between the Romanian Communist Party (RCP) and the Securitate, and the Securitate’s operational work underwent a growing bureaucratization. of the Securitate’s operational organization could be detached. The defection of the Romanian intelligence deputy chief, general Ion Mihai Pacepa, inflicted a serious blow to the prestige of Securitate. The political leadership reacted by tightening control over the secret services.

4/ 1978–1989: In the last decade of the communist regime the state security experienced a professional decadence that ran parallel to the bankruptcy of the whole system. Security tasks were increasingly neglected and day-to-day activities were overly politicized.⁴ Pursuant to Decree No. 121 of the State Council of April 8, 1978, the DSS came to be part of the Ministry of Interior and performed the ministry’s responsibilities in **protecting state security and in detecting and preventing crimes against state security**. Until as late as 1989, the DSS retained its structure established in 1978 in nearly unchanged form. Changes were limited to the addition of units specializing in counter-terrorism, and to the increased fight against financial crime.

COLLABORATION AND COLLABORATORS, THE SOCIAL EMBEDDING OF THE SECRET SERVICES

In the early period, Securitate employed a staff of approximately 4,000⁵ to fulfill its purpose as defined by the Romanian Communist Party. Owing to institutional reforms and to fulfill their role properly, the Securitate was transformed into a stand-alone ministry. In 1956, after the merger with the Interior Ministry, the headcount was 56,754. The number of those dismissed in the first wave of internal cleansings of 1956 equaled 25,139. In 1967, Securitate staff numbered 16,740 and apparently avoided major changes in subsequent decades, as the corresponding figure in 1989 hardly exceeded 15,000.

It is very important to point out that the Securitate was solidly embedded in society and in the overall state apparatus, as it could rely on such organs as the new Soviet-type Police (*Militia*), the Securitate Troops (*Comandamentul Trupelor de Securitate – CTS*), the Justice organization, the Law Enforcement Directorate, and last but not least, the Communist Party. Acting in close cooperation and built one on the other, these structures could successfully sustain the totalitarian regime. The Romanian communists who came into power with Soviet support, only managed to enforce total control over the gendarmerie in 1949. This force was converted into **Militia**, a military police unit with a staff of nearly 60,000. It must be noted that the rapid replacement of staff members with persons loyal to the Party was not easy.

4 Florian Banu, Liviu Țăranu, *Securitatea 1948–1989. Monografie. Vol I.*, București: CNSAS – Editura Cetatea de Scaun, 2016, 68.

5 Banu – Țăranu, *Securitate 1948–1989*, 62.

Therefore, even in the early 1950s, only 35,000 of the approved 52,000 jobs could be filled.

By the 1960s this headcount decreased to 30,000. The changes carried out in the late 1960s and in 1978 left the Militia's staff and organization unaffected, both in terms of headcount and organizational role. Cooperation with the Securitate was continual, as the Militia also performed information gathering tasks, especially in the rural environment. Militia joined in all repressive measures initiated or monitored by the Securitate, e.g. mass internment and forced relocations in the late 1940s and early 1950s. Later they took part in oppressing the miner riots in the Jiu Valley in 1977, and in breaking up the workers' anti-Ceaușescu protest in Brașov in 1987. Their role in sustaining the regime did not stop at mass measures. They also focused on and acted against specific individuals that could lead to the death of the person subjected to the proceedings.⁶

A similar role was assigned to and fulfilled by the Command of the Security Troops, a repressive body established in 1948 by reshaping the prewar Gendarmerie. As of the late 1940s, the aggregate number of staff for its central and regional organizations totaled to 64,000⁷. At first, the CTS was subordinated to the Interior Ministry, then after a number reorganization steps, border control was taken from them in 1960, and the number of staff was reduced to slightly over 23,000. At that time, the CTS reported to the Securitate. According to archive sources, their headcount remained nearly unchanged until 1989.⁸ This law enforcement body played a key role in supporting the regime. In the 1950s, CTS implemented campaigns of forced relocation and internal displacement of opponents and those classified as potential threats to the state security. CTS staff also guarded work camps and internment camps. After the consolidation of the 1960s, security troops actively participated in the violent repression of the aforementioned anti-regime protests.

JURISDICTION AS A SEPARATE UNIT WITHIN REGIME-SUSTAINING INSTITUTIONS

The Romanian Communist Party (RCP) implemented a Soviet-type power structure. In that model, the law enforcement organs of the state were transformed into "the fist of the people" and charged with the principal responsibility of "safeguarding the revolutionary gains of the people". The same way, the communist party enchainned the judicial system to gain full power. As with the Securitate, the institutional history of jurisdiction in communist Romania can be divided into two distinct periods: the first ending in the mid-1960s, and the second ending in 1989. In the first period, jurisdiction was under total political control, as shown by the fact that court rulings were appointed by the Political Committee of the RCP and the work of judges was supervised by party committees at courts.⁹ Pursuant to applicable laws, those convicted to death penalty due to acts against the state were not entitled to appeal until as late as 1956. Even then, appealing was only enabled formally in the name of "socialist legality", since appeals were almost always rejected and the original verdict was carried out.¹⁰ Organic cooperation with the Securitate was also a result of follow-up investigations. In practice, the Securitate supervised information gathering by the political police at the courts.

Another form of depriving individuals from their rights was the implementation of mass administrative measures,

Year	Number of convicts
1950	6,635
1951	19,235
1952	24,826
1953	4,730
1954	5,073
1955	3,332
1956	2,357
1957	3,257
1958	6,362
1959	8,910
1960	1,711
1961	2,232
1962	657
1963	223
1964	240
1965	258
1966	294
1967	312
1968	20

Source: *Arhiva Consiliului Național pentru Studiarea Arhivelor Securității, fond Documentar, Dosar 53, vol. 21, f. 76.*

legitimized by the dictatorship's jurisdiction either in advance – as "blank checks" – or retrospectively. For example, if the Securitate arrested someone without authorization from a prosecutor, the Securitate official involved in the case was made immune to any disciplinary action. What is more, as the legal status of justice agencies was transformed in the early 1950s and their involvement in sustaining the regime increased, prosecution was militarized and the organization was assigned unlimited power. It is not surprising that the Securitate and justice agencies worked hand in hand to present statistics proving their effectiveness in combating various "enemy" categories (wealthy peasants, clergymen, or the former aristocrats and state functionaries in the pre-1944 period). They acted so on political impulse, but also on their own initiative, serving target achievement motivations by boosting penalty statistics by declaring people guilty in advance.

The time of mass repression was followed in the late 1960s by the introduction of more sophisticated investigative tools and working procedures. The Securitate employed less and less violent operational methods to keep society under control.¹¹

6 Banu – Țăranu, *Securitate 1948–1989*, 371. In 1985, engineer Gheorghe Ursu was interrogated and died in the prison hospital of Jilava later in the year.

7 90 % of that staff comprised enlisted soldiers.

8 See Florica Dobre, Florian Banu, Cornelia Duica, Silviu B. Moldovan, Liviu Țăranu, eds., *Trupele de Securitate (1949–1989)*, București: Editura Nemira, 2004.

9 Mircea Chiritoiu, "Rolul Biroului Politic al PMR în instrumentarea proceselor politice din România anilor 1949–1953", in *Analele Sighet 7*, București: Fundația Academia Civică, 1999, 288–292.

10 Banu – Țăranu, *Securitate 1948–1989*, 390.

11 This did not mean, however, that life-threatening methods disappeared. Lethal actions of Romanian secret services abroad against emigrated persons are a good illustration of that. The use of terrorists for carrying out penalties remained acceptable for the regime, as shown in the 1981 Munich attack by international terrorist Carlos and his associates against the Romanian section of Radio Free Europe. See Liviu Tofan, *Șcalul Securității: Teroristul Carlos în solda spionajului românesc*, Iași: Polirom, 2013. Other evidence of the ruling regime's double game was the Haiducu case. ►

Similarly, the disguised deprivation of rights became dominant in judicial proceedings as well. Keeping the interests of the working class in focus remained an ideological guideline, except that while in earlier times it was the usual business for Securitate and the Militia to imprison fellow citizens; under Ceaușescu the justice system was brought aboard to create the impression of “socialist legality”. The reassignment of criminal acts into a different legal category continued to enable repression. Attempts to overthrow the political order and counter-revolutionary acts, financial crimes and criminal acts against public property all became politicized.¹² Measures of mass repression did not disappear as the Securitate continued to identify and process data on “dangerous truants” or “parasites” as they were called in authority parlance at the time, then the Militia would arrest these individuals. According to reports, Amnesty International was aware of 5,800 imprisoned individuals as of 1982.¹³

The **system of prison institutions** is another key area to mention when analyzing the history of the secret services. When these institutions were subordinated to the DGSP in 1949, they actually underwent comprehensive operational transformation. Counter-espionage, intelligence and reconnaissance are professional areas where officers must be subject to supervision. Political inmates were confined at special locations, and many of them were forced to undergo the Soviet educational theorist Anton Makarenko’s method of brutal psychological reeducation at prisons in Pitești, and two other sites, as well as at Danube–Black Sea Canal labor camps. This was done in an effort to obliterate the former identities of the young, suspected right-wing extremists (“total psychological exposure”) as the first step toward their adaptation to the desired new ideology (“metamorphosis”). This system of reeducation was abruptly discontinued in the autumn of 1952, and some of the guards at the prisons where it was utilized were brought to trial and condemned to death. Many of those who had been exposed to the experiment either committed suicide or became insane following their release from prison. In prison institutions, the Securitate’s presence was continual via the Investigation Directorate. Its impact on society was also evident throughout the network of undercover agents.

THE SECURITATE’S RELATIONSHIP TO THE PARTY: EMBEDDEDNESS AND CONFLICTS

The relationship between the communist party and secret services was solid from 1945 all the way to 1989. Yet the relationship can be divided into phases based on changes in its quality. In the time of the political transition to total power, the previously, top quality, secret service was transformed along a Soviet Stalinist model. The former national structures were dismantled with the help of purification committees and leaders were selected on the basis of political loyalty. Already in the early 1950s, only 400 of the 10,000 security officers were not members of the party or its youth organization.¹⁴ The new role of protecting the People’s Republic and its institutions against domestic and foreign enemies not only appeared in the name but also in the statutes of the security service established in 1948 (**General Directorate of People’s Security – Direcția Generală a Securității Poporului – DGSP**). Control by the party was already present in the secret service from 1949 in the form of a political directorate. Special services had their own party committees in place that reported directly to the Central Committee of the Party. Regional and

county-level units worked in close cooperation with Securitate branches. Securitate was not obliged to report on its own activities, but regularly briefed local party bosses on the operative situation on the ground.

In addition to the party committees operating in the services, control by the party was also enforced through the human resources directorate and the training directorate. The former ensured proper selection while the latter made sure to keep staff members properly politically educated. Regarding both pre-1964 (Soviet-trained), and post-1964 (national-minded) Securitate, it remains a disputed issue whether the Securitate was under collective party control, or it mostly dependent on a single individual.¹⁵

When Nicolae Ceaușescu came into power in 1965, the relations between the Party and the Securitate changed as well. The party general secretary personally supervised the intelligence, and Securitate was increasingly directed by the RPC Political Committee via the State Security Council. By the mid-1970s, it became a routine for local and regional parties to supervise the Securitate’s operative work. A rather illustrative example of the party’s influence is the composition of the enrollment committee that interviewed would-be professional officers: the party delegated five members, and the concerned organizational unit of the services delegated one professional member. Party control over interior ministry organs was further strengthened by the fact that Nicu Ceaușescu, from the mid-seventies, the son of the general secretary was a member of the Interior Ministry’s Political Committee, as Secretary of the Central Committee of the Union of Communist Youth. Still, even such forced ideological and party control proved insufficient to induce full ideological commitment in the Securitate staff; as the 1989 revolution would have demonstrated.

VIOLATIONS OF LAW BY COMMUNIST SECRET SERVICES BASED ON COMMUNIST LEGAL PROVISIONS

The following overview provides some examples of the systematic violation of law committed by the security services and the law enforcement against Romanian citizens between 1945 and 1989.

1/ Abuse of power based on Decree 221/1948. This decree ordered that only professional state security officers are entitled to act in “investigating criminal acts that endanger the democratic political system and the security of the people”. Based on

► Haiducu was a dormant Securitate agent who attempted to assassinate intellectuals living in Paris in the early 1980s. The assassinations were ordered by Romania and targeted Virgil Tănase and Paul Goma. See Liviu Tofan, *A patra ipoteză. Ancheta despre o uluitoare afacere de spionaj*, Iași: Polirom, 2013.

12 Banu – Țăranu, *Securitate 1948–1989*, 384–398.

13 Octavian Roske, ed. *Romania 1945–1989. Enciclopedia regimului comunist. Represiunea P-R*, București: Institutul Național pentru Studiul Totalitarismului, 2016.

14 Source: Arhiva Națională Consiliului Național pentru Studierea Arhivelor Securității (ACNSAS), Fond Documentar, dosar 199, f. 89. Quoted in Banu – Țăranu, *Securitate 1948–1989*, 282.

15 Marius Oprea, *Banalitatea răului. O istorie Securității în documente 1949–1989*, Iași: Polirom, 2002, 359. According to Oprea, minister of Interior Drăghici was the grey eminence behind Gheorghiu-Dej and in that capacity he performed direct control over the security services.

this elastic legal background, individuals who were deported, sent to work camps, subjected to forced relocation or show trials all belong to the victims. This legal provision opened the way to deprive them of their rights as an alleged enemy of the state. The notion of “enemy” was given by those in power, and included the members of historical parties, the former leaders of law enforcement organizations, defense forces and public administration, church leaders, church personnel and priests of various denominations, and ethnic minorities.

2/ In the mid-1950s, on the borderline of historical eras, just when the grip of the regime became looser, Council of Ministers Resolution 337/1954 set out provisions on designating new places of residence for those released from forced relocation or deportation. National Assembly Decree 89/1958 authorized the Securitate to designate mandatory job positions for those who may have committed crimes but did not endanger the political order. Securitate Troops and Militia also took part in carrying out these violations as both organizations were part of the Interior Ministry.

3/ In the Ceaușescu era, the legal framework pertaining to the Securitate reworded the organization’s objectives. However, these changes were only rhetoric in nature and did not impact the substance of the contents. According to State Council Decree 295/1968, the primary task of the services was to “detect, prevent and eliminate any hostile activity against the state and the social system”. In fact these authorities acted in defense of the dictatorship when carrying out investigations, when identifying individuals who acted against the socialist order of society. A record was kept of these individuals, using preventive network methods, by checking their correspondence, eavesdropping on them and employing similar methods. Another preventive measure was the separation (by way of isolation or defamation) of the person concerned from his living and work environment. Secret actions were taken to expel the individual from his job, or from the settlement he was living in.

Violations committed by the various security agencies on the grounds of maintaining socialist social order took place in high quantity and in diverse forms. It must be stressed that violations of communist legal system took place on a daily basis by law enforcement, e.g. although the Constitutions of 1948, 1952 and 1965 guaranteed the secrecy of correspondence and telephone conversations, these rules were transgressed in mass quantity. The authorities were free to commit such violations as the legal provisions pertaining to their operations (i.e. decrees 221/1948, 295/1968 and 121/1978) simply did not regulate the specific order of secret service procedures and the application of the related methods. However, the Securitate’s internal rules of procedures, commands and directives provided accurate instructions to staff on how the aforementioned operational methods must be used. In fact this in itself could be a violations. The unlimited use of other specific secret service means (secret intrusion, eavesdropping, filming or photographing, etc.) rested on the same controversial legal background, comprising contradictory decrees and internal regulations.¹⁶ The cases mentioned above were unlawful even by the legal standards of the era. Thus after 1989, the institutions assigned to scrutinize the communist repression machine also needed to investigate whether the professional staff of the law enforcement organizations, at the time, violated constitutional and/or fundamental human rights. Often the one-time officers of organizations that served the communist dictatorship use this very legal paradox in their own defense, stating that they only

fulfilled orders. They also argue that the officers of the special services of the era carried out professional duties and that the political leaders of the dictatorship are liable for mass deprivation of rights and excesses.¹⁷

The extremely high figures referring to those surveilled and as secret *informants* (or “agents”, according to the Romanian terminology of *agenți*), resident agents, or “home managers”, must be placed into the context of the deep embeddedness of the secret services in the communist (and post-communist) Romanian society. In the late 1940s, the number of agents exceeded 42,000,¹⁸ while in 1951 the persons targeted were above 460,000; that is to say almost 5 % of the overall adult population.¹⁹ Until the comprehensive reorganization in 1968, “enemy categories” underwent several changes. The Interior Ministry command 155/1959 extended the scope of enemies to be monitored and recorded, subjecting entire groups and segments of society to operational surveillance, monitoring and, inevitably, record keeping. In 1965, records were kept of 560,000 individuals²⁰ while the number of collaborators reached 119,000²¹ by 1967. The record keeping system was put through a revision in the late 1960s, when a more permissive redefinition of the concept of “enemy” paved the way for a sharp decrease of both monitored individuals and collaborators. According to archive sources, 84,000 collaborators were known in 1968, then their number moved upward in the 1970s and 263,000 collaborators were kept on record in 1986.²² The same figure reached to 486,000 in 1989, on the eve of the regime change. Monitored individuals decreased to 51,000 by the mid-1970s, then figures took an upward turn, with more than 110,000 persons being subject to active surveillance in 1989.²³ As recollected by a senior officer of the Securitate’s 1st Directorate (counter-intelligence), the number of collaborators was 100,000 per year.²⁴ This figure is not contradictory to the data mentioned by archive professionals, since it is not clear yet whether the number of collaborators was calculated from Securitate records, and if both active and inactive, but not yet deleted, collaborators were counted.²⁵

16 Vasile Malureanu, *Apararea ordinii constituționale. Perspectiva unui ofițer de informații*, București: Editura Paco, 2016, 80.

17 Malureanu, *Apararea ordinii constituționale*, 84. Several members of the ACMRR din SRI (Society of Reservist and Retired Officers of the Romanian Intelligence Service), including the aforementioned Malureanu, Filip Teodorescu and others strongly argue that the liability of the dictatorship should be separated from the activities of special services. These views were published in the volume *Un risc asumat*, București: Editura Viitorul Românesc, 1992), and in the publication *Adevăruri evidente*, issued by the ACMRR-SRI for the 25th anniversary of the SRI in 2015.

18 Cristina Anisescu, “Dinamica de structură și rol a rețelei informative în perioada 1948–1989”, in AAVV, *Arhivele Securității*, vol. 1. București: Editura Pro Historia, 2002, 10–40; see also Dennis Deletant, *Teroarea comunistă în România*, Iași: Polirom, 2001, 101.

19 *SRI – Cartea Albă a Securității*, vol. II. *Categorii de persoane supravegheate*, București: Editura Presa Românească, 1994, 45.

20 *SRI – Cartea Albă a Securității*, vol. III. *Schimbări în structura de personal, direcțiile și conținutul activității organelor de securitate*, București: Editura Presa Românească, 1994, 34.

21 Anisescu, “Dinamica”, 28.

22 Anisescu, “Dinamica”, 35. The same data were communicated to Constantin Titu Dumitrescu and the Romanian Senate Committee investigating abuses committed by the Securitate by the SRI, on January 4, 1994.

23 Malureanu, *Apararea ordinii constituționale*, 115.

24 Malureanu, *Apararea ordinii constituționale*, 151.

25 Passive staff means dormant agent. Different categories are represented by those who passed away and were not yet deleted from the records and those who remained in the records due to other reasons (e.g. intelligence opportunities disappeared).

IMPACT OF 1989 ON THE NEW/ OLD SECRET SERVICES

The key expectation of Ceaușescu and the political elite regarding the Securitate was to detect, prevent and terminate attempts to overthrow the regime. In the petrified state staff of the late 1980s, the Securitate was the most efficient part. The secret service gathered excellent intelligence and informed Ceaușescu of the most relevant international developments.²⁶ The Romanian president was informed timely of the Gorbachev–Bush meeting to be held in Malta on December 2–3. The position paper contained details on the possible negative outcome of the talks for the Romanian regime, and took for granted the unverified information that the two leaders reached an agreement on Romania.²⁷ But his behavior at his last visit to Moscow on December 4²⁸ was just as anachronistic as his strategic responses to the rapid changes throughout the region.²⁹ By 1989, Ceaușescu's departure from reality had been realized for a long time by the American secret services. As described in the chapter devoted to the transformation of the Romanian political system after 1989, even if the United States and their allies did not take part in the overthrow of the Ceaușescu regime, they had longtime identified a new potential leadership under the guidance of Ion Iliescu.³⁰

Neither senior political leaders, i.e. the RCP Central Committee,³¹ nor the Securitate turned against Ceaușescu in organized form until his attempted escape on December 22, 1989.³² Securitate's senior officials placed themselves under the command of the Defense Minister who arbitrarily took power. The most effective and highest ranking secret service units, the Counter-Terrorism Special Unit – *Unitatea Specială de Luptă Antiteroristă*, (USLA), and the Command of the Securitate Troops (*Comandamentul Trupelor de Securitate*, CTS) followed suit; during the night of December 22 to 23, they placed themselves under direct army control. A CFSN statement aired on Romanian state television early in the morning of December 23, 1989 solemnly declared: “The Armed Forces and the Securitate will work in full cooperation to ensure the country's stability and the well-being of citizens.”³³ Secret services by nature tried to defend themselves as institutions. The leadership of Securitate reportedly acted in this manner when it issued a central briefing to the regional units in November 1989, informing them that the dictator could fall from power or even die in the near future, and events should be expected that may involve clashes between the army and demonstrators.³⁴ To prepare their staff for such situations, high-ranking DSS officials commanded that the Securitate shall not intervene forcefully in anti-Ceaușescu demonstrations.³⁵ Ceaușescu's secret service did not take open action against the dictator and according to certain accounts, this behavior originated in the servile attitude and incompetence of the party's puppets working in the management of secret services.³⁶ At the same time, this calculated passivity enabled a significant portion of staff to keep their function after the regime change. According to an East-German intelligence report, as early as September 1988, NATO assigned the Securitate's staff into three distinct groups. The first included high-ranking leaders put in position solely by the dictator's grace, thus their loyalty was beyond doubt. The second category was the largest in number, comprising staff members who approached their duties as a profession. What this meant is political views were less decisive for them, thus they would have performed similar professional tasks in a different political regime as well. The last group included mostly younger professional officers who

were only interested in building their careers and therefore did not criticize the leadership at the time at all.³⁷

The recollections of Iulian Vlad, Securitate's last commander-in-chief, draw up the image of a competitive organization and a leadership that recognized the opportunity to protect the organization through inactivity. In 1989 Securitate purposely restricted its range of work to informing duties, with the clear goal of preserving its organizational capacity throughout the regime change. The spirit of these recollections cannot be incidental, as they credit the thesis that Securitate's benign neglect gave a decisive help to the revolution.³⁸ A quite different picture takes shape from the recollection of Virgil Măgureanu, the first director of internal counterespionage (*Serviciul Român de Informații*, SRI) after 1989. According to Măgureanu, communist special services did not have a single, harmonized plan to manage the situation during the revolutionary events of 1989. Nevertheless, he could recall several individual cases that took place before the regime's fall and involved escapes and hiding.³⁹

After the 1989 revolution, the presence of secret service leaders in the Ministry of Defense and in the new leadership of the army proved to be insufficient for eliminating misunderstandings and conflicts between military units and the CTS.⁴⁰ Transparency and

26 In a classified report no. 0075/1989 dated December 1, 1989, the DSS informed Ceaușescu that spheres of influence would be discussed at the meeting between the two great powers. Cristian Troncotă, *Duplicității. O istorie a Serviciilor de Informații și Securitate ale regimului comunist din România*, București: Editura Elion, 2003, 207–208.

27 See an accurate transcription of minutes at the digital repository of the National Security Archive: <https://nsaarchive.gwu.edu/NSAEBB/NSAEBB298/Document10.pdf> (accessed July 11, 2017).

28 At this meeting, Ceaușescu expressed strong support of a maverick stand and seriously overestimated his own international role by voicing proposals to other Warsaw Pact countries regarding what they should do regarding the withdrawal of Soviet troops. The rigidity of his arguing and thinking is well described in Vasile Buga, *Sub lupa Moscovei: politica externă a României 1965–1989*, București: INST, 2015.

29 Adam Burakowski, *Dictatura lui Nicolae Ceaușescu 1965–1989. Geniul Carpatilor*, Bucharest: Polirom, 2016 (2nd ed.), 385–400, discusses in detail the reasons of Ceaușescu's fall.

30 The CIA considered Ion Iliescu a potential rival already in the early 1980s. According to the intelligence assessment of March 1982 titled *Unrest in Romania: Causes and Implications*, Ion Iliescu “would be an important figure in a post-Ceaușescu leadership”. See <https://www.cia.gov/library/readingroom/document/cia-rdp83b00228r000100070004-7>, 16 (accessed July 12, 2017).

31 According to Burakowski, Ceaușescu formally resigned in front of the party's Executive Committee, but all the presents assured the leader of their full support. Burakowski, *Dictatura*, 411.

32 Virgil Măgureanu, Alex Mihai Stoenescu, *De la regimul comunist la regimul Iliescu*. București: Editura RAO, 2008, 118.

33 Alesandru Duțu, *Revoluția din Decembrie 1989. Cronologie*, Craiova: Editura Sinteht, 2010, 209.

34 Șerban Sandulescu, *Decembrie '89. Lovitura de stat a confiscat Revoluția Română*, București: Editura Omega Ziua Press, 1996, 246–282. Colonel Dumitru Rășină, chief of Securitate of Arad county, recalled that at a briefing held in the Brașov regional unit, higher officers mentioned that Ceaușescu would be dead within three months.

35 Troncotă, *Duplicității*, 165.

36 Ionel Gal, *Rățiune și represiune în Ministerul de Interne 1965–1989*, vol. I., Iași: Editura Domino, 2001, 150.

37 Stejărel Olaru, Georg Herbstritt, *Stasi și Securitatea*, București: Editura Humanitas, 2005, 400.

38 Troncotă, *Duplicității*, 230.

39 Măgureanu – Stoenescu, *De la regimul*, 56.

40 Florica Dobre et al., (ed.), *Trupele de Securitate*, București: CNSAS – Nemira, 2004, 621. Summary Report of April 1990 – Threatening Actions by the 4th Romanian Army against CTS Dormitories.

disinformation often took victims on both sides. One specific case involved the slaughtering of a USLA squad on the night of December 23 to 24. This case is a good illustration of how power groups made use of the revolutionary situation in repositioning themselves, and that secret services were losing the related power struggles against the army.

The first political organ of the new political regime was the Ion Iliescu-led Council of the National Salvation Front (*Consiliul Frontului Salvării Naționale*, CFSN). Decree 4 on December 26, 1989 reassigned the Securitate under the Ministry of Defense.⁴¹ With this decision, the new Romanian government closed the Securitate's history and launched the establishment of a new secret service structure. The final termination of the Securitate organization was brought on by Statutory Provision 33 on December 30, 1989. Upon termination, the organization comprised 15,322 individuals, including 10,114 officers, 3,179 deputy officers and 1,288 civil employees. This staff included county and central organizations, and naturally covered institutions as well. The leader was Major-General Iulian Vlad in the capacity of State Secretary of the Interior Ministry.⁴² On December 31, 1989, the last Securitate chief Iulian Vlad was arrested, and deputy prime-minister Gelu Voican Voiculescu was assigned as temporary chief of the civilian secret service.

In summary, the former leaders of secret services seemed to have adequately assessed the complex situation posed by the 1989 revolution. Out of the various tactical options arising from the complexity of the situation, they chose the one that seemed to promise the most benefits in the short run.

TRANSITION TO A NEW INTELLIGENCE STRUCTURE

The interim leader of the civilian secret service, Gelu Voican Voiculescu guaranteed the protection of former secret service staff members⁴³, and the National Security Committee (*Consiliul Siguranței Naționale*) was to be the new governing body. The opportunities conveyed by the dismantling of the former organization raised interest from several professional groups and organizations. The military counterintelligence (*Direcția de Informații ale Armatei*, DIA) planned to take over the Securitate's intelligence organization and counter-espionage functions, while Măgureanu was planning the creation of a mammoth-sized secret service by merging the former internal counterintelligence and foreign intelligence departments into a single body. Finally, a long-time intelligence officer with broad Soviet connections, Mihai Caraman emerged as the winner. In January 1990, after visiting both the CFSN and the Ministry of Defense, Caraman began to organize a new intelligence service in his capacity as state secretary and Defense deputy minister.⁴⁴ The resurfacing of this renowned intelligence officer of the 1960s and especially his reactivation of old-time cadres dismissed by the former leaders did not seem like forward-looking measures. The logistical and administrative staff of the renewed organization was oversized and created room for a patron-and-client system.⁴⁵ Pursuant to CFSN Decree 111, on February 8, 1990 the foreign intelligence suffered a major internal reorganization. Army control would be terminated at the end of the year, when legislators adopted Act 39/1990 on establishing a stand-alone foreign intelligence service (*Serviciul de Informații Externe*, SIE). The new organization was placed under the supervision of the Romanian Supreme Defense Council (*Consiliul Suprem*

de Apărare a Țării, CSAȚ), and Mihai Caraman was confirmed in the position he would fill until April 1992. Systemic reforms did indeed not take place in the early 1990s, and the SIE remained overly centralized and managed by hands-on control.⁴⁶ Due to incessant warnings from the Romanian civil organization and international human rights organizations, and on the explicit request of NATO secretary general Manfred Wörner, the alleged former Soviet spy Mihai Caraman resigned as SIE leader in 1992. His fall opened the way for another old professional to emerge. Ioan Talpeș, a former staff member of the military, also served as president Iliescu's national security and police advisor, holding a deputy minister rank. Under his guidance, the SIE began to align with the Western secret services. To gain the confidence of his Western partners, the new director regularly fulfilled US requests to share classified information on the network of undercover officers.⁴⁷

In early 1990, the military got possession of an unbelievable amount of information when screening tens of thousands of secret service officers and confiscating their archived operational files. At the same time, the left-wing post-communist government felt the need for a totally new and politically committed secret service. Pursuant to a new informative body was established in 1990 under the denomination of Service Protecting Facilities of Public Interest (*Serviciul pentru Paza Obiectivelor de Interes Public*). The creation of the special military organ coded Military Unit 0215 (UM 0215) was assisted by such big names of the former Securitate as Nicolae Doicaru; the UM 0215 reported directly to the Interior Ministry. Its staff included officers from the former Bucharest Securitate Branch (*Securitatea Municipiului București*, SMB) and from one of the most influential, albeit less known secret service in post-communist Romania has been the General Directorate for Intelligence and Internal Protection (in Romanian, *Direcția Generală de Informații și Protecție Internă*, DGIPI), subordinated to the Ministry of Administration and Interior. Thus, it is the secret service of the Ministry of Interior. DGIPI was established in 1990 upon CFSN Decree No. 100, from the branch of the Securitate covering Bucharest, and the former IV Directorate of the communist secret police, and military counter-information. DGIPI turned into the UM 0215 ("two and a quarter," in the popular parlance of the 1990s), then transformed into the Special Directorate of Intelligence of the Ministry of Interior. Then, in 1998, it was turned into the General Directorate for Intelligence and Internal Protection (DGIPI) subordinated to the Ministry of Administration and Interior.⁴⁸

The Militia organization was officially dissolved and its remnants reorganized into a new civil security, the Police, an organization also seeking to assume specialized law enforcement tasks. In the period reviewed, the Police organization was chaotic.⁴⁹

41 *Monitorul Oficial al României* (the Romanian Official Gazette) published the decree concerned in Issue 5, Year 1, dated December 27, 1989.

42 Herbstritt – Olaru, *Stasi*, 436–437.

43 Marius Oprea, *Moștenitorii Securității*, București: Humanitas, 2004, 98.

44 Gheorghe Dragomir, *Recviem pentru spioni*. Vol. 1, București: Editura România în lume, 2006, 355.

45 Dragomir, *Recviem*, 356.

46 Măgureanu – Stoenescu, *De la regimul*, 253.

47 Măgureanu – Stoenescu, *De la regimul*, 10.

48 On the role of DGIPI see the informative study of Elena Dragomir, *The Romanian Secret Services, Politics and the Media: a Structural Overview*, <http://www.balkananalysis.com/romania/2011/04/20/the-romanian-secret-services-politics-and-the-media-a-structural-overview/> (accessed July 10, 2017).

49 Alex Mihai Stoenescu, *Din culisele luptei pentru putere (1989–1990)*. *Prima guvernare Petre Roman*, București: Editura RAO 2006, 469.

Operational continuity with the communist Militia was gained by former work schemes like the infamous anti-hooliganism and “anti-parasitism” raids, or the clearly undemocratic stance of the special unit charged with monitoring opposition political parties. Even if this latter unit was dissolved after the first Mineriad of June 13–15, 1990, the exact role played by its staff during the tragic events that led to the death of several dozen people remains unclear.⁵⁰ In the early post-communist period, the new/old secret services gravitating around the two power centers (the President and the Prime minister), who were in strong competition and put considerable efforts in their reciprocal weakening and defamation.⁵¹

The formal establishment of new, internal, counterintelligence became urgent to Iliescu after several ethnic clashes between Romanians and Hungarians in the Transylvanian city of Târgu Mureș claimed several casualties in March 1990, and put Romania in a negative focus in the international press.⁵² Dated March 28, 1990, Decree 181 of the Interim Council of National Unity established the, already mentioned, SRI as Romania’s new counter-espionage organ. The new organization under the leadership of former university professor Virgil Măgureanu was first put to the test during the bloody Mineriad of June. The SRI’s partial intervention in support of the government⁵³ raises serious questions about the professionalism of counter-espionage at the time and about their role in establishing the rule of law. During the Măgureanu era, which lasted until 1997, the staff members taken over from the Securitate were rotated within the organization on an ongoing basis. This scheme prevented the return of past practices at a systemic level. At the same time, the change of staff could only take place gradually, as young, trained professionals were not available in sufficient quantity and quality. Further the SRI treated staff mobility extremely flexibly. This approach made it easier for staff members who got their jobs as protégées of the Ministry of Defense to leave the SRI.⁵⁴ The pre-1989 heritage was a heavy burden in terms of human resources. Old-style officers could hinder the execution of orders and were able to compromise specific operations.⁵⁵ The community of post-1989 special services in Romania was further expanded with institutions that were responsible for various areas: the Guard and Protection Service (*Serviciul de Protecție și Pază*, SPP), the Special Telecommunication Service (*Serviciul de Telecomunicații Speciale*, STS), and the Independent Service for Defense and Anti-Corruption (*Serviciul Independent de Protecție și Anticorupție*, SIPA), the latter being placed within the Ministry of Justice.

The Guard and Protection Service originated from a small personal protection unit the military leadership decided to set up immediately after the 1989 revolution. The task of the four officers involved in the original project was to provide physical security to the provisional political leadership in turbulent times. The SPP was later legalized by Decree 204 of May 7, 1990 passed by the Interim Council of National Unity. In the new structure, the primary task of this unit was to protect the President, the Prime minister, and high-ranking Romanian and foreign officials. The Supreme Defense Council gave the structure the name Guard and Protection Service on November 15, 1990, and the SPP became formally independent by the National Security Act 51 of July 21, 1991.

In the 1990s, this special service organization was confronted several times⁵⁶ with the fact that many of its staff members used to serve in the former Securitate’s Fifth Directorate or Security Directorate. The STS (Special Telecommunication Service) was

set up pursuant to the December 18, 1992 resolution of the Supreme Defense Council. In fact, they were built on the former DSS organization, the Securitate’s “R” Unit or Special Unit. From an organizational viewpoint, they could only gain full separation from the Ministry of Defense based on Government Decree 229 of May 23, 1993. This decree was the first legal provision that defined the STS organization and its operational framework as a stand-alone agency. They only achieved independence pursuant to Act 92/1996.

The military intelligence of the Defense Ministry preserved its original pre-1989 structure until February 1991. Even then, only its name was changed to *Direcție de Cercetare a Armatei*, i.e. Military Reconnaissance Directorate. This name was soon changed to Military Information (*Direcția Informații Militare*, DIM) in September 1993. Parallel to this, pursuant to Ministerial Order 41, the Counter-Espionage Directorate was established beginning in May 14, 1990. The Directorate reported to the minister of Defense. General Victor Negulescu was appointed to lead the organization. Negulescu had an operational past as Romania’s military attaché to Rome in the late 1980s.

EFFICIENCY AT ROMANIA’S SPECIAL SERVICES

During Ion Iliescu’s rule from 1990 to 1996, both Romania’s society and thus its secret services were characterized by the work ethic and everyday practices of the previous era. Non state-owned media outlets in Romania were not powerful enough in the early 1990s, thus only foreign publicity could exercise influence on the political leaders. According to several trustfully accounts, a remarkable number of former Securitate higher officers were hired by the new security services.⁵⁷ Both the 1991 Constitution, and 14/1992 Act on the SRI’s operational code declared that special services must operate in a politically neutral manner. This was not the case during the Măgureanu years.⁵⁸

50 Oprea, *Moștenitorii Securității*, 109–110.

51 Dragomir, *Recviem*, 359.

52 Măgureanu – Stoenescu, *De la regimul*, 167, and *Monografia SRI 1990–2015*, Bucharest: Editura RAO, 2015, 68. The official history of the post-1990 internal secret service represents an excellent, albeit not independent source to understand the transformations SRI underwent through the last 25 years.

53 Institutul Revoluției Române din Decembrie 1989 (IRRD), *Caietele Revoluției*, 2010, no. 4–5, 35–85. Memoirs of former Chief of Staff gen. Mircea Chelaru, head of SRI counter-espionage after the 1989 revolution claim that the SRI intervened in support of president Iliescu during the events of June 1990.

54 Mihai Pelin, *Trecutul nu se prescrie. SIE&SRI*, București: Editura Kullusys, 2004, 11.

55 Ștefan Dinu, *Condamnat la discreție*, Bucharest: Editura Neverland, 2009, 291.

56 Sorin Ghica, “Cele mai mari dosare de corupție din anii ‘90”, *Adevărul*, August 6, 2015: http://adevarul.ro/news/eveniment/cele-mai-maridosare-corupție-anii-90-1_55c35a24f5eaafab2c4ec4f6/index.html (accessed July 14, 2017).

57 See Vlad Stoicescu and Liviana Rotaru, “Doi si-un sfert din adevar: Toti oamenii presedintelui”, *Evenimentul Zilei*, June 16, 2010: <http://www.evz.ro/detalii/stiri/doi-si-un-sfert-din-adevar-totii-oamenii-presedintelui-898231.html> (accessed July 12, 2017). The authors mention that at the UM 0215, subsequently DGPI, out of the total staff of 275 (as of June 1990), 178 were members of the Securitate Fourth Directorate. The article also discusses routines in the pre-1989 era that still characterized the UM 0215 in the 1990s.

58 The role of Măgureanu as SRI leader in the Minerriads of the 1990s is currently investigated in an ongoing lawsuit as it as July 2017.

Not incidentally, in 1997, the NATO Security Office launched the first institutional partnership in Romania, not with SRI, but with the more flexible SIE, the civilian foreign intelligence. SRI, SPP and Army officers were often involved in corruption cases.⁵⁹ The most astonishing for its international implication was probably the Jimbolia affair. During the 1990s, Romania broke the UN embargo against Yugoslavia, as people with decision-making power such as SRI-chief Măgureanu, and the minister of Transportation Aurel Novac organized an illegal network through which 1,107 wagons of gas and diesel gas were smuggled to Yugoslavia from the border locality of Jimbolia. The huge profit was used to finance the government party before the 1996 elections that President Iliescu would lose despite all attempts at keeping power.⁶⁰ The 1996 elections represented a landmark in the Romanian post-communist transition. The new president Emil Constantinescu quickly replaced the longstanding chief commanders of the SRI and SIE, Măgureanu and Talpeș, both loyal to Iliescu, with more palatable figures from within the security system. These changes alone did not help Romania's accession to NATO, but they did indicate the country openness to Europe and its endeavor to unite with the European Union and NATO. The new element in the changes at the helms of special services was the appearance of people who had a new worldview regarding politics. In fact, a new deputy director was appointed at each organization, including the STS. Traditionally, the position in question is that of the manager responsible for operations. In most cases when a new person took this job, he was not a professional expert. President Emil Constantinescu claimed in 2009 that he reformed the special services on his own decision and based on his actual mandate when he replaced 38 generals with managers who had never joined the former Securitate.⁶¹ Still, true reform focusing on professional matters did not take place. Both the SRI leader and the SIE leader prepared materials that enabled compatibility with NATO, but their institutional implementation never started. In 2000, Iliescu was again appointed president for a third mandate. Key positions were filled again with members of the pre-1989 era Securitate.⁶² Further, counter-terrorism also changed after the 2001 terrorist attacks. In the early 2000s, the SRI and SIE made considerable efforts to prove their NATO compatibility. The Parliament adopted Romania's Second National Security strategy and the Supreme Protection Council enacted new operational rules. Both institutions actively pursued cooperation with foreign counterparts, including NATO's Office of Security, the partner services of NATO member states, and transnational security agencies such as INTERPOL and EUROPOL. The SRI started to take the lead in the fight against terrorism and also against internal corruption.⁶³ In April 2002, Romania hosted the first joint meeting of NATO and NATO candidate services, and in May 2002, Romania hosted its first joint conference of all Balkan intelligence services on the topic of counter-terrorism. At an international level, the renewed services mostly showed spectacular progress in counter-terrorism efforts. These measures were recognized and appreciated by Romania's Western partners, and contributed much to improve the country's image among the intelligence community.⁶⁴

CONTROLLED PUBLICITY

The link between transparency and efficiency has been a decisive element in the recent history of the Romanian secret

services. The principal organization in domestic operations, the SRI continually strives to achieve a positive public image. In 2004, Romania joined NATO and as the right-wing, pro-Western candidate Traian Băsescu became President, a new era began in the history of the secret services as well. Significant changes in personnel took place. Many staff members were retired and young leaders were put at the helm of the SRI, including professionals like George Maior, Florian Coldea, Silviu Predoiu and Mihai Răzvan Ungureanu. The generational change is the easiest to capture at counter-intelligence. After the 2004 presidential elections, a definite change of direction finally took place at the SRI starting in 2006. This change was supported by political leaders and was characterized by a deep strategic partnership with the USA. The first spectacular milestone was the meeting of George Maior, a former diplomat who was appointed as the new leader in 2006, with the Director of National Intelligence, John D. Negroponte, at the SRI's headquarters in Bucharest. Their talks were followed by a bilateral meeting of Maior and CIA director Michael Hayden in 2007. The 2011 visit of FBI director Robert Mueller to Bucharest was a sign that the quality of relations has been sustained. Similarly, the visit of CIA director John O. Brennan to Bucharest in 2013 also demonstrated solid and fruitful cooperation.

The SRI worked dynamically to develop a new image by building professional relations with foreign counterparts. At the same time, Romania's number one special service also built political and diplomatic ties: In 2008, simultaneously to the NATO summit in Bucharest, a convention of the newly established Young Atlantists network was held at the SRI headquarters, with British foreign minister David Miliband as keynote guest. On the same occasion, SRI chief George Maior met with Laura Bush. In 2011, the meeting of Charles, Prince of Wales with George Maior represented a great diplomatic recognition for the SRI and Romania.

59 Eurocolumna, Țigareta I-II, and Portelanul scandals.

60 In the Jimbolia case, the SRI Banat, SRI Timiș, SRI Bihor regional branches were involved in the illegal business. See on this Cristina Nicolescu-Waggoner, *No Rule of Law, No Democracy. Conflict of Interests, Corruption, and Elections as Democratic Deficit*, Albany (NY): State University of New York Press, 2016, 79–80.

61 "Constantinescu: Este normal că România să fie condusă de un fost colaborator al Securității?" *Ziua de Cluj*, September 30, 2009: <http://ziuadecj.realitatea.net/mobile/articol.aspx?t=Articole@eID=16656> (accessed July 15, 2017).

62 Victor Veliscu was advisor to the SRI director, Dan Gheorghe was security director at the Otopeni International Airport, Aurel Rogojanu was advisor to the SRI director, Marian Ureche was appointed as leader of the SIPA (the intelligence service operating until 2006 under the Justice Ministry), Tudor Tănase was assigned to the STS, while Mihai Caraman became an advisor to the prime minister. The parliamentary committee supervising the secret services was led by former intelligence officer Ristea Priboi. According to investigations by historian Marius Oprea, Priboi conducted political police activities inside Romania. He was involved in the 1981 actions of the Securitate against a large group of intellectuals – the Transcendental Meditation affair. Priboi was also involved in the repression of the 1987 workers' strike in Brașov. Several witnesses has claim they were investigated by him, including one who accuses him of participation in acts of torture. Oprea, "The Fifth Power. Transition of the Romanian Securitate from Communism to NATO", in *New Europe College Yearbook*, 2003–2004, no. 11, 163–64.

63 *Monografia SRI*, 178–180.

64 Florina Cristina Matei, "Romania's Anti-terrorism Capabilities: Transformation, Cooperation, Effectiveness", *Journal of Defense Resources Management*, 2012, 3 (1), 37–54.

The elaboration and adoption of a new national defense strategy in 2006 marked the beginning of a new era. To achieve recognition by, and openness to the Romanian society, actions were taken in compliance with applicable laws to create a new image of the services. Such actions included large demonstrations and flag initiation ceremonies. Further promotional actions included the issue of memorial stamps and 10-lei memorial medallions commemorating the SRI's 25th anniversary.

A key element in the Western partnership became the fight against international terrorism, a cornerstone of Romania's present national defense strategy. The implementation of this strategy and its public impact in Romania and abroad was significant. The first example was the rescue of three Romanian journalists captured in Irak,⁶⁵ an intelligence success that delivered a message of intransigence: "Wherever they take them, we will find them". Romania's answer to post-9/11 challenges was crystal clear. The country committed itself to fight terrorism. Since the end of the Cold War, the international intelligence community constantly strove to implement practices that avoid rigid approaches and provide answers to quickly changing international security challenges. Simultaneously, these procedures enabled the special services to build adequate ties to civil society, including the academic community, official decision makers, retired political decision makers, retired professionals and obviously representatives of civil circles.⁶⁶ The Romanian services also faced these challenges and tried to answer them.

To boost the efficiency of Romanian special services, president Băsescu established a National Intelligence Community under the supervision of the CSAȚ. Following a series of warnings from civil society and the media, the SIPA was terminated in 2006, reducing the number of secret services to six. The change of political direction in 2014 and the election of new president Klaus Johannis did not affect the branding efforts launched in the mid-2000s. The departure of SRI leader Maior and the appointment of Eduard Hellwig did not bring any discontinuity in the institution's foreign and professional policy. The best evidence of this is the appointment of Maior as Romania's ambassador to the USA, and his reception by FBI director James Comey at the FBI headquarters in 2015.

CONTROL AND SUPERVISION: CORRUPTION AS A RISK FACTOR

The efficiency of the special services is not compromised by transparency. On the contrary, transparency strengthens public confidence in the institution concerned. In the course of the NATO and EU accession process in 2002, the transparency and surveillance of special services were important topics that monopolized public thinking in Romania. In the wake of 9/11, the key task that the Romanian public expected from special services was to support NATO and the CIA in combating terrorism. Results of an opinion survey carried out by the Romanian Institute of Public Opinion Survey (IRSOP), in March 2002 half of those interviewed said special services do not deal with these issues owing to their political conviction and 52 % agreed that special services serve Romanian national interests. Interviewees were also asked about transparency, whether they thought that Romanian special services had already underwent a transformation along a Western model. 60 % of those surveyed gave

a positive answer. According to Radu Timofte, the SRI chief at the time, 5,500 of the institution's 6,800 staff members taken over in 1990 had already retired. Thus by 2002, only 15 % of the active staff serving in the Securitate before 1989, were still serving. Most of these officers had reportedly worked before 1989 in counter terrorism, counter-espionage and training areas. At the same time, Bruce P. Jackson⁶⁷ stressed that the issue of old cadres in the ranks of special services was still not clarified, and that corruption should be combated in a credible and consistent manner.

Control and supervision of the two largest special services is formally provided for by law. In reality, in the early 1990s, when the special services were established and their structures were developed, transparency was not implemented with the strong resilience of "former practices and behaviors,"⁶⁸ according to the fitting description of George Cristian Maior. Both parliamentary and public control practices over the special services were missing. The first definite legal measure to ensure transparency appeared in the SRI Act adopted in February 1992, declaring that a specific parliamentary committee shall exercise control over the secret services. Similarly, SIE was also supervised by a parliamentary committee. Both standing committees have had a positive impact on the special services, since a permanent group of specialists was charged with the close supervision of their activities. The committees currently scrutinize among others the annual draft budget of special services, violations of law reported by citizens and the annual reports submitted by special service leaders.

Corruption cases involving members of the Romanian parliament pose a risk to transparency and parliamentary control. Under Maior's direction, the organization underwent major structural transformation. By the mid-2010s, it developed to a level where it was also prepared to combat cross-border cyberattacks. The professionalism and popular recognition of SRI staff members improved as evidenced by an INSCOP survey in April 2016. Results showed that 51 % of those asked had confidence in the domestic special services. It must be noted that the survey also covered the intelligence organization (SIE). In the digital age, special services employ operational digital tools and procedures for data gathering as specified in applicable laws. While major reorganization was reported by special services, the number of eavesdropping cases (intercepts of telephone conversations) went up. 6,370 intercept orders were approved in the baseline year of 2005 while the same figure was 38,884 in 2013, representing a more than 600 % increase. It must be noted that this figure includes all permits issued to all special services.⁶⁹ The public

65 Eduard Ovidiu Ohanesian, *Raport din spatele ușilor închise*, Iași: Editura Junimea, 2011.

66 Steve Tsang, *Intelligence and Human Rights in the Era of Global Terrorism*, Westport, CT: Praeger, 2008.

67 Bruce P. Jackson is president of the Project on Transitional Democracies, a non-profit supporting post-soviet and Balkan democracies in building closer ties with the European Union and NATO.

68 George Cristian Maior, "Managing change: The Romanian Intelligence Service in the 21st Century", in *International Journal of Intelligence and Counterintelligence*, 2012, vol. 25, 217-239.

69 George Tarata, "Noua Securitate. SRI proteste România", *Lumea Justiției*, May 25, 2016: <https://www.luju.ro/institutii/servicii-secrete/sri-proteste-romania-noua-securitate-condusa-de-coldea-si-hellvig-este-preocupata-de-gainarii-si-dosare-politice-nu-si-de-atentatele-laviata-romanilor-soldate-de-a-lungul-anilor-cu-sute-de-decese-din-cauza-infectiilor-nosocomiale-hexi-pharma-sau-repreze?pdf> (accessed July 14, 2017).

may also raise questions about efficiency when looking at special services headcounts from an international benchmark. Among NATO member states, Romania ranks second regarding the number of professional special service staff. In the USA, officially, the FBI has 35,344 officers/agents for a population of 314 million, while Romania has a reported (the exact figure is not a public information) intelligence staff of 12,000 for 20 million inhabitants. Regarding budgets, the SRI's funding exceeds that spent on healthcare, as the organization has a budget of RON 1.2 billion, i.e. approximately USD 300 million⁷⁰ at its disposal while the SIE's budget is only RON 214 million (USD 53 million⁷¹). The two organizations are thought to have an aggregate staff of 15,000.

In addition to professionalism and efficiency, transparency and control continue to need improvement. Since 2000, Romania's armed forces have been directed and managed along guidelines and recommendations issued by the DCAF (*Democratic Control of Armed Forces – Geneva Center*). These guidelines are aimed at ensuring proper organization and transparency. At the same time, the credibility of the report issued in 2003 to certify the successful democratic transition of the Romanian secret services was jeopardized by the unconventional biography of his author. The US-born intelligence expert, Larry Watts, has been in fact been one of the most effective agents of influence for Romania's intelligence network in the United States since the middle of the 1980s, when he first visited Romania as a PhD student in history. A longstanding advisor to former president Iliescu and foreign intelligence director Ioan Talpeș, Watts is deeply embedded in Romanian political circles and the intelligence community. Albeit informative, the position papers published by Watts in the early 2000s in the Western specialized press were clearly useful for the political agenda of Romanian governmental circles, which had always supported his activity. This circumstance should suggest to scholars and stakeholders to critically read and evaluate the over-optimistic conclusions reached by Watts and his Romanian pundits.⁷²

EU Recommendation No. 1713/2005 sets forth solutions for monolithic forms of control like parliamentary committees that supervise the special services. Best practices to follow include Belgium, Canada and England,⁷³ where the presence of civilian specialists in committees is a day-to-day practice that ensures civilian control over the services. In Romania, the participation of civilian experts in parliamentary committees is not a novelty, as two of the 19 members of the Supreme Council of Prosecution (*Consiliul Suprem ale Magistraturii – CSM*) represent civil society. Thus best practices in terms of form are already in place, only the legal framework and its application must be provided for.⁷⁴ The ongoing Sebastian Ghiță case⁷⁵ highlights the risks of purely political parliamentary control. Consequently, the presence of professional civil representation in special committees is desirable.

LESSONS LEARNT AND RECOMMENDATIONS

While Romania's commitment to combating corruption is beyond doubt, the related procedural practices may raise questions. Adrian Tutuianu, chairman of the parliamentary committee supervising the SRI made a public statement at a press conference on February 28, 2017 claiming that the SRI

had entered into cooperation agreements with other state organizations since 1992. These are classified cooperation arrangements under which SRI officers were enabled to pursue activities at the institutions concerned.⁷⁶ At the same time, anti-corruption efforts should be subject to consistent and transparent control by the DNA-SRI (law enforcement and secret service). This approach could help avoid serious international assessments like "Romania's National Anti-corruption Directorate is an active participant in its position struggles."⁷⁷ In addition to European institutional supervision mechanisms like the Cooperation and Verification Mechanism and other supervisory procedures, attempts should be made to establish bottom-up, non-partisan civil control in each supervisory body that oversees special service operations. By doing this, Romanian civil society could be represented proportionally in supervisory bodies, further increasing public confidence in special services.

70 See Elena Dumitrache, "Statistica uluitoare", *Lumea Justiției*, October 12, 2014: <http://www.luju.ro/institutii/servicii-secrete/statistica-uluitoare-romania-ocupa-locul-ii-in-clasamentul-tarilor-membre-nato-privind-numarul-de-agenti-din-serviciul-national-de-informatii-pe-primul-loc-se-claseaza-sua-unde-fbi-la-un-numar-de-314-milioane-locuitori-are-35-344-agenti-sri-pentru-20-mili?pdf> (accessed July 14, 2017).

71 Information based on 2010 data.

72 Watts spoke about his past in a 2016 interview with the director of the Romanian Institute for Recent History, Liviu Tofan: <https://www.stiri-extreme.ro/dupa-pacepa-larry-watts-dezvaluie-noi-agenti-kgb-din-romania-aflati-langa-ceausescu-si-apoi-alaturi-de-iliescu-interviu-irir/#>. For a critical analysis of Larry Watts' use of sources see <http://www.contributors.ro/societatile/rastalmacirile-lui-larry-watts-si-rastalmacirile-altora-despre-larry-watts/> (accessed July 14, 2017). Doubts might be also raised regarding the impartiality of the analysis that Larry Watts prepared for the DCAF: "Control and Oversight of Security Intelligence in Romania", in *Geneva Centre for the Democratic Control of Armed Forces (DCAF) Working Papers*, 2003.

73 See Transparency International Romania, *Serviciile de Informații în Echilibrul Interinstituțional*, June 16, 2015: https://www.transparency.org.ro/stiri/comunicate_de_presa/2015/16iunie/Policy%20Paper_Serviciile%20de%20Informatii%20in%20Echilibrul%20Interinstitutional.pdf (accessed July 15, 2017).

74 See the analysis of George Jigău (Centrul pentru Studiul Democrației) and Anca Sinea (Centrul pentru Studii Internaționale), *Cum pot serviciile secrete și transparența să încapă în aceeași frază? Miza controlului civil al serviciilor pentru consolidarea democrației*, March 10, 2017: <http://www.contributors.ro/editorial/cum-pot-serviciile-secrete-%C8%99i-transparen%C8%9Ba-sa-incapa-in-aceea%C8%99i-fraza-miza-controlului-civil-al-serviciilor-pentru-consolidarea-democra%C8%9Biei/> (accessed July 16, 2017).

75 Sebastian Ghiță, a former Social Democratic representative and member of the parliamentary committee that supervises the SRI, made incriminatory public statements about SRI deputy-chief Florian Coldea, dismissed in January 2017, and about Laura Codruta Kövesi, the influential head of the Anti-Corruption Directorate (Direcția Națională Anticorupție, DNA). Ghiță's statements albeit biased negatively affected the credibility of both institutions. His accusations were echoed not only in the governmental press hostile to the anti-corruption fight but also by authoritative civil forums such as www.romaniacurata.ro and www.riseproject.ro.

76 Petriana Condrut, "Până unde au mers protocoalele SRI. Reglementări sau implicare în activitatea altor instituții?", *Gândul*, March 6, 2017: <http://www.gandul.info/stiri/pana-unde-au-mers-protocoalele-sri-reglementari-sau-implicari-in-activitatea-altor-institutii-16183971> (accessed July 16, 2017).

77 See the excellent research paper of David Clark, *Fighting corruption with con tricks: Romania's assault on the rule of law*, London: The Henry Jackson Society. Democracy, Freedom, Human Rights, 2016: www.henryjackson-society.org/wp-content/uploads/2017/01/Romania-paper.pdf (accessed July 16, 2017).

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REGIME ARCHIVES

AN OVERVIEW OF THE CNSAS

ISTVÁN BANDI

ANSWERING SOCIAL DEMAND

Citizens of former Soviet-bloc countries regarded 1989 as an “*annus mirabilis*” [a miraculous year]. Public demand for removing the communist dictatorship and holding accountable those participating in it was had already been formulated in Article 8 of the Timișoara Proclamation of March 1990; the first lustration act initiated by Romanian civic society. “... the act on elections should prohibit, for the first three parliamentary terms, the nomination of former communist activists and former Securitate officers on any list. (...) In order to stabilize the situation and to reach nationwide reconciliation, it is of utmost importance to keep these individuals off of public life.” (<http://www.societateatimisoara.ro/>)

It is a matter of fact that Romania underwent a troubled and long transition to full-blown democracy, and after 1989 the country was governed, for a long time, by political figures whose career and mental setting were deeply rooted into the pre-1989 era. These individuals played a key role in delaying the screening and revelations of the past. Over the last few years, most probably as a beneficial consequence of the intensive public discourse around the crimes and human right violations committed by the communist regime in Romania, the societal attitude towards the recent past experienced a major change. While in the early 1990s, polls taken by CSOP (Centrul pentru Studierea Opiniei și Pieței) showed that 44 % of those surveyed considered the fall of communism a good thing, just twenty years later in 2011 the same rate was up to 61 %, while 37 % regarded it as a positive thing that the communists took power in Romania after World War II (Agerpres – Sondaj CSOP-IICMER).

EVOLUTION OF THE INSTITUTION’S LEGAL FRAMEWORK AND POLITICAL CHALLENGES

At the end of the 1990s, as a closing act of the transition period, the first bill was presented in Parliament, enabling insight into the Securitate archives. The bill was pushed forward by Peasant Party Senator Constantin Ticu Dumitrescu, a former victim of the communist dictatorship and chairman of the Association of Former Political Prisoners. The institutional model for this initiative was the German Federal Commissioner for the Records of the State Security Service of the former German Democratic Republic. After suffering several amendments to the content and form, the bill was passed by lawmakers in December 1999 as Act No. 187, “concerning one’s access to his/her own files and the disclosure of the Securitate as political police.” Albeit not conceived by the same intent as Ticu Dumitrescu’s original bill, an act passed during the presidential term of liberal-democrat Emil Constantinescu enabled the formation of the National Council Scrutinizing the Securitate’s Archives (*Consiliul Național pentru Studierea Arhivelor Securității* – CNSAS) in 2000.¹ The CNSAS was intended as an informal lustration agency similar to

the Bulgarian Dossier Commission, but during its almost twenty years of activity the mandate and scope of activities of the CNSAS have gone through changes to its legal parameters and the political environment surrounding the institution.² The CNSAS was created as a budgetary organ supervised by the parliament and directed by an 11-member board, the members of whom were and still are delegated either by political parties, churches, or other public institutions for six-year terms. The law charged the new institution with preventive screening and disclosure of public servants with a past of collusion with the communist state security. It also charged the CNSAS with the management of access to individual files of former victims and scholars, and with the gradual takeover of the former political police’s archived sources for academic and educational purposes.

However, in the first operational period, the CNSAS did not possess proper infrastructure, archives, or adequate staff. After the 2000 elections, the post-communist Party of Social Democracy in Romania – PDSR, led by Romanian president Ion Iliescu, took the helm again, negatively affecting the Council’s activity. The Board was supposed to name the individuals responsible for severe violations of law by the regime before the change of the political system, while carrying out screenings, without taking over the archives of communist secret services. A major political crisis erupted in 2002, when members of the Council split over the semantics of lustration. Six of them, (public intellectuals **Andrei Pleșu**, **Horia-Roman Patapievici**, **Mircea Dinescu**, former political prisoner **Viorel Niculescu**, and historians **Claudiu Secașiu** and **Ladislau Csendes**) did not accept the idea of unveiling the names of secret collaborators of the Securitate, without also exposing those professional officers who actually performed as *political police*. Five other members disagreed with this stand and therefore did not attend board sessions for months, contributing to the slow down of the lustration process that was progressing slowly anyway due to the lack of archival materials. These members included university professor of law Emil Boc, who was also conservative prime minister between 2009 and 2012, and Social Democrat, lower chamber member, Ion Predescu, who served as a member of the Constitutional Court between 2004 and 2013. Only in 2003 did the Social Democrat cabinet agree to increase the external storage capacity of declassified materials handed over to the CNSAS by the post-1989 security services (**Romanian Information Service** / Serviciul Român de Informații – SRI; **Foreign Intelligence Service** / Serviciul de Informații Externe – SIE; and **Military Archives and Documentation Service** / Serviciul Arhive și Documentare³

1 CNSAS or “council” refers here to the more than 250 staff of the institution, while “board” refers to the 11-member administrative body that supervises the council.

2 Cynthia M. Horne, *Building Trust and Democracy: Transitional Justice in Post-Communist Countries*, Oxford: Oxford University Press, 2017, 141–142.

3 The Romanian word *documentare* equally refers to recording, classifying and retaining information.

Militară – SADM). The CNSAS was assigned a depot in the locality of Popești-Leordeni, located in the surroundings of Bucharest, (hereinafter the permanent external storage of CNSAS). Fast-paced work began, in mixed committees, including members of the CNSAS and the aforementioned secret services, to transfer as many classified documents as possible to the newly established institution. A major benefit of this new approach was that during 2004–2005 the new centre-right government encouraged the services to take major efforts to transfer their archived documents and micro-film into the new depot. The Ministry of the Interior, however, did not take action at all upon the claim that no law or decree had ever specified and regulated the scope of declassified materials that should be (or should have been) handed over to the CNSAS. Thus, the unintended victims of the power clash within the government were not the real targets of the disclosure process – those who had served and/or collaborated with the communist regime, but rather those individuals who attempted to bring over as many documents as possible to the CNSAS archives. In the beginning, the vicious combination of unregulated circumstances and the lack of experience gave rise to expensive document management procedures. Exposing archived files to lengthy transportation is anything but ideal in terms of security. It would have been better to follow the German and Polish practice, according to which the declassified files were kept and made accessible to former victims and scholars in those local state security headquarters where the documents had been previously stored. A different approach would have spared private citizens and researchers long, exhausting trips to Bucharest only to exercise their right to read their own security file.

The outcome of 2004 parliamentary elections and the clear victory of a pro-European, anti-communist centre-right coalition, led by newly elected president Traian Băsescu, produced a major positive impact on the CNSAS and archive policies in Romania. On February 28, 2005 the **Supreme Defence Council (CSAȚ)** issued a resolution to ask for the urgent transfer of 12,000 rm. of documents in addition to the 700 rm. of documents transferred by the SRI to the archives in the previous five years (**see the 2006 annual report of CNSAS**). Urgency decree (Ordonanța de Urgență – **OUG**) No. 149 dated November 10, 2005 set out new provisions to guarantee the regular business of the institution.

In 2006, further positive developments were advanced by the imminence of Romania's membership into the European Union. On February 22, **Emergency government decree No. 16** (OUG 16/2006) expanded the circle of those eligible for lustration and required persons holding important public offices to fill in a form to clarify their position concerning cooperation with the former Securitate. In the case that their declaration proved to be false, they could be held accountable according to this decree. In March, a new executive board was appointed at the CNSAS, this time including the author of the 1999 lustration law, Constantin Ticu Dumitrescu. On December 16, president Traian Băsescu solemnly condemned communism as an “unlawful and sinful” political system.

Further documents were transferred to CNSAS in 2007; when the quantity of documents handed over to the archives reached 20,000 rm., the CNSAS could fully comply with obligations set out in the institution's founding act. The mixed committee formed by CNSAS experts and representatives of the special services convened 32 times throughout that year to promote document transfers and the screenings of a total of 17,734 individuals. 4,159 of

these proceedings were launched automatically based on statutory provisions, while 13,575 were initiated on request of CNSAS. Finally, the Board passed 4,610 resolutions. 101 persons were declared “collaborators” (that is, secret informants) of the Securitate, and another 381 were found to have been in a professional relationship with the political police as officers. In 341 additional cases, the Board passed resolutions on collaboration based on individual submissions. In 2007 security screenings almost tripled compared to the previous year. It must be underscored that in the meantime, the institution's headcount did not increase. Even though the budget would have allowed for a staff of 300, only 255 positions were filled (**see the 2007 annual report of CNSAS**). Although the year 2007 provided major impetus to screening, identification of former agents, research and document transfers, a horde of legal measures passed in 2008 brought a turnaround at the institution in terms of screening and research of the recent past.

A major conflict concerning the attributions of the CNSAS erupted in early 2008, upon a lawsuit about the alleged involvement with secret services of Senate vice-chairman **Dan Voiculescu**. Attorney **Sergiu Andon**, chairman of the Lower House requested the review of Act 187/1999 for compliance with the constitution. Constitutional Court Resolution No. 51 of January 31, 2008 declared the unconstitutionality of the 1999 act establishing the CNSAS and of the subsequent government decree that regulated its activities. The liberal government of **Călin Popescu-Tăriceanu** prevented a full setback by quickly passing two complementary emergency decrees. With the decisive support of the prime minister's security policy advisor, public intellectual **Marius Oprea**, Parliament unanimously passed act 293/2008 in December that year. The act is still in effect and sets the framework for the institution's operation. The new law ordered that each resolution issued by the CNSAS Board declaring the involvement of an individual with the secret police must be reviewed and decided on by a court. [Thus the final verdict must come from a court in each case.] This procedure of law application reduced the effectiveness of the CNSAS and the Board. It required that once approved by a majority vote of the Board, all cases processed in the archives (ACNSAS) by the responsible directorate in charge must be submitted to the Bucharest Court's public administration department. While the proceedings are free of charge, the CNSAS is required to attach to all submissions, authentic copies of the relevant archived documents. The person subjected to scrutiny is entitled to contest the court decision. The court is required to publish its non-appealable final decision in the Official Gazette.⁴ As a consequence, the screening procedure has become more complicated and lengthy. In accordance with the new legal provisions, the CNSAS Board submitted 292 cases to the Bucharest Public Administration Court in 2008. Dated early 2010, the 2009 annual report showed that 213 cases were still underway at the court, 12 cases were voided owing to the subject person's death, while collaboration was confirmed in 53 cases and allegations of collaboration were rejected in 11 cases. For a comparison, the corresponding figures from the CNSAS' counterpart organization in Germany can be quoted. In the first ten years of operation, the Joachim Gauck-led BStU screened 1.7 million persons, identifying 950,000 STASI officers and agents.

4 See in detail Dragoș Petrescu, “Public Exposure Without Lustration”, in Lavinia Stan, Lucian Turcescu, eds., *Justice, Memory and Redress in Romania*, Cambridge: Cambridge Scholars Publishing, 2017, 131–136.

Year	Identified individuals
1999	Establishment of CNSAS
2000	none
2001	1 collaborator
2002	2 collaborators
2003	26 collaborators ⁷
2004	60 completed identifications ⁸
2005	49 completed identifications
2006	270 collaborators 156 officers
2007	330 collaborators 402 officers
2008	610 collaborators 210 officers
2009	739 collaborators 298 officers
2010	847 collaborators 337 officers
2011	867 collaborators 234 officers
2012	858 collaborators 206 officers
2013	888 collaborators 253 officers
2014	914 collaborators 214 officers
2015	1047 collaborators 121 officers
2016	not published yet

Table 1. Number of those involved in the lustration process.
Source: CNSAS annual reports, 2000–2015.

Moreover, despite the well-sounding definition put into the 2008 law, *unveiling* (“*deconspiracy*”) only refers to the identification of an alias. This can only be initiated by the target person (or his legal predecessor) who was the subject of the monitoring. The new law made accountable and liable the owners or tenants of “covered” flats,⁵ that is to say individuals who agreed to make their homes available for hosting meetings between state security officers and their secret informants. Often they also allowed state security officers to carry out “operational tasks” at work places. These homes were technically equipped for facilitating secret investigation actions, like roping in agents, having conversations with network members, intimidation, defamation and other actions. A major controversy emerged around the role of the clergy after the extent of the collaboration with the communist state security had started to emerge, causing public scandal among believers and distress in the ecclesiastical hierarchies. According to the law in force since 2008, security screening of church leaders had been removed from the Board’s responsibilities. However, scholarly research carried out by accredited persons has been not restricted.

A new hope emerged in the wake of an international treaty signed in Berlin in December 2008 that placed cooperation between Bulgarian, Czech, Polish, German, Hungarian, Romanian and Slovak archives in a new foundation, which has helped embedded the CNSAS to increase its international visibility. 2009 marked the first time when indemnification of the victims of communism was enabled. There is symbolic significance in

the fact that the *act* regulating indemnification was numbered Act 221.⁶ The rules and procedures of this act were hardly comprehensible. While relatives were also eligible for legal remedy, the related provision was very difficult to apply as the Court of Constitution declared it non-compliant in 2010 (ruling no. 1358, dated 21 October 2010). Finally, the issue of indemnification was escalated to the European Court, but the proceedings were still underway in 2015.

THE CNSAS ARCHIVES: STRUCTURE AND ROLE

The laborious genesis of the CNSAS archives as described in the previous paragraph has several structural reasons that must be mentioned before describing what the archives look like. In compliance with the 1996 archives law, the CNSAS has been defined as the stakeholder and the manager of the Securitate archives. The CNSAS was not allowed to rearrange the incoming documents or to alter the structure of the archive collections as inherited. The CNSAS was compelled by legal force to preserve the documents as they had received them from the former secret services. If these declassified materials had been transferred in the 1990s, their archival processing could have been more efficient and might have involved a larger quantity of documents. Contrary to the method used in Germany and Poland, Romania chose to centralize the document processing, instead of establishing county-level branches of the CNSAS, which would have enabled them to act as stakeholder. On top of this, centralization is not yet over, since the transfer of documents does not mark the end of the process, for individual papers cannot be used unless all documents have been sorted in an inventory. The documents taken over from the Romanian Foreign Intelligence Service (SIE) are structured in the same manner as those of the counter-intelligence (eg. former Securitate) archives. Both possess an “intelligence” archival fond (*Fond Informativ*), a “network” fond (*Fond Rețea*), and a “documentation” fond (*Fond Documentar*). The files of military counter-intelligence have not yet been systematically processed by the CNSAS staff. For the time being, most professional researches and private inquiries have focused on the three aforementioned sub-fonds.

Another initial shortcoming was that the state organs that transferred declassified materials to CNSAS did not hand over any electronic inventories of these files. The list of fonds and sub-fonds was put together by a professional team of the state security

5 The owners and tenants of covered houses (*in Romanian: gazde case conspirative*) were individuals who agreed to make their homes available for hosting meetings of secret agents. Often they also allowed state security officers to carry out “operational tasks” at the work places. These homes were technically equipped for facilitating secret investigation actions, like roping in agents, having conversations with network members, intimidation, defamation and other actions.

6 For a curious combination, 221 was the number of the act that ordered the establishment of the General Directorate for People’s Security (*Direcția Generală a Securității Poporului*) in 1948.

7 The 2003 annual report was controversial regarding the identification of agents. While the “number of unveiled agents” line in the summary chart on page 42 says that 26 identifications were finalized in 2003, the main text on page 36 says that the Board issued a certification of collaboration about three persons and found 46 people to have been officers of the former political police.

8 The 2004 annual report also is ambiguous about the number of identified collaborators and officers, respectively. The only reliable indicator is the 60 completed identifications.

archive personnel only on the basis of the sorting order of the received documents that had been worked out by the Securitate's recording and archiving rules back in the 1970s. The fate of investigation files (*Fond Penal*) can aptly illustrate how difficult it was to sort documents belonging to the same fond. The investigation files had a turbulent past because they shed light on the politically inspired court rulings, and the number of those imprisoned based on political motives in communist Romania between 1945 and 1989. Although some believe that such rulings only existed until 1964, when some 15,000 political prisoners had been released upon a general amnesty, archival evidence shows that politically motivated proceedings continued until 1989, the last political trial being staged in March of that year. During the communist regime, the investigation files were divided among several state institutions, and nothing happened after 1990 to restore the unitary feature of these files. Some of these files were preserved by the Romanian Intelligence Services (SRI) until 2000, when the transfer of the archives to the CNSAS began, while the Ministry of Justice held other significant portion of documents. Thus, the CNSAS was practically forced to initiate cooperation with the Ministry of Justice as well. Owing to other responsibilities, the ministry was required to safeguard the investigation archives. This arrangement generated multiple shortcomings, for whenever a private applicant or a researcher requested insight into the documents of a specific case, those documents may have been kept at two or more different locations. At the same time, the Ministry of Justice had to work with the very same documents in certain rehabilitation proceedings. The situation was worsened by the circumstance that the political rehabilitation of former political prisoners began in the same year, when the CNSAS was established, and the Ministry of Justice launched related proceedings. Judges and attorneys used former Securitate files as a starting point, and many of those files were held at said ministry, while another part of them at the SRI. Parallel to this, the CNSAS requested the transfer of the papers based on its legal obligations. Finally, the CNSAS managed to collect the dossiers of the investigation fond from the SRI, the Ministry of Justice and the Ministry of Public Administration. After the mass document transfers to the state security archives in 2005–2007, the last years of the expansion of the archives slowed down considerably to a yearly rhythm of approximately 200 rm of paper-based documents.⁹ The CNSAS currently stores 25,000 rm of paper documents at the Central Archives of Bucharest (DAC – Direcția Arhiva Centrală), and at the Popești-Leordeni Archives (DAPL – Direcția Arhiva Popești-Leordeni). In addition to paper-based documents, the archives also store microfilm. As of early 2017, more than 600,000 micro films were in possession of the archives. Most of them being transferred in the past three years. When taking micro film and mechanized data storage devices into consideration, the quantity of paper-based data kept in the archives can be actually doubled. Thus if all data on such media were printed, the length of documents kept at the CNSAS would amount to nearly 50 000 rm. This makes the CNSAS the third largest document collection repository, on the activities of the Communist state security, in Eastern Europe.

PROBLEMS AND SUGGESTIONS CONCERNING THE ACCESS TO STATE SECURITY ARCHIVES

Sticking to the principle of “keeping those involved [with secret services] away from public matters”, announced in the March

1990 Timișoara Proclamation, the CNSAS represents a key institution for revealing the past and contributing to transitional justice in its capacity as the main stakeholder of the documents of the communist dictatorship's secret services.¹⁰ Unfortunately, over the last almost twenty years, the societal “high hopes” towards moral regeneration have by far exceeded the narrow manoeuvring space given to the CNSAS by the lawmakers. Day-to-day lustration of the state apparatus has been triggered or slowed by a combination of unwillingness and inertia.

One of the most important public achievements of the CNSAS has been the ability for individual access to state security files. **Eligible individuals entitled by law can get access to relevant files** concerning their security past. However, research conditions are far from ideal due to several factors, such as the small size of the research room, or the excessive workload of archival staff. Professional researchers and individual citizens asking for their own file have to wait for longer periods, and this might especially hurt those belonging to the elder generations, in their right to access relevant documents. Time-consuming procedures for the identification of former informants and/or officers is another potentially disadvantageous factor for elderly applicants. The CNSAS does not possess an integrated catalogue that could provide guidance on which documents are still with their former stakeholders (special services and/or other branches of the public administration), thus one applicant may not receive, upon his first request, all the documents pertaining to him.

Procedures for academic research are in place, albeit there are inconsistencies. In this regard, it would be very helpful to the CNSAS, if the external research staff were allowed to contribute to agent identification as well, although this would require a change to the legal framework. Second, more computers would be needed for a faster and more effective examination of the applications. A personnel increase at all the archival branches of the CNSAS would be one precondition. From an archiving standpoint, as of today, the CNSAS has only processed and utilized a very small portion of the documents received from other archives, as it does not have either enough staff, nor the appropriate technological assets for carrying out any major inventory taking or archiving chores. The headcount at the Archives Directorate (DAC) located in the headquarters is 20, while another 15 staff works at the repository in Popești-Leordeni (DAPL) that was established after 2008. As per applicable regulations, however, the latter staff are not responsible for processing documents for archiving purposes. If the organizational unit comprising 20 archiving

9 CNSAS annual reports 2005–2016, and interview taken by the author with the director of the archives of CNSAS, dr. Laura Stancu (Cornea). Bucharest, March 2, 2017.

10 One major step forward in revealing the Securitate's institutional history was the institutional and organizational history monograph written by the CNSAS research community and published in 2016, titled *Securitatea 1948–1989*, edited by **Florian Banu** and **Liviu Țăranu**. The publication is a piece of academic work encompassing nearly ten years of research in various archives (ACNSAS – **National Council for Investigating the Securitate's Archives**; ACNJ – **Archives of the Gendarmerie's National Command**; AMAE – **Archives of the Ministry of Foreign Affairs**; AMI – **Archives of the Interior Ministry**; AMR – **Romanian Military Archives**; ANIC – **Central National History Archives**; ANR – **The National Archives of Romania**; ASRI – **Archives of the Romanian Counter-Intelligence Services**). Another significant work is a monograph by Florian Banu, a renowned researcher at the CNSAS, published in 2016 and titled *From the SSI to the SIE. The History of Romanian Espionage in the Communist Era (1948–1989)*. This monograph relies on archive sources and reviews organizational history topics along with operational ones.

associates processed 160 files a day, it would take them at least 100 years to create a comprehensive, searchable inventory list that encompasses the entire archives. This calculation assumes static conditions while we know that approximately 100–200 rm of additional documents are transferred to the CNSAS each year. Thus, the processing timeline mentioned above would be extended with additional decades. Digitalization is one possible way for efficient, secure and lasting document processing and retention. An example of a step in the right direction is that the CNSAS has begun to scan archived materials and selectively publish them on their website. However, with the current human resource and financial constraints, it seems a very distant goal to make 10,000 rm of documents available for digital research within the foreseeable future.

Thus the rules of procedure for screening is very complicated and lengthy, as private submissions from eligible individuals, cases revealed through academic research, and investigations triggered by legal requirements all land on the Board's table. The number of staff at the unit charged with preparation is just 20, which even in the election year didn't change. Further, the legal provisions enacted in 2008 slowed down the process of publishing the names of collaborators and secret service professionals who bear responsibility for wrongdoings.

As far as the administration and management are concerned, the CNSAS suffers a serious and structural problem of public underfunding. If decision makers charged with budgeting took into consideration the fact that in terms of size, the CNSAS comes third after its German and Polish counterpart institutions, it would bring significant improvements to the institution's position. While the headcount of these units is several thousand strong, the number of CNSAS employees decreased from 250 after the enactment of new regulations in 2008 to 228 by the end of 2015. Similarly, the CNSAS annual budget of EUR 2.5–3 million between 2008 and 2015 is much lower than that

of the German BStU or the Polish IPM. Filling the currently vacant general director and deputy positions at the CNSAS could definitely improve the coherence of the organization and its relationship with Parliament. Management representation would bring improvement to the institution. The centralization of the inventory of the archive fonds and sub-fonds, while developing the infrastructure and professional criteria for the searching of materials could improve the flow of information and make the institution even more open to the academic community and society as well.

The screening process of public servants in Romania is still underway. As much as the circumstances allow, the CNSAS delivers on its duties. Regarding the future, the primary objective of the institution is to continue with the process. As the German Lutheran pastor and intellectual Karl Bonhoeffer reminds us, however, the most difficult task in dealing with the totalitarian past is to overcome lethargy. Still, we must proceed through the phases of understanding if we really want to get to know what happened before 1989. Like in every other spheres of life, getting to know the facts can change the quality of our existence in respect to the secret service archives as well. The second task is even more difficult. The harm done to society must be remedied with relentless efforts. However, it requires the identification of the collaborators who contributed to the establishment and sustenance of the past regime. We may hate communism, but no democratic political system can authorize anyone to harm those who dream of reviving the fallen political system of the past. At the same time, tolerance (not acquiescence) and forgiveness should set the path which cannot be brought to conclusion with proceedings based on agent lists. Let us not degrade the need for historical revelation and public access to information to the level of power struggles. Let us prove that we can bear the sometimes painful truth of a better explored past, and that we are bold enough to have faith in a better future.

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LUSTRATION

LUCIANA JINGA

Romania adopted several lustration law projects, but none of them was fully implemented. No politicians or other public persons ever lost official authority positions because of a juridical act condemning their past collaboration with the communist regime.

FORMS OF PROTECTION OF THE NEWLY ESTABLISHED CONSTITUTIONAL, POLITICAL AND ECONOMIC STRUCTURES

THE PROCLAMATION OF TIMIȘOARA, MARCH 1990

The Proclamation of Timișoara was published for the first time in its final form on March 8 1990 and publically presented on the 11th of March in an assembly that took place in the Opera Square, in Timișoara. The 13-point document called for continuing to build on the victory over the communist dictatorship achieved in December 16–20, 1989. The inhabitants of Timișoara, the city where the Romanian Revolution started, wanted a wider recognition of their sacrifice. The proclamation thus demanded the symbolic recognition of the city's key role in the revolution. The authors also made practical demands for economic reform and for establishing authentic democratic practices. They called for temporarily (for the first three running legislatures) banning former Communists and Securitate officers from running for office and also demanded a ban on former party activists running for the position of President of the country. Such a ban would have disqualified Ion Iliescu, and other former communists from leadership in political life.

THE EVOLUTION DURING 1990s

After The Proclamation of Timișoara, the first legislative proposals regarding the access to personal files and the disclosure of the Securitate as political Police came quite early, when Constantin Ticu Dumitrescu, the President of the Association of Former Political Prisoners made an amendment to the Electoral Law in March 1990, asking for restrictions on former members of the Romanian Communist Party. The amendment did not pass. In 1992, after the first parliamentary elections in Romania, Constantin Ticu Dumitrescu initiated a Parliamentary motion banning any person, who during 1945–1989, had worked consciously as an informer for the Securitate, delivering notes and information about other persons, to be elected, or to maintain a state office or an administrative or teaching position. This motion was signed by 114 Senators and 200 Deputies and was discussed by the Parliament, and voted by a majority. The motion never came into force. Because of this, one year later, in 1993, Ticu Dumitrescu presented a legislative proposal with the same content. It was never discussed in the Romanian Parliament during 1993–1996. In the electoral campaign of 1996, the Romanian Democratic Convention (CDR) made a promise to reveal

the past. Many voted for the CDR because of this promise. It was the biggest issue separating the CDR from the other important candidate, the PDSR party.. In 1996 the Democratic Convention won both the general and the presidential elections. Emil Constantinescu, the candidate of the Democratic Convention had an incredible campaign, in which he promised the renewal of a political class, with no former communist officials and secrets agents among future politicians. The Romanians were swayed by all these promises and voted for a change. The general disappointment was as high as the hope invested in president Constantinescu when he announced that the new government wouldn't support a lustration law because such a legislative act would demonstrate the ruler's weakness, incompetence and incapacity to use the power given to them by people. Many voters felt betrayed and withdraw their support for the newly elected authorities. Between 1997 and 1999 the Democratic Convention collaborated with the Social Democrats in changing the essence of the initial law project presented by Constantin Ticu Dumitrescu.

USE OF SECRET SERVICE ARCHIVES

In 1999, a year before the general elections, the Romanian Parliament adopted Law No. 187/1999, on Access to Securitate Files and the Unveiling of the Securitate as a Political Police. The law has 26 articles that cover the following distinctive themes:

The right of any Romanian citizen to see his/her own files, and to find out the identity of the Securitate agents and collaborators who created and offered information present in that file.

The right of any Romanian Citizen, Romanian public institution, or NGO to know if those already appointed or running for certain public offices are agents or collaborators of the former Securitate and the obligation of all candidates for the named positions to give a certified declaration whether she/he worked as an agent or a collaborator for the Securitate, and if the nature of this involvement can be considered **political police**.

The law defines the terms:

- *political police* – all structures within the Securitate, created for the establishment and maintenance of the totalitarian communist power, as well as for the repression or limitation of fundamental human rights and liberties
- *Securitate agents as political police* – any person who had an operative position (formal position) within the Securitate (1945–1989), including those working undercover.
- *Securitate collaborators as political police* – persons who received money or any another benefits for his/her activity in this capacity, held a secret house or a meeting house for the use of the Securitate, was a *resident* (was not an agent, but conducted operative actions), and any other person who gave information to the Securitate, that affected, directly or indirectly, fundamental human rights and liberties. A notable exception is the information obtained during the investigation of political prisoners.

The National Council for the Study of the Securitate Archives (CNSAS), set up as an independent public institution, controlled by the Romanian Parliament, mandated to investigate the past of public officials and electoral candidates based on the secret files.

The law produced little effects because:

The law said nothing about the transfer of the archives from The Romanian Information Service (the intelligence agency) to the National Council for the Study of the Securitate. The Romanian Information Service had the right to deny access to those files that contained information concerning a “national security matter”. As the law did not specify what a “national security matter” is, the SRI acted discretionary and the files of post-communist politicians were kept under lock. The transfer of the files started in 2005 and according to SRI officials, most of the archive is now stored by CNSAS.

The law did not include any sanctions for politicians who chose to lie in their declaration.

At the time, the problem was not that evident, as the law stipulated any false declaration will be punished according to the Penal Code. An example of this is the case of Dan Voiculescu, at the time of the verdict, the leader of the Conservative Party and owner of the successful media Consortium, Antena 1. The CNSAS investigated his case in 2008 and gave the official verdict of collaborator of the Securitate in 2011. This also meant that Dan Voiculescu lied in his declarations (2004, 2008) by not admitting his liaisons with the Securitate. One month after the CNSAS verdict, the General Prosecutor was petitioned to send Dan Voiculescu to trial for false statement. To a general surprise, the prosecutor ruled that Voiculescu couldn't go to trial for false statement in his declarations. The explanation was simple. His act of lying had no legal repercussions. Of course, it was an immoral, but not an illegal gesture, as the Romanian Constitution has no provisions for vetting former Securitate agents and collaborators.

ATTEMPTS FOR LEGAL REGULATION OF LUSTRATIONS

Both civil society and public opinion were divided on whether a lustration law, almost 20 years after the fall of the communist regime, would contribute to the cleansing of the political scene. President Băsescu, elected in December 2004, publicly declared his support for a lustration law, while Crin Antonescu, leader of the Liberal Party, said that a late lustration law would have no real effects in the Romanian society.

Despite the general believe that Romania would never find the tools to fight former communist activists and Securitate agents still active in politics and the economy, in 2006, the Romanian presidency and government showed the political will to condemn the political past. President Traian Băsescu publicly condemn the communist regime in the Romanian Parliament (December 2006); The Institute for the Investigation of Communist Crimes started its activity (May 2006), and the government approved the Emergency Governmental Ordinance No. 16/2006, which expanded confession-based lustration in Romania and entrusted the CNSAS with the task of verifying personal statements signed by public office holders and detailing their past collaboration or non-collaboration with the Securitate. The final verdicts were to be published in the state gazette, *Monitorul Oficial*. A step forward was that if the verdict differed from the public

statement, the CNSAS had the authority to notify the courts, as the act of signing a false declaration is a legal offense, in the case of state representatives, punishable with the loss of public office.

According to the same Ordinance, any collaboration (not only as political police) with the Securitate of judges and prosecutors holding or seeking administrative leadership positions in the court system, or the prosecutor's offices, or elected to the Superior Council of the Magistracy, led to disqualification. This provision was in force from 2004, according to Law No. 303/2004, as well as Law No. 247/2005, concerning the professional status of judges and prosecutors. All three legislative acts affected only those appointed after the laws came into force (2005) and not those still occupying public offices, but appointed before. In practice, as the case Florica Bejenariu shows (judge elected to the Superior Council of the Magistracy; before 1989 she wrote 52 informative reports for the Securitate), the judicial system refused to apply this provisions.

One of the political leaders unveiled by the National Council as a former secret agent was Dan Voiculescu. He not only refused to apologize for his activity as secret agent of the Securitate, but contested the verdict and asked the Constitutional Court to review the constitutionality of the entire lustration legislation. In January 2008 the Court found Emergency Ordinance No. 16/2006 unconstitutional, invalidating all verdicts that the Council had handed down up to that moment, and threatened to shut down the CNSAS completely. IICCR researchers and other members of civil society joined CNSAS employees for public protest in support of the CNSAS and its activity. The government solved the situation by limiting the CNSAS mandate to storing secret documents and granting citizens access to their files, while transferring to the courts the right to decide who was (or was not) a former agent or collaborator of the Securitate.

A lustration law project was introduced in 2006 by four Liberal legislators, including Deputy Mona Muscă. After a lot of procrastination and political wrangling, in May 2010 the Chamber of Deputies adopted the proposal, while the Senate petitioned the Constitutional Court on its constitutionality. The Court agreed that lustration infringed the constitution by blocking some citizens' access to elected positions and failing to individualize guilt. As a direct consequence the law was modified only to include nominated public offices. The liberal-democrats also eliminated from the law any mention of the Communist Youth League leaders, as the Prime Minister at the time, Emil Boc, served as a Communist Youth League leader in Cluj County.

In February 2012, Mihai Răzvan Ungureanu, head of the External Information Service from 2007 to January 2012, replaced Emil Boc. Ironically, Ungureanu also served as a leader of the Communist Youth, from 1985 to 1989. The person chosen to replace Mihai Răzvan Ungureanu, as director of External Information Service, was Teodor Meleșcanu, an old school diplomat of the communist government. Soon, Romanian officials realized that the lustration law project also mentioned the vetting of communist diplomats. Subsequently this professional category was eliminated from the law.

The bill affected neither former Securitate agents who continued their activity as agents of the post-communist intelligence services (because their files were considered an issue of national security), nor those whose secret files mysteriously vanished, as in the case of presidents Ion Iliescu and Traian Băsescu, both important party leaders before 1989.

Romanians started to make jokes about the situation, saying that in its final form, the law will mention only Nicolae Ceaușescu and his wife, already dead in the Romanian Revolution.

The leaders of the Hungarian minority in the Romanian Parliament also asked for the law to include the removal of all communist prosecutors, but the proposal was rejected by the *Committee for legal matters* of the Parliament. A former political prisoner asked the Committee for a re-evaluation of the provision, offering as motivation, his own history of abuses perpetrated by communist prosecutors. In the end, the Parliament plenary adopted the amendment.

Besides the prosecutors, the law included persons who held remunerated political positions in the central and local structures of the Romanian Communist Party, full members and alternates of the party's Central Committee, ministers in the communist governments, and the directors of the publishing houses.

The law was adopted by the Romanian Parliament on 28 February 2012. Just a week later, on March 7 2012, the Constitutional Court, petitioned by the professional organizations of judges and prosecutors, found the Lustration Law unconstitutional. The project was dropped; in the last five years no other legislative initiative replaced it.

IMPLICATIONS FOR THE STATE AND SOCIETY

On March 29, 2012, the CNSAS elected a new leading structure. One of the members elected was Corneliu Turianu. Immediately, the civic organization Miliția Spirituală, responsible for revealing names of Securitate agents and collaborators, published an article showing that Corneliu Turianu, was a former member of the Romanian Communist Party, held leading political positions in the 1970s, as secretary of the party organization at one of the regional law courts in Bucharest and was responsible for the ideological and political training of the judges within Bucharest Tribunal. Andrei Muraru, a researcher at the Institute for the Investigation of Communist Crimes and the Memory of the Romanian Exile, and later president of the same institution, publically accused Turianu for his communist past and asked for his vetting from the leading structure of the CNSAS. Corneliu Turianu accused Andrei Muraru of misleading the public and won. The judges pointed out that Andrei Muraru, in his declaration, placed Turianu as secretary of the party organization of the Bucharest Tribunal, and not of the regional law court, as mentioned

in the documents. Turianu kept his leading position at the CNSAS until his death, in November 2016.

Without a lustration law, Securitate agents and collaborators, communist prosecutors and judges held positions of authority in key post-revolutionary Romanian Institutions.

Two excellent political scientists, Lavinia Stan and Raluca Grosescu, in their studies, showed that the Romanian Revolution resulted in elite reproduction, not elite replacement. The second echelon of the communist leadership (local leaders, Communist Youth League leaders, party members that held authority position in different economic structures) replaced the first echelon (namely the Executive Committee of the Communist Party). The historian Marius Oprea joins the two political scientists with his analysis on how the former communist officials and the Securitate agents are the big winners of the Revolution, representing the majority of new political and economic elites.

LESSONS LEARNT AND RECOMMENDATIONS

A quick overview shows that former communist officials and Securitate agents dominated the cabinets and the Parliament after 1990, 1992 and 2000. More recently, for the elections in 2012 and 2016, mass media campaigns revealed another troubling phenomena. Former communist leaders and Securitate officers have been replaced by active officers of the Romanian Secret Service, the successor of the former Securitate. The first three post-communist presidents, Ion Iliescu, Emil Constantinescu, and Traian Băsescu, seven of the nine prime ministers (Petre Roman, Nicolae Văcăroiu, Victor Ciorbea, Mugur Isărescu, Adrian Năstase, Emil Boc, and Mihai-Răzvan Ungureanu,), were drawn from the ranks of the communist state, party, economic, or student leadership. After 2012, the concerns regarding the communist past of the President and Prime Minister were replaced by scandals of corruption that reopened the discussion about the necessity of a real lustration process in Romania. The admission process to NATO and the European Union might have been an instrument to put real pressure on Romania to keep the newly established constitutional, political and economic structures. It seems, however, that the Western partners have come to terms with the reality of a geo-strategically important country, where ubiquitous security agencies have conquered the role of political king-makers. A central issue for the next years will be how to limit the growing power of this unelected ruling elite without affecting national and regional security.

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INVESTIGATION AND PROSECUTION OF THE CRIMES OF THE REGIME

STEFANO BOTTONI

This chapter analyzes the instruments the Romanian juridical system has adopted since 1989 to deal with the crimes perpetrated by different state agencies during the communist regime, and reconstructs the rugged path towards the establishment of a framework of legal regulation that would make possible the criminal prosecution of perpetrators and their political supervisors.

A JURIDICAL FARCE: THE CEAUȘESCU TRIAL OF DECEMBER 25, 1989

The first act of the transitional justice in Romania was the trial of Nicolae and Elena Ceaușescu on December 25, 1989. During and after the process, the entire responsibility for the multifaceted crimes committed throughout several decades in their modern repressive bureaucracy was directed on a single and highly symbolic target, the presidential couple. The personalization of the criminal past allowed many co-executors to avoid any civil and criminal liability.

On December 22, 1989 Ceaușescu and his wife fled the capital in a military helicopter but were captured and taken into custody by the armed forces. The idea of the public trial announced on December 23 by Ion Iliescu was quickly set aside. The jury was also chosen by the National Salvation Front (NSF). Two lawyers from Bucharest were called to “recite” the part of the office defense, respectively for Elena and Nicolae. The NSF’s choice to form an extraordinary military tribunal alleviated some of the normal procedural guarantees and was therefore functional in the hurry to liquidate the President, but this posed serious legal challenges.

First, Nicolae Ceaușescu’s repeated invocation of a judgment before the Grand National Assembly (GAN) was legally founded. Every member of the GAN was in fact protected by immunity and according to the 1965 Constitution was still in force, he/she could not be “stopped, arrested or sentenced in criminal trial without the prior approval of the Grand National Assembly during its sessions, or the State Council, in its sessions.” The GAN was also invested in the power to elect and revoke the President of the Republic, as well as controlling its actions. In strictly legal terms, Ceaușescu was right to raise this objection, because the GAN had not yet been officially dissolved.

Obviously, any reasoning for the legitimacy of the judiciary conflicted with the crude reality of the institutional limbo that culminated on December 25, with the execution of the presidential couple. The legitimacy of the NSF was, in fact, to be demonstrated, and the shape of the new regime was still in the forefront, because the NSF turned itself into the nation’s government on December 26. In that political void, the tribunal defined itself as “the people,” and proclaimed that it had formed a new power structure. The Ceaușescus, on the other hand, refused to recognize the tribunal and regarded their overthrow

as a foreign-directed “coup d’état”, a thesis that would become popular after 1990 among former Securitate officers and opinion makers.

Even if one takes for granted that the military court was legally entitled to judge the case, a further contradiction emerges. Although Ceaușescu had proclaimed a state of emergency on December 17, authorizing the military courts to operate in an exceptional procedure, such circumstances could not rule out the regular celebration of the trial. The two office lawyers provided to Ceaușescu talked about their special client in the most despicable terms and did not provide the slightest defense, even reaffirming at every opportunity the guilt of the defendants. The behavior of the judge was also far from correct, as he began to apostrophise the deposed President as a “coward,” who had organized “orgies” and had worn “luxurious clothes”.

On the other hand, the crimes that had been challenged by the two Ceaușescus and confirmed by the judgment – genocide, usurpation of state power, acts of diversion and compromise of the national economy – were all largely unfounded, with the exception of the compromise of the national economy. The latter, in fact, found easy evidence (though not exposed in a story) in the disastrous condition of the Romanian economy, a direct result of the policies of Ceaușescu. The rest of the accusations would probably have been dismantled by any defender under normal circumstances. A further element that contributes to undermining the legality of the trial was the complete lack of an investigation phase: the charges of imputation therefore revealed all their fragility and improvisation. The accusation of genocide, in fact, was based on the number of victims of repression. These were calculated on the basis of unsubstantiated estimations of 12,000 casualties, in Timișoara, provided by East European news outlets, that had spread stories of torture, massacre of pregnant women and children, of mass graves, of attempts to sabotage nuclear power plants and aqueducts, of snipers refugee in underground tunnels, and of foreign terrorists. The tribunal therefore spoke of 64,000 casualties, which were purported to be a result of the orders of the former President, which would have allowed, at least theoretically, to speak of genocide. The indiscriminate repression of more than 60,000 people in a few days could have not been assimilated to a mass extermination, but the absence of the conditions for that charge was already evident at that time. It is not a coincidence that, in the subsequent trials of the suspects responsible for the victims of Timișoara, the original charge of “genocide” was transformed into “aggravated killings”.

The other two charges related to usurping of the powers of the state and of having committed acts of diversion held a strong symbolic value, but besides being inaccurate at the procedural stage, contained few legally relevant elements. The institutional system that converged on Nicolae Ceaușescu was in fact based on constitutional and legislative pillars, and in principle, was not the product of the abuse of power. If communist practices were found to be forbidden by the new power, they were rather

linked to the nomenclature which cynically exploited its privileged position. Ceaușescu's institutional architecture in Romania was not condemnable in terms of democracy and the rule of law, but the President's despotic role was written in clear letters in papers and statutes. Even in the case of the December 1989 events, Ceaușescu's behavior was morally despicable but legally unimpeachable. The President and Chief of the Armed Forces defended the power of what was seen by the threatened institutions as an attempt at subversion and sought, violently and unsuccessfully, to restore public order. The disputed diversionary acts are correctly referred to in article 163 of the Penal Code, which provided for the death penalty for such offenses.

To further undermine the legal validity of the trial, the death sentence was most probably written before the trial began. There was no room for any alternative to the condemnation, no one mentioned the possibility of appeal. There was no time span between the self-proclaimed prosecution and the shooting; the ten days provided for by the Code of Criminal Procedure for the referral to appeal, or the five days of grace before the deaths of the perpetrators were not expected.

EARLY TRANSITIONAL JUSTICE: THE ANTI-COMMUNIST TRIALS OF THE 1990s

Between late December 1989 and January 1990, the new provisional government abolished numerous measures of illegal character – like the infamous abortion ban – and “contrary to the interests of the Romanian people” ordered on December 30 the dissolution of the communist State security agency (*Departamentul Securității Statului*). However, the new government's activity soon raised serious doubts about the commitment of the authorities to decommunize. The 1965 Constitution was not formally abrogated: it was essentially forgotten and acted in an extra-constitutional space, at least until the decree of March 18, 1990, which entrusted the future parliament with the task of adopting a new Constitution. paper. The Securitate was not dismantled, but merely integrated into the Ministry of Defense and subsequently renamed the Romanian Information Service (SRI). Thirdly, the allegiances of the Warsaw Pact were kept loyal, wiping out any doubts about the ideological position of the new rulers: reformism within a system of values that was inherited from the previous regime and that no one intended to question. Finally, the orders, the directives, the institutional restructuring, and the same appointments came entirely from the political body, the Council of the Front, that assumed full powers. The Council of the Front also gave itself the power of nomination and revocation of the government, definition of the electoral system, nomination of the Committee for Constitutional Reform, approval of the state budget, signatory of international treaties, declaration of State of war, and the power to introduce capital punishment.

In the first months after the victorious revolution of December 1989, the new transitional power allowed and even stimulated some attempts at giving justice to the casualties of the revolutionary period. Extraordinary military courts were set up nationwide according to a decree published on January 8, 1990. The machinery of justice began with an emphasis on the prosecution of so called “terrorists”, but their existence could not be proved and none of the supposed targets were brought to justice. A number of public trials took place in 1990–1991 against former

dignitaries and army officers, and although none of the trials showed the same disregard for fair juridical procedures as that against Ceaușescu, they nonetheless contributed to undermine public confidence in the judiciary, due to exaggerated charges that had to be later changed or even dropped.

The first of them concerned Ceaușescu's four closest aides: former Interior Minister Tudor Postelnicu, former deputy Prime Minister Ion Dinca, former RCP organization chief Emil Bobu, and former deputy PM Manea Mănescu. The four dignitaries faced accusation of complicity in “genocide” because of the orders issued to fire on peaceful demonstrators in December 1989. They were sentenced to life imprisonment, and all of their properties were confiscated. In March 1990, a series of proceedings that came to be known as the “Timișoara Trial” charged 25 Securitate and criminal police (*Miliția*) officers with complicity in genocide for the mass killings in Timișoara. The trial lasted almost two years, during which the charges were downgraded to aggravated murder and complicity in murder. When the sentence was passed, on December 9, 1991 only eight defendants were jailed with sentences ranging from 15 to 25 years. Six defendants were acquitted, one had died during the process, while ten defendants were convicted but subsequently pardoned or released for their time served in prison taken into account. By 1994, all the previously convicted persons for the Timișoara massacre had been released for different reasons. The same happened for the trial started in Bucharest against the members of the Political Executive Committee of the RCP in July 1990. Just as in Timișoara several months before, the initial charge of “genocide” had to be modified to instigation of aggravated murder. At the end of the procedure, only 9 out of 21 defendants received relatively mild sentences for “complicity in murder” and “negligence of duty”, and even those sentenced were soon liberated for health reasons. As Edwin Rekosh has shown in his analysis of the lustration process in Romania, the post-1989 trials shared the worst aspects of two contradictory political impulses. “They started as highly politicized show trials caught up in the hysteria of the moment, but in the end the concrete results were effectively subverted through indirect means, presumably due to political influence.”¹

Only the 1996 government change and the coming to power of the Democratic Convention made it possible for new, more professional and unbiased wave of trials. In 1997, military prosecutors brought to justice generals Victor Stănculescu and Mihai Chițac Athanasius as the main people responsible for the armed repression in Timișoara. In 2000, the generals were sentenced to serve 15 years in prison, but after a new political change, which brought back to power the postcommunist Social Democrats, the General Prosecutor of Romania made an appeal for annulment in 2001. The case was reopened and the defendants were released from custody. Finally, on October 15, 2008, the High Court of Cassation and Justice convicted the two generals to serve 15 years each in prison for involvement in the massacre of Timișoara. On March 2013, the European Court of Human Rights (ECHR) in Strasbourg compelled the Romanian Government to pay compensation of around 350,000 Euros to victims of the 1989 Revolution in Timișoara. “During these procedures, the examination of the case by the courts was repeatedly interrupted,”

1 Edwin Rekosh, *Romania: A Persistent Culture of Impunity*, in Naomi Roht-Arriaza, ed., *Impunity and Human Rights in International Law and Practice*, New York-Oxford: Oxford University Press, 1995, 134.

noted ECHR in its resolution, and “it took another eight years before the case file was settled”.

THE CASE OF FORMER MINISTER OF INTERIOR DRĂGHICI

It must be noted that although the victims of Romanian communism have to be numbered in the hundreds of thousands of arrested, deported or executed people, until very recently only four indictments laid by public prosecutors referred to crimes ordered or committed by communist dignitaries before those of December 1989 (the so called “revolution file”). On the one hand, the state did not take any action to investigate the killings or inhuman treatment committed in the interrogation cells of the Securitate or in communist prisons. On the other hand, the complaints lodged with the prosecutor’s office by the victims were investigated with a slowness equivalent to inaction. Certain criminal investigations were quickly stopped due to the death of incriminated persons, others were interrupted on the grounds of lack of evidence. In other instances, a combination of internal and external pressures stopped any attempts of justice. In August 1992, after former political prisoners had long asked to open a case against Alexandru Drăghici, former Interior Minister between 1952 and 1967, and one of the main men responsible for the mass repression of the Stalinist era and post-1956 period, the Romanian general prosecutor asked for Drăghici’s extradition from Hungary, where the former high-ranking dignitary had fled with his wife after the 1989 revolution. In 1993, Drăghici and three Securitate officers were accused of instigation and aggravated murder. However, the accusations did not make reference to political crimes, but to the shooting, in 1954, of an individual

having a personal conflict with Drăghici. Thus, the indictment did not refer to the role that Drăghici had played in repressing political opponents, but only to an act of personal abuse, which had no relevance to the political repression of the communist regime. The extradition request was rejected by the Hungarian authorities, which argued that the statute of limitation for this crime had expired. Drăghici died undisturbed in December 1993 in Budapest, although a Romanian court had found him guilty in another case of incitement to murder, and sentenced him *in absentia*.

LESSONS LEARNT

As shown well by Raluca Ursachi and Raluca Grosescu in their analysis of post-communist juridical practices of lustration, from a juridical perspective, the trials against former communist dignitaries in Romania after 1990 were based on the same legal framework of the time of the facts, according to the principle *nulle crimen sine lege*. The investigation of the various cases and their judgment in court were confronted in this context with a number of difficulties of juridical order, the major obstacles being: 1) the amnesty of certain crimes by presidential decree enacted at the end of Ceaușescu regime; 2) the statute of limitation; 3) the difficulty to frame these crimes and abuses as imprescriptible crimes as defined by the socialist Criminal Code. The extreme politicization of trials involving persons belonging to the former communist, and the social composition of courts that, where until very recent times judges and prosecutors whose career had started well before 1989, were in a dominant position, can also explain why the post-communist wave of trials failed to achieve the goal of providing justice for both communist crimes and the mass repression in December 1989.

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REHABILITATION OF VICTIMS AND COMPENSATIONS

LUCIANA JINGA

In terms of rehabilitation, Romania represents a special case in the former Soviet Bloc. Most post-communist countries passed rehabilitation laws in the early 1990s: Bulgaria and Czechoslovakia in 1990, Germany and Hungary in 1992, Albania in 1993.

Romania offered rehabilitation with considerably delay. The first law that annulled the communist-era convictions handed down on political grounds came in 2009, only to be declared unconstitutional and blocked. The compensation program, on the other hand, was one of the first measures taken by the first post-communist government, but provided mostly symbolic benefits and very little financial support.

SCOPE AND TYPOLOGY OF THE REHABILITATION

First of all rehabilitation of those convicted on political grounds is a symbolic gesture that speaks itself about the abuses of the communist courts. Second, after December 1989, many former political prisoners were asking for rehabilitation for practical reasons. They needed a clean record in order to occupy public positions or to get a travel Visa. Access to the public system jobs still had the condition of a clean record by Romanian authorities. In the eyes of Romanian society, political prisoners were no better than any other convict. Colleagues, neighbours, and even family members were reluctant to associate with them.

LEGAL FRAMEWORK OF THE REHABILITATION AND THE COMPENSATION PROGRAM

DECREE-LAW NO. 118/1990

In 1990, Romania adopted Decree-Law No. 118, regarding some of the Rights for People Persecuted for Political Reasons during the Dictatorship Installed in Romania on the 6 March 1945, which covered those who were displaced, deported, imprisoned, abused in psychiatric institutions, or confined to a particular place of residence by the communist courts or the Securitate, if the measure was taken as a means of political persecution. The Decree-Law provided symbolic financial compensation for each year of imprisonment (200 lei) or displacement endured, free medical assistance and medication, free use of public transportation, and means and income tax exemptions. Here it is important to stress that a larger category of persons (retired persons for example) benefited from similar measures. The time spent in prison, labor camp, or obligatory residence was recognized as working time for pension purposes. Those who spent time in prison or psychiatric wards could count towards their state pension, both the time period and the time they could not work because of the invalidity resulting from imprisonment. When calculating pension rights, each year of persecution counted as eighteen months. These rights

extended to persons who could not work because the Securitate monitored them for some political reason. The victims' living relatives could claim small pension rights as successors. Local commissions consisting of representatives of the Ministry of Labor and the Association of Former Political Prisoners decided which former victims could qualify for these rights. The decision could be appealed within fifteen days after notification of the claimants.

Individuals who were convicted for crimes against humanity or who were proven to have conducted fascist activity within an organization or movement could not enjoy reparations granted through this law. This is an important distinction which was maintained in other laws and in judiciary practice as well.

Until 1996, the Social Democrat government continued to deny the criminal character of the communist regime and refused to raise compensation to more meaningful levels, and adopt the rehabilitation law

EMERGENCY ORDINANCE NO. 214/1999

Emergency Ordinance No. 214/1999, repeatedly amended between 2000 and 2015, also provided reparations to the victims of the communist regime. Based on this legal document, those persons who were convicted for crimes committed for political reasons or subjected to administrative abuse, as well as individuals who participated in activities of armed opposition or forced the overthrow of the communist regime between 1945 and 1989 were entitled to be granted the status of "fighter in the anti-communist resistance". According to article 2 of this law, the main acts which could qualify as crimes committed for political reasons are protests against the communist dictatorship and its abuses, the support for pluralist and democratic principles, propaganda for the overthrow of the communist social order, armed opposition against the communist regime, and respect for human rights and fundamental freedoms. The status of "fighter against anti-communist resistance" is granted by a committee formed by representatives of the Ministry of Justice and the Ministry of Administration and Interior, as well as representatives of the Association of Former Political Prisoners in Romania. The holders of the "fighter against anti-communist resistance" status benefited by receiving restitution of confiscated goods and rights provisioned by Decree-Law No. 118/1990. Again, the title was not granted to members of the far-rightist Iron Guard movement. Law No. 568/2001 extended these benefits to those who engaged in armed fighting against the regime during the 1945–1964 period or who were expelled by the communist regime from schools and universities on political grounds. The consequences of the two laws remained minor as the additional benefits were mostly symbolic. More than that, the ordinance was applied differently across the country, generating a series of discrepancies between former victims who had similar cases but resided in different localities.

1990–2009 – REHABILITATION ON INDIVIDUAL BASIS

For two decades the Romanian post-revolutionary governments passed no measures regarding the rehabilitation of former political prisoners. The rehabilitations were decided on an individual basis at the discretion of the prosecutor general, who could invoke an appeal to the court of last resort (*recurs în anulare*). This procedure allowed a political figure appointed by the executive to overturn definitive court orders. The prosecutor general used the procedure to block both the return of property awarded by the courts, and also to challenge the legality of the criminal and administrative court verdicts handed down before 1989. Another possibility of obtaining rehabilitation was to convince the courts to reopen the case. Former political prisoners, however, did not use this legal solution because of the time, money, and time consuming procedure. What they wanted was for the state to recognize its past mistakes and grant rehabilitation automatically.

In 2000, sixteen former political prisoners condemned to forced labour by the communist courts from 1951 through 1954 were rehabilitated and their jail sentences were annulled, but the procedure remained discretionary

LAW NO. 221/2009

In 2009, the Romanian Parliament passed Law No. 221/2009 on the Politically Motivated Convictions and Administrative Measures Handed Down from 6 March to 22 December 1989. The project was initiated in 2007 by the historian Marius Oprea, the first president (2005–2010) of the Institute for the investigation of Communist Crimes and the Memory of the Romanian Exile, Constantin Ticu Dumitrescu, head of the Association of Former Political Prisoners, and Minister of Justice, at the time, Monica Macovei. The law rehabilitated all persons sentenced for political reasons by communist courts to jail, forced labor, or forced domicile on the basis of criminal code stipulations, communist laws, and administrative measures that condemned acts of dissidence and opposition, armed or unarmed. The law extended to persons who had already benefited from Decree-Law No. 118/1990 and Government Ordinance No. 214/1999. All abusive court sentences were annulled and erased from all records. In addition, within three years of the law's adoption, politically persecuted persons, and their descendants, could apply to the Romanian state for compensation of moral damages for the time spent in prison and for property lost in abusive confiscations that accompanied the court sentences to jail, forced labor, or forced domicile. Persons who had been demoted to an inferior army rank could also ask for the reversal of that decision. As in the case of previous legislation on rehabilitation, these advantages did not extend to the “persons condemned for crimes against humanity, and those who had promoted racist and xenophobic ideas and doctrines that encouraged hate or violence toward ethnic, racial or religious groups”, mostly referring to members of the Ion Antonescu regime and the Iron Guard. According to the law, a crime had a political nature, if the person expressed opposition or protested against the totalitarian regime, had an affiliation with democratic principles by protesting against the communist dictatorship, the communist ideology, the abuse of power by those who held the reigns of the country, supported principles of democracy and political pluralism, participated in propaganda that was aimed to revert the social

order to democracy, used weapons to eliminate the representatives of the communist regime by force, respected human rights and liberties, or eradicated communist discriminatory measures grounded in religion, political opinion, wealth, or social origin. The political nature of these convictions had to be assessed by the court, because communist sentences rarely mentioned the political opinions of the accused or the country's political situation.

As in the case of the previously discussed law, article 7 mentions that the provisions of Law No. 221/2009 are not applicable to persons convicted for crimes against humanity or for carrying out racist, xenophobic or anti-Semitic propaganda. This specification is important as it allows us to ascertain that the political nature of a conviction is determined by the reason for the conviction, and not only by the conviction's legal grounds. While most claims were rather small, a handful of them reached hundreds of thousands of Euros. For the government, already facing a global financing crisis, it became evident that the total sum of claims could seriously burden the national budget and decided to put a cap on the amount of compensations, by the Ordinance No. 62/2010.

One month later, an Romanian Ombudsman challenged Ordinance No. 62/2010 in the Constitutional Court, arguing that it violates provision regarding equality of rights stipulated by article 16 of the Constitution. Basically, the Ombudsman pointed out that the ordinance establishes differential legal treatment between persons who have already had a final decision based on Law No. 221/2009, and persons whose requests had not been settled at that moment. The Constitutional Court acceded to this perspective and ruled that the provisions of Ordinance No. 62/2010, which established thresholds for compensations, are contrary to Romanian fundamental law. Furthermore, the Court considered that the application of the ordinance to situations in which there is an undefinitive judgement, in the first instance, also violates the principle of non-retroactivity, stipulated by article 15 (2) of the Constitution.

However, on 21 October 2010, The Constitutional Court settled the objection of nonconstitutionality raised by the Ministry of Public Finances, in the Tribunal of Constanța with several files regarding the application of Law No. 221/2009. The Court found that there are two legal norms which provision allows for the allocation of money to persons persecuted for political reasons by the communist dictatorship, namely Decree-Law No. 118/1990 and Law No. 221/2009. As Decree-Law No. 118/1990 established the conditions and the value of the monthly compensation, a second regulation with the same objective infringes on the supreme value of justice proclaimed by article 1 (3) of the Constitution. Furthermore, the parallel regulations regarding these types of compensations also infringe on article 1 (5) of the Constitution regarding the mandatory observance of laws. As a consequence, the Court declared as unconstitutional article 5 (1) (a) thesis one, according to which the state is obliged to allocate compensation for moral damages caused by political convictions.

Furthermore, the ruling of the Constitutional Court is also relevant regarding the nature that reparations have in the Romanian legislation. According to this decision, the objective of compensations for moral damages suffered by the victims of the communist regime is not the restoration to the situation before the gross violations of human rights law occurred. The aim is rather to produce a moral satisfaction through the acknowledgement and

condemnation of measures which violated human rights. Furthermore, the Court considered that the obligation to allocate compensation to persons persecuted by the communist regime has only a moral nature. This view is motivated by the Constitutional Court, through several rulings of the European Court of Human Rights, which found that the provisions of the European Convention on Human Rights do not impose on member states specific obligations to repair injustices or damages caused by previous regimes.

SOCIAL SATISFACTION

According to some voices, approximately one million Romanians could have benefited from the provisions of Law No. 221/2009. However, by the time the law was passed the number of political prisoners still alive had quickly declined. In September 2010 there were 174 cases in which the courts handed down definitive decisions awarding compensations in virtue of Law No. 221/2009. The courts awarded compensation packages ranging between 300 and 1 million euros.

One of the arguments in favour of the law was that another important category of victims, the victims of and participants in the 1989 revolution, had already benefited from Law No. 341/2009 that granted substantial benefits including monthly compensation of 3,672 Lei (equivalent to 900 euros) for those disabled during the events, and 2,200 Lei (500 euros) for the participants and the their surviving relatives, as well as free housing, public transportation, access to public cemetery plots, and access to public crèches and kindergartens for their children.

After Law No. 221/2009 came into force, several former political prisoners asked the Romanian government for reparations proportional to the time they spent in communist prison and the suffering they endured.

One of the beneficiaries was Ion Diaconescu, politician and former political prisoner, who was awarded 500,000 Euros by the Bucharest Tribunal in June 2010. Following this groundbreaking decision, the Romanian Government issued Emergency Ordinance No. 62/2010 to amend Law No. 221/2009 and established a threshold of 10,000 Euros for the compensation of the convicted persons, 5000 Euros for the husband / wife and first grade descendants and 2500 Euros for second grade descendants.

The law also included among the beneficiaries, persons persecuted for their participation in the 1987 workers' protests in Braşov, who were assigned forced residences, were relocated to other towns, or were deported.

It is important to stress that according to that piece of legislation, no other group of communist-era victims qualified for that series of advantages, including the miners who participated in the 1977 protests, which were very similar to the events in Braşov 1987. This law also made no reference to other categories of victims, such as the women that suffered or died as consequence of the pronatalist law, the children that suffered and died in the homes for "unrecoverable minors", or those committed to detention centres for minors. The exclusion is odd, taking into consideration that Marius Oprea, the most vocal initiator of the law, as President of IICCR, supervised a team of researchers that documented these situations.

ORGANIZATIONS OF FORMER VICTIMS

THE ASSOCIATION OF FORMER POLITICAL PRISONERS IN ROMANIA (AFDPR)

The first, and still most representative organisation of the former political prisoners created on the 2nd of January 1990, is Asociația foștilor deținuți politici din România, The Association of former political prisoners in Romania. It was formed for the expressed purpose of seeking reparations for the suffering of its members. The initiative group included well known former political prisoners like Constantin Dumitrescu, Radu Ciuceanu, and Constantin Lăteș. In December, the organisation reached 120,000 formally registered members and 41 national branches. The headquarters was established in Bucharest, and the first Congress of the AFDPR was in October 1990, in the presence of 600 active members, who elected Constantin (Ticu) Dumitrescu as president of the organization. This event also marked the first official split between the founding members, which resulted in the expulsion of Radu Ciuceanu. 1995 represented a second turning point of the organization. With the support of the The Christian Democratic National Peasants' Party, a group organized around Cicerone Ioanițoiu, they left the AFDPR. The Congress, held the same year, reaffirmed the unity of its members and confidence for the historical leader, Constantin (Ticu) Dumitrescu. As president of the Association of Former Political Prisoners, his initiatives touched on all the important aspects of Romanian transitional justice. The first major breakthrough was the rehabilitation of former political prisoners (Law No. 118/1990). Subsequently, in 1991, he addressed a criminal complaint against those responsible for the crimes of the totalitarian regime. In 1993, he initiated what later become the Ticu Law (Law No. 187/1999 on Access to the Securitate Files and the Unveiling of the Securitate as a Political Police). His last important initiative was the 2007 law project concerning the legal redress for those who received politically motivated convictions, and the administrative measures from 6 March 1945 to 22 December 1989, adopted as Law No. 221/2009, a year after his death.

His successor Octav Bjoza was re-elected for a new mandate until 2019. In 2012 the social democrat government appointed him as honorary ambassador for the European Union, and since 2014 he has been head of the State Office for acknowledging the merits of those who fought the communist regime in Romania. The same year he was decorated by the Romanian President Klaus Iohannis. Recently, Octav Bjoza teamed up with Radu Ciuceanu, the director of the Institute for the National for the Study of Totalitarianism and other representatives of former political prisoners, against Law No. 217/2015 (on the ban of organizations and symbols of fascist, racist or xenophobic character and of the promotion of the cult of people that are guilty of crimes against peace and humanity), by questioning the fascist nature of the Romanian Legionary Movement.

OTHER NATIONAL OR LOCAL ORGANISATIONS OF FORMER POLITICAL PRISONERS

Federația Română a Foștilor Deținuți Politici și Luptători Anticomuniști/ The Romanian Federation of Former Political Prisoners and Anti-Communist Fighters, or Fundația Luptătorii din Rezistența Armată Anticomunistă/ the Foundation

“The Fighters in the Armed Anti-communist Resistance”, although an active part in the public actions of former political prisoners remained in the shadow of AFDPR.

ICAR FOUNDATION

Another important organisation is the ICAR Foundation, created in 1992, which provides medical, psychological, legal, and social rehabilitation services to survivors of communist-era political persecution and gross human rights abuses. ICAR is the only organization in Romania that has set out and implemented such a program. It helped to establish 2 other rehabilitation centres that offer a various range of rehabilitation services to victims of serious human rights abuses (such as arrest, condemnations on political, ethnical or religious ground, deportation, exploitation, extermination in concentration camps, torture, inhuman or degrading treatments) among former political prisoners and their immediate families either by in-house services or by referral to external professional networks.

OUTCOMES OF THE LAW NO. 221/2009

NEGATIVE

The National Council for the Study of the Securitate Archive and the Institute for the Investigation of Communist Crimes, the two institutions that could provide the documents and legal assistance to former political prisoners, were quickly overwhelmed by petitions from potential beneficiaries, but also from the courts who asked them to acknowledge their rights. In March 2012, the total number of such requests for the CNSAS reached 11.000, the IICCMER had less than 20 researchers who had to solve another 2.000 petitions.

Former political prisoners denounced the stipulations of the law that required them to go to court to find justice. The law recognized as political in nature only the convictions expressly included among communist laws and criminal code provisions after 1964, that were listed in article 1.2, and asked the courts to demonstrate the political character of all other convictions. The law obliged political prisoners who received non-political sentence, usually charged with petty crimes, to petition the courts to have their rehabilitation rights recognized. A category particularly problematic concerned those committed to psychiatric facilities, and literally, forgotten by the system and their families. Despite the existence of Securitate records on their names, without medical documentaion, the courts, in many cases, did not granted any reparation packages.

Emergency Government Ordinance No. 62/2010 limited moral damages for political imprisonment to a total of 10.000 Euros for victims, 5000 Euros for their spouses and children, and 2500 euros for their grand-children. It was assumed that the victims who received reparations through Decree-Law No. 118/1990, Emergency Ordinance No. 214/1999 and Law No. 568/2001 qualified for lower compensation levels than the victims who had received no support prior to 2010, whereas victims who had suffered for longer periods of time and from more serious human rights violations were entitled to higher compensation levels.

In November 2010 the Constitutional Court invalidated Emergency Government Ordinance No. 62/2010 and Law

No. 221/2009. This decision blocked the reparations program and reversed compensations to the meagre levels in force prior to the adoption of Law No. 221/2009.

The quick and unexpected evolution of the situation generated confusion among potential beneficiaries and divided former communist-era victims into three categories: 1) those to whom court decisions handed down between the adoption of Law No. 221/2009 and Emergency Ordinance No. 62/2010 who were awarded unlimited reparations, 2) those to whom court decisions handed down between the adoption of the Emergency Government Ordinance No. 62/2010 and the Constitutional Court decisions of 2010 granted reparations not exceeding the equivalent of 10.000 Euros, and 3) all other victims who either did not aske for compensations or in whose cases the courts were unable to reach a decision by late 2010 (the vast majority). The Small Judicial Reform of November 2010 scrapped the possibility of contesting restitution verdicts at the Supreme Court with a second appeal. Different appeal courts gave different solutions to similar restitution cases, adding more frustration to former victims.

The total number of communist-era victims who have asked for reparations and rehabilitation remains unknown. According to the Ministry of Work and Social protection, the total number of communist era victims that received compensations decreased from 63.259 in 2009 to 54.378 in 2013. According to the AFDPR, in 2014, 30.000 wives and descendants entitled to compensations, 20.000 persons deported, and 3000 former political prisoners were still alive.

The court practice shows that the vast majority of requests were for restitution, which implies rehabilitation as first step, and very few asked for rehabilitation alone. Because of the considerably delay; only a small fraction of the former political prisoners were still alive and could benefit from it.

The compensation program, although one of the first measures taken by the first post-communist government, provided mostly symbolic benefits and very little financial support. The Law No. 221/2009 that was meant to expand the compensation scheme produced effects for less than 12 months and was quickly replaced by other less favourable legislative measures. But not even the less favourable Emergency Ordinance No. 62/2010 produced effects because, both legislative stipulations were soon declared unconstitutional and blocked.

The rehabilitation law come into force two decades after the fall of other communist regimes. Because of the considerably delay; only a small fraction of former political prisoners were still alive and could benefit from it.

The associations of victims are pushing for a historical reconsideration of the fascist nature of the Iron Guard. This would increase the number of possible beneficiaires but by default is raising public notoriety of the Romanian extreme right extremists.

POSITIVE

In 2014, the leaders of the Liberal Party initiated a law project to raise the monthly amount of compensations, from 200 lei to 400 lei (90 Euro). The law passed in February 2015.

In 2014, the Romanian Government transformed the former State Office for the victims of and participants in the December 1989 revolution to the State Office for the acknowledgement of merits for those who fought the communist regime in Romania between 1945–1989. This State Office is organised as public institution,

subordinated to the Government, has a clear objective to initiate new legislation and to coordinate the application of current Romanian legislation regarding the rights of the revolutionaries of December 1989, the fighters of the anti-communist resistance, but also persons that suffered after participating in the 1987 anti-communist events of Braşov. The exact categories concerned by the activity of this institution are those described by Law No. 341/2004, Law No. 221/2009 and the Decree-Law No. 118/1990.

The institution is organised as a link between the associations of victims and the Romanian public authorities, both at local and central level. Besides the legislative responsibilities, other objectives include:

- Financing programs initiated by the anti-communist fighters or by associations of victims,
- Elaborate studies in order to identify sustainable financial resources for the programs initiated by the anti-communist fighters or by associations of victims,
- Insure the creation and administration of a national data base of all the anti-communist fighters;
- Offer support to all the associations of victims in organizing national and international events.
- Initiates memorialisation programs and projects.

The Current head of the State Office is Octave Bjoza, the president of AFDPR.

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EDUCATION AND PRESERVATION OF SITES OF CONSCIENCE

ȘTEFAN BOSOMITU

During the communist era, the memorialization practices excluded everything that had any connection with the old regime, favoring a new typology of symbols that advocated the communist party's policies and ideals. City and street names were changed, and places that had connections with the short but eventful history of the communist party became places of memory – such as Doftana prison (an important penitentiary where communists were incarcerated on political grounds during the inter-war period), and the Tg. Jiu Camp (a concentration camp where several communist party members were detained during World War II). The situation reversed with the fall of the communist regime in 1989. The transition period involved a set of practices that were supposed to mark the end of the dictatorship and the total disavowal of a dictatorial and traumatic past – renaming localities, public squares, streets, institutions by replacing the names of former communist leaders with new ones dedicated to the fight against communism and democracy. In this respect, special attention was granted to former repression sites – as places of memory that marked the resistance and the struggle against the dictatorship. Thus, several projects intended to commemorate the communist past ensued, most of them related to different sites that illustrated the traumatic existence during the late regime.

From this perspective, the Romanian case presents some curiosities. The first initiatives emerged and developed from civil society, as the political power installed after the fall of the Communist regime failed to engage in the unfolding of the traumatic experience of communism. These unofficial initiatives marked a turning point that prompted, and later influenced, official advancements in the field. Still, the major and the most important project requested and advanced by civil society is still unfulfilled – as of today, a Museum of Communism in Romania is nothing but a project. In the same respect, educational projects related to the traumatic past tend to suggest a similar pattern. Even if important steps were made, and significant projects implemented, the overall image remains confuse. As will be explained, the impact of these projects is inconclusive, while a new generation of nostalgia for the communist regime proliferates.

The first initiative that intended to curate and memorialize communism as a traumatic past occurred in early 1990's, and it was an unofficial enterprise, introduced by civil society. Ana Blandiana, poet and former dissident, president of the Civic Alliance, at that time, advanced the idea of founding a Memorial dedicated to the victims of communism. The Memorial for the Victims of Communism and to the Resistance was established in 1993, as an initiative of the Civic Academy Foundation (*Fundația Academia Civică*). The Memorial consists of an International Center for Studies in Communism, based in Bucharest, and a Memorial Museum, established in 1995, within the precinct of the former prison of Sighet; a small town in North-Western Romania. The project of the Memorial was submitted to the Council of Europe in 1993 and, after two field visits by the CE

experts, the Memorial was taken under the aegis of the Council of Europe in 1995. The Memorial Museum was inaugurated in 1997, when the Romanian authorities recognized the Memorial as a *site of national importance*. One year later, the Memorial was recognized as a “site of conscience” by the Council of Europe, along with the Auschwitz Memorial, and the Peace Memorial in France. Even if initially, the Memorial Museum focused mainly on the traumatic history of the Sighet penitentiary during Communism, the curated themes evolved, and were supplemented over the years; thus, nowadays, the Memorial Museum intends to offer a comprehensive overview on, the history of Central and Eastern Europe under Communism, the establishment of the Communist rule in the Soviet Bloc countries, the Stalinist terror, the 1956 events in Poland and Hungary, the “Prague Spring” of 1968, and the history of “Solidarność” in Poland.

Since 1998, the Civic Academy Foundation organizes each year a summer school dedicated to students aged 14–18. In this event, the former prison becomes a non-traditional classroom where youngsters have the opportunity to learn about different aspects related to the communist past. The students attend conferences and seminars introduced by prominent historians, participate in round tables and debates, and visit the thematic exhibitions presented during the summer school.

Another important actor of the civil society that launched several projects related to the traumatic communist past is the Association of Former Political Prisoners (AFDPR). Founded in January 1990, the Association gathers former political prisoners, deportees, and other persons who suffered different types of persecutions during the communist regime. The Association is organized as a central organization, based in Bucharest, with subsidiaries in every county. Since 1990, AFDPR initiated the largest and most important “memory project”, erecting more than seventy-five monuments dedicated to the victims of communism, and posting several other marble plaques in places considered to be sites of memory and consciences related to communist repression. Such monuments and/or marble plaques were constructed adjacent to famous political prisons or labor camps: Aiud, Gherla, Târgșor, Poarta Albă, Căvnic, Pitești, Miercurea-Ciuc. Other monuments were erected in villages where armed resistance fighters fought Securitate troops, and in villages where uprisings occurred against collectivization: Teregova, Caransebeș, Sâmbăta, Nucșoara, Răstolnița, Ibănești, Mesentea, Oravița. Moreover, monuments dedicated to the struggle against communism were also constructed in different towns and cities around the country: Alba-Iulia, Bistrița, Brăila, Cluj-Napoca, Craiova, Cugir, Călărași, Drobeta Turnu Severin, Oradea, Râmnicu Vâlcea, Reșița, Satu Mare, Târgoviște, Timișoara. Two monuments were also erected abroad, in Paris and Thonex (Geneve).

Another important project launched by the AFDPR is the monument dedicated to anti-communist resistance recently assembled in a central public square in Bucharest. Initiated in 1997, the project was only finalized in May 2016, when the 30

meters high monument “Wings” was inaugurated. The monument was built on the place where a statue of Vladimir Illich Lenin used to rise during the communist regime. The statue was removed in 1990 (not by the authorities, but through a private initiative) with applause from the crowd. The granite pedestal of the Lenin statue was recuperated in 2014 and used for the pedestal of the new monument; as a historical reparation, this intended to exorcise Romanian society from the evil of the communist dictatorship.

The existence, and activity, of the Sighet Memorial, supported by the continuous efforts and advancements of the AFDPR, preceded and anticipated the official condemnation of the communist regime as “criminal and illegitimate” (December 18, 2006). The condemnation was based on an official and comprehensive report compiled by several experts that formed the Presidential Commission for the Study of the Communist Dictatorship in Romania.

The official report, compiled by the Presidential Commission, included several recommendations related to issues such as condemnation, memorializing, legislation and justice, research and archives, and education. The recommendations related to the need to memorialize the traumatic communist past referred to establishing a National Day for the Commemoration of the Communist Victims, the erection of a Monument of the Victims of Communism in downtown Bucharest, the establishing of distinct sections dedicated to the “communist horrors” within history museums in the country, the establishment of a Museum of the Communist Dictatorship in Romania, the organization of conference series within the major Romanian universities, discussing themes related to the Communist past, the review of the final report within an abridged and adapted to didactic purposes form, in order to be used as a high school textbook. The recommendations also stated the need to institute twelve presidential scholarships, to be awarded to young researchers interested in the study of the communist past.

Simultaneously with the presidential initiative, another similar initiative was instituted, but by the Government. This parallelism was due to the political rivalry between the President Traian Băsescu (member of the Democrat Liberal Party) and the Prime Minister Călin Popescu Tăriceanu (member of the National Liberal Party). The above-mentioned parties ran together in the 2004 elections, as a coalition and managed to defeat the Social Democrat Party with a powerful anti-corruption and anti-communist discourse. In once, of the disputes between the President and the Prime Minister, both institutions tried to capitalize on the major theme of the electoral campaign – anticommunism. The Institute for the Investigation of Communist Crimes and the Memory of Romanian Exiles (IICCMRE) is a government organization founded in December 2005. Formerly named the Institute for the Investigation of Communist Crimes in Romania (IICCR), the institution was created when governmental ruling 1724/2005 was passed. The merger in November 2009 between the latter (IICCR) and the National Institute and Memory of Romanian Exiles (INMER) represents its current form. The objectives of the Institute include, but are not limited to, investigating and identifying human rights violations and abuses during the dictatorship, providing appropriate resources for those wishing to take action in such cases, preserving the memory of the Romanian exile, and of the crimes, which had transpired during the regime in all former communist countries. Since its foundation, IICCMRE became one of the most important institutions

that dealt with the communist past, introducing and promoting several memorialization and educational projects.

The “Prison of Silence” Memorial in Râmnicu Sărat and the Educational Centre on Communism in Romania are two of these projects. IICCMRE aims to transform a former place of isolation into one of reflection about the criminal nature of Communism. The prison in Râmnicu Sărat had operated for several years as a transit point for political prisoners who were being transferred to other detention centers to serve their sentence. A series of representatives of political parties, clergymen, as well as other unwanted persons were incarcerated for longer periods of time in “The Prison of Silence”. Among the most famous prisoners were former leaders of democratic parties. In June 2007, IICCMRE took over the administration of the former prison in Râmnicu Sărat and initiated a series of actions destined to raise awareness among policy makers, and inform the public about the commemorative value of the site, but also aiming to reach practical solutions in regard to the restoration of the building that is now in an advanced state of decay.

Another important project developed by IICCMRE was the establishment of a Museum of Communist Crimes in Romania. According to IICCMRE, the necessity of such an initiative lays in the low levels of interest about the recent past among the younger generation and the pedagogical challenge of transmitting historical data. Moreover, such an undertaking concerns the process of strengthening the rule of law by offering a more detailed knowledge of the mechanisms of an arbitrary state rule. IICCMRE undertook numerous actions in order to raise awareness for the necessity of founding a Museum of Communist Crimes in Romania (MCCR), such as the campaigns *The Right to Memory*, *The Reasons for Building a Museum of Communism in Bucharest*, organized in partnership with the Romanian Television, and the debate for *The Right to Memory. The Museum of Communism in Romania* aired for four months on Adevărul LIVE, the online platform of the most popular Romanian newspaper. An international workshop was also organized to gather and analyze the rationales behind building the MCCR in Bucharest.

Beside these museum projects, IICCMRE organizes various educational programs for secondary school pupils, college students, and teachers: summer schools (e.g. The Summer University from Râmnicu Sărat and Făgăraș-Sâmbăta de Sus Summer School), as well as workshops, seminars, competitions, conferences, exhibitions and other events dedicated to young people from Romania and abroad. The IICCMRE’s educational activity is focused on professional cooperation with schools and institutions of higher education, in order to enrich the supply of pedagogical materials and facilitate the teaching of recent history. Considering the lack of both curriculum and handbooks dedicated to the history of communism in Romania, IICCMRE sought to become a lobby agent for the implementation of an adequate program of study on Romanian communism. In July 2008, in response to IICCMRE’s recommendation, the Ministry of Education drew up the syllabus for an optional course entitled “A History of Communism in Romania”. The same year, IICCMRE in collaboration with experts from the Advisory Presidential Commission for the Study of the Communist Dictatorship in Romania, the National Council for the Study of the “Securitate” Archives, and the Ministry of Education, published a first textbook on communism in Romania; a first such initiative at the European level. The textbook offers a package of lessons related to communism during the interwar, the taking over of

power, state institutions, the destruction of civil society, political repression, the economy, private life, resistance and dissidence. In 2008, IICCMRE launched a methodological teacher-training program, which intended to promote specific teaching methods in the area of the history of communism. These trainings were based on school curriculum and the didactical materials put at their disposal by the Ministry of Education.

Another important educational project implemented by IICCMRE refers to a MA program on Communist studies. Initiated in collaboration with “Al. I. Cuza” University of Iasi, a MA program on the “History of Communism in Romania” was launched in 2008. The partnership between the two institutions also involved the founding of a Center for Communist and Post-Communist Studies in Iasi. The program was dismantled in 2014, due to the lack of interest from both students and the university administration. In 2014, a similar program was launched through an initiative by the Faculty of History, University of Bucharest. The MA program in Bucharest is still functional.

The collaboration between IICCMRE and the Advisory Presidential Commission for the Study of the Communist Dictatorship in Romania, and their lobbying towards the authorities led to another important advance related to the memorialization of the communist past. Law No. 198, which passed on November 11, 2011 established that August 23 became the National Day for the Commemoration of the Victims of Fascism and Communism, while December 21 became the National Day for the Memory of the Communist Victims in Romania.

Besides the state founded initiatives, several private projects that in the recent years aimed to memorialize communism were launched. An interesting fact is that all these memorialization projects doubled by educational initiatives.

An important initiative was linked with a preeminent former prison – Jilava. The prison started to function at the beginning of the 20th century, within the precinct of a former military fort; part of a defense belt built around Bucharest in the 1870's. The Jilava Fort 13 became one of the most important prisons in Romania in the 20th century, being decommissioned only after the fall of the communist regime. Several official and unofficial initiatives attempted to transform the former prison into a museum or a memorial. The most recent one was promoted by the Association of the Former Political Prisoners (AFDPR), and the Romanian Foundation for Democracy – a NGO managed by the former President Emil Constantinescu. In 2013, the former prison administration was transferred from the National Administration of Penitentiaries to the Ministry of Culture, with the explicit task of inaugurating a memorial to the victims of communism. The project of the Jilava Fort 13 Memorial was thus launched as an initiative of the Romanian Foundation for Democracy, with the support and the assistance of the Association of Former Political Prisoners, and the Institute for the Investigation of Communist Crimes in Romania. Further collaborations were also initiated, the most important one was with the Ministry of Education. As a result, in 2016, an educational pilot center was established within the precinct of the former prison – the Center for the Study of Recent History in Romania. The educational pilot center is aimed at high school and college students, and provides a space equipped with IT and multimedia devices. From an educational point of view, this project intends to capitalize on the long and complex history of Fort 13 Jilava, which is a place of memory, representative of the 20th century, with all the horrors of totalitarianism. According to a press release, “the educational

approach is primarily aimed at young people who are obliged not to forget history and keep alive the memory of those who have paid with their life and freedom, and for their courage to face the abuses and crimes of the communist dictatorship”.

Another similar initiative is related to the Pitești prison. Established in 2011, the Foundation Pitești Prison Memorial purposes to transform the precinct of the former Pitești prison into a memorial. The Pitești Prison Memorial was opened in 2014 and its main task is to develop educational projects and exhibitions related to anticommunist resistance and the communist penitentiary system. In 2014, the former prison was opened to the public; visits are available by prior appointment, on request. The Memorial intends to develop a permanent memorial museum. In partnership with the Center for Studies in Contemporary History, a summer school project was launched in 2014 – “The Pitești Phenomenon” Summer School, which intends to “preserve the memory of what people suffered and the people who suffered, through a series of lectures held by renowned researchers, important personalities in the field of culture, and former political prisoners”.

Another private/unofficial initiative was related to the Făgăraș Fortress (built in 1310), which was used as a prison for political detainees between 1949 and 1960, and became a museum of the city in 1968. Since 2004, the Negru Vodă Foundation initiated the founding of a Memorial within the precinct of the fortress – the Memorial Museum of the Anticommunist Resistance Făgărași.

This succinct overview of the major museum and educational projects initiated in post-communist Romania may allow us to draw some conclusions related to the positive and negative aspects of these advancements. The memorialization and educational projects related to the traumatic communist past were implemented as early as the 1990's, both by official (the state authorities) and unofficial (civil society) actors. These advancements implied both positive and negative consequences.

A major issue related to these problems of the removal of communism and its symbols from public spaces after 1989, was that they were sometimes replaced by national and chauvinistic symbols; this refers to the interwar fascist Iron Guard and/or the figure of pro-fascist Marshal Ion Antonescu (ruler of Romania during World War II), mainly due to their relentless anti-communism. This type of symbolism is sometimes also associated with the anti-communist resistance and the Romanian gulag – still several of the political prisoners were related to the fascist Iron Guard movement.

In the same respect, post-communist society also experienced the emergence of a new generation of nostalgia for communism. Some of them are nostalgic for their youth, others because they believe that the communist regime offered them social and economic stability that post-communist democracy failed to deliver, and others identify themselves with the nationalism promoted by the Ceaușescu's regime. The nostalgia for communism is also due to the inability of the authorities, historians, and civil society to document and explain the crimes of communism, and its intrinsic totalitarian nature. The evolution of political elites after 1989 also influenced the process. The fact that most of the political leaders were, in fact, members of the second (or third) echelon of the former communist ruling class, their ignorance and refusal to discuss the recent past, their reluctance to pass laws on lustration, access to the Securitate files also explain the growing numbers of the nostalgics.

Another important issue to emphasize relates to the fact that the hegemonic discourse on the traumatic past was strongly shaped and influenced by political power. After the fall of the communist regime, Romanian authorities ignored and even refused to challenge and debate the recent past; a situation that led to the radicalization of civil society's narratives on communism. Thus, the major narratives related to this issue were generally both simplistic and "Manichean", as it portrayed the communist past as a confrontation between "good" and "evil". The symbolic narrations on communism appear as the expression of the triumph over it, as in a winner's version of the past. It speaks about what should be remembered from the past, and what should be forgotten. Subsequently, with the official initiatives related to the "discussion" of the communist past (the Presidential Commission established in 2006, and the government agency – IICCMRE, established in 2005), the situation did not necessarily improve, as the two institutions were considered as "actors" of political disputes between the parties, many of the achievements of these institutions were ignored or considered as politically biased. Still, the recent advancement of the historiography seeks to balance the type of narratives that are strongly influenced by the traumatic past, in order to provide a scientific account on the illegality and criminality of the communist dictatorship, raise awareness on the constant violation of human rights, and restore the dignity and the memory of the victims of the regime.

Moreover, another major theme that these memorialization projects illustrate is that of communism as an accident in the history of Romania, induced by external forces (i.e. the Soviet Union), and maintained during half of century through violence and terror. In this respect, the responsibility for the horrors of communism is transferred to an amorphous group of foreigners and aliens, while the Romanians are exonerated by any responsibilities or blames.

Although a Museum of Communism has not yet been established in Romania, there are several initiatives that intend to accomplish the task. Still, all these initiatives do not attempt to complete the projects independent from the authorities, considering that it is the state's responsibility to commit to and finance such an enterprise. Even if there are several politicians that consider the founding of a Museum of Communism as a stringent necessity, a vast majority ignore the issue, while the economic and social problems of the Romanian society serve as an alibi for their disregard. Moreover, on this particular issue, it is important to highlight the preference of the major actors for quantity, and not necessarily for quality. The existence of several competing projects related to the establishment of a Museum of Communism proves the lack of consensus between

the important institution on themes and issues: the name and location of the projected museum, the mission of this museum, what it should highlight, how the traumatic past should be displayed, etc. It also proves the existence of a competition between the different actors regarding this endeavor for official/unofficial primacy over the project. Even if a Museum of Communism in Romania remains a problematic issue, such a project could be facilitated by the collaboration of all the actors involved in these types of undertakings, but also by a consequential involvement of the authorities, that could accelerate the project.

LESSONS LEARNT AND RECOMMENDATIONS

Related to the educational projects developed during the past years, a few comments are necessary. A cursory overview of these achievements may suggest that, even if tardily, many important projects were implemented. But the implementation of these projects was both lengthy and inconclusive. Despite the efforts of IICCMRE and the Ministry of Education, which led to the introduction of an optional high school course, and their constant interest in providing constant and meaningful feedback to school-teachers on the latest didactical materials and methodological upgrades, the success of this project was limited. This situation is due to the school curricula's planners' permanent lack of interest and consideration for the history courses, in general (the number of history courses dramatically declined over the past years – resulting to a single course/week), the congested curricula that hardly approves the introduction of new courses, and the lack of interest/knowledge of teachers, who were supposed to gain new qualification. Moreover, the optional high school course "History of Communism in Romania", introduced in 2008 was distress by the introduction in 2015 of a new optional course – "The Recent History of Romania" (a project funded by the EU), which practically annulled the previous course. A similar pattern of lack of success refers to the MA program on Communist studies introduced in 2008 at the University of Iasi. The program concluded in 2014, due to the lack of interest of both the students and the university administration. However, another similar program was introduced in 2014 at the University of Bucharest, a project in progress. These educational projects ineffectiveness is due to several causes: the late and lengthy implementation, the lack of interest from both students and teachers, and a congested and inadequate curriculum. But by far, the most severe cause relates to their optional status in the curricula. For more coherent and more efficient politics on education and on preserving the memory of the traumatic past, extensive and compulsory programs need to be introduced.

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TIMELINE OF THE MAJOR EVENTS

November 20–24, 1989	14th congress of the Romanian Communist Party in Bucharest. Despite the peaceful collapse of communist regimes throughout Eastern Europe, Nicolae Ceaușescu turns down general expectation of internal change and promises to maintain the leading role of the Party
December 2–3, 1989	Summit in Malta between US President George Bush and CPSU General Secretary Mikhail Gorbachev. Although the fate of the increasingly isolated Romanian communist was not in the agenda of the meeting, according to available evidence, Romanian intelligence informed Ceaușescu of a plan orchestrated by the great powers to get rid of him
December 4, 1989	Last Gorbachev–Ceaușescu meeting in Moscow. The Soviet leader urges his Romanian counterpart to launch reforms resembling those undertaken in the Soviet Union and the rest of the Eastern Bloc
December 14, 1989	Rumours of an aborted anti-regime meeting in Iași
December 15–16, 1989	Ethnic Hungarian Reformed priest László Tőkés speaks out publicly against Ceaușescu in Timișoara. More and more citizens of all faiths back him amid the attempt of the authorities to forcibly remove him. First clashes between the riot police and groups of young protesters
December 17, 1989	A huge crowd marched on the communist headquarters at city hall in Timișoara. Portraits of Ceaușescu are burned and thrown from the building. The army intervenes against the anti-regime protesters on Ceaușescu's order before he leaves for Iran on a previously planned official visit. More than sixty people are killed, their dead bodies brought to Bucharest to be cremated
December 18–20, 1989	The revolt extends to other cities in Western and Central Romania. After returning home from Iran, Ceaușescu proclaims martial law during a television speech and blames Hungarian irredentism for the turmoil
December 21, 1989	The protest reaches Bucharest while Ceaușescu addresses the crowd in a live broadcast outdoor speech. The army and the special security forces commit further bloodshed in Cluj, Sibiu, Brașov and other cities. During the night, December 21 to 22, bloodshed is perpetrated in Bucharest, leaving over 150 victims and hundreds of injured
December 22, 1989	More demonstrators reassemble early in the morning and huge crowds of workers march to downtown Bucharest from the industrial platforms and are locked in a standoff with the army in the main square of Bucharest. Ceaușescu tries to speak from a balcony, but is shouted down. The presidential couple flees the capital by helicopter. A National Salvation Front is appointed to handle the chaotic situation of the victorious revolution. Heavy fighting erupts throughout the country until December 25 amid rumours of terrorist groups activity, most probably members of the still loyal Special Antiterror Unit (USLA)
December 25, 1989	Ceaușescu and his wife Elena are put on trial and executed. Armed fight abruptly ends after their lifeless bodies are shown on TV
December 27, 1989	The entire executive power is assumed by the Council of the National Salvation Front (CNSF), supported by the Army and all “healthy forces”. Former communist. Ion Iliescu is elected president of the CNSF
December 30, 1989	Repressive security services (<i>Departamentul Securității Statului</i>) are dissolved via decree by the CNSF. In reality, officers continue to receive their salary and many of them perform operative duties at the service of the new power structure
January 12, 1990	The Romanian Communist Party is outlawed by decree of the CNSF
January 18, 1990	All party properties are nationalized by decree of the CNSF
January 29, 1990	The post-communist CNSF calls for miners from the Jiu Valley to attack political rivals amid growing internal tensions
February 6, 1990	The National Salvation Front becomes a political party and decides to run for the first democratic elections
February 18, 1990	Second violent visit of the Jiu Valley organized by miners to Bucharest
March 11, 1990	The Proclamation of Timișoara is publically presented on the 11 in a mass rally assembly in Opera Square of Timișoara. The 13-point document calls for total lustration in the spirit of the 1989 anti-communist revolt

March 15–21, 1990	Interethnic clashes in Târgu Mureș between Romanians and Hungarians leave several casualties and hundreds of injured
March 26, 1990	The Romanian Intelligence Service is established formally as the new independent security agency. According to independent estimates, its staff is overwhelmingly composed by higher officers from the dismantled Securitate
May 20, 1990	The National Salvation Front wins a landslide victory in national elections, receiving more than two-thirds of all votes cast, and NSF leader Ion Iliescu is elected President of Romania for a two-year term with 85 percent of the vote. The NSF victory over the anticommunist opposition makes it impossible to start any lustration procedure in the following period
November 21, 1991	A new Constitution is adopted by the Romanian parliament and then approved by popular referendum. The text defines Romania as a “national, sovereign, independent, unitary, and indivisible state”; and enshrined the return to multiparty democracy and the rule of law. However, the structure of powers and the collective mentality inherited from the communist period prevent the application of the declared principle of the separation of executive, legislative and judicial powers
December 7, 1993	The chairman of the Association of Former Political Prisoners, senator Constantin Ticu Dumitrescu introduces a motion on secret informants that amounts to a lustration proposal. Although the text only refers to part-time (non professional) informants and excludes officers, the Romanian Parliament does not support the motion
December 7, 1999	The Romanian Parliament adopts Law No. 187/1999 on Access to the Securitate Files and the Unveiling of the Securitate as a Political Police. The Law covers 1) the right of any Romanian citizen to see his/her own files and to find out the identity of the Securitate agents and collaborators who created and offered information present in that file; 2) the right of any Romanian citizen, Romanian public institution or NGO to know if those already appointed, or running for certain public offices are agents or collaborators of the former Securitate, and the obligation of all candidates for the named positions to give a certified declaration of whether she/he worked as an agent or a collaborator for the Securitate. The law prescribes the creation of the National Council for the Study of the Securitate Archives (CNSAS), set up as an independent public institution, controlled by the Romanian Parliament, and mandated to investigate the past of public officials and electoral candidates based on the secret files
December 18, 2006	The Presidential Commission for the Study of the Communist Dictatorship in Romania, formed in April 2006 as a panel headed by political scientist Vladimir Tismăneanu and focused on examining the activity of institutions that enforced the communist dictatorship, presents its final report to Parliament. The 660-page text is adopted as an official document of the Romanian Presidency and published on its website. The report made Romania the third former Eastern Bloc country, after the Czechoslovakia and Bulgaria, to officially condemn its Communist regime
January 31, 2008	A major crisis affects the activity of CNSAS after the Constitutional Courts ruled that Law No. 187/1989 on lustration was unconstitutional, since the CNSAS College has been given the status of parallel judicial structure and simultaneously performs the double function of prosecutor and judge. The governments allows the CNSAS to continue its operation through two Emergency Governmental Ordinances
November 14, 2008	Law No. 293/2008 establishes a new comprehensive frame for the activity of CNSAS
July 7, 2008	The Institute for the Investigation of Communist Crimes in Romania officially launches the first high school curricula, and later text book, on the History of the Romanian Communist regime
February 28, 2012	The Romanian Parliament gives the final vote on the Lustration Law
March 7, 2012	The Constitutional Court, petitioned by the professional organizations of judges and prosecutors, finds the Lustration Law unconstitutional and the project is dropped
July 23, 2015	Alexandru Vișinescu, a communist-era Romanian prison commander is convicted of crimes against humanity for the deaths of 12 inmates, is sentenced to 20 years in prison, in the country’s first such trial. It is considered a historic sentence because any crimes committed in the communist era can also be condemned. Vișinescu case is initiated and documented by the Institute for Investigation of Communist Crimes and Memory of Romanian Exile (IICCMRE)
June 1, 2017	Following the success of the Vișinescu’s case, IICCMRE files a denunciation to the Prosecutor’s Office for the inhuman maltreatment of children admitted to foster homes during the communist regime in Romania. The case mainly refers to the sick or disabled children who used to be admitted in the hospital foster homes in Cighid, Pastrăveni and Sighetu Marmăției, where over 10,000 children were subjected to inhuman treatment and aggression

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MEMORY OF NATIONS

Democratic Transition Guide

[The Russian Experience]



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AUTHORS

NIKOLAI BOBRINSKY

Transitional Justice Researcher, Lawyer and Social Activist focusing on election monitoring and defense of voting rights in election commissions and courts in Russia. Co-creator of the “Churov list” (black list of election commissions’ members allegedly involved in election fraud in the course of State Duma elections of 2011).

NATALIA KOLYAGINA

Project Coordinator and Editor of urokiistorii.ru Website at International Memorial in Moscow (since 2009). Her main research interests are modern monuments, historical politics and elaboration of the difficult past of Russian and European societies.

EVGENIA LEZINA

Scientific Researcher at the Centre for Contemporary History Potsdam (Zentre für Zeithistorische Forschung – ZZf Potsdam) (since October 2018). Former Senior Research Fellow at the Analytical Levada Centre in Moscow. Visiting Fellow at the Federal Foundation for the Study of the Communist Dictatorship in the former German Democratic Republic (2012–2013), at the Imre Kertész Kolleg of the Friedrich Schiller University Jena (2016) and at the Centre for Contemporary History Potsdam (2017).

SVETLANA SHURANOVA

Project Coordinator at International Memorial in Moscow coordinating projects on access to archived information (since 2013).

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TRANSFORMATION OF THE POLITICAL SYSTEM (1988–1993)

NIKOLAI BOBRINSKY

INTRODUCTION

The process of dismantling the Soviet totalitarian communist regime and establishing the new Russian state is most often associated with the word “Perestroika”, which usually stands for the political and economic changes in the USSR that preceded its collapse in 1991. The fall of the Soviet Union is a separate event, closely related to the failure of the communist regime. In turn, these historic events are closely related to the Cold War and its termination.

This chapter discusses only those aspects of the above mentioned processes that are associated with Russia. In this respect, we should note that the Soviet Union included a considerable part of the lands which had been a part of the Russian Empire before its collapse in 1917. Having seized power in Russia, the Communist Party divided its historical territory into several separate republics, and in 1922 it united them into the Union. One of these republics was the Russian Soviet Federative Socialist Republic, or the RSFSR. Being an artificial political unit in the USSR over the largest part of its history, the RSFSR gradually grew into an independent political entity from 1989 onward – and after the fall of the Soviet Union it became an independent state.

THE SOVIET POLITICAL SYSTEM AT THE DAWN OF PERESTROIKA AND THE ROLE OF RUSSIA IN THE SYSTEM

By the mid-1980s the Soviet Union was a centralized single-party dictatorship. De facto the supreme power in the state belonged to the Political Bureau of the Central Committee of the Communist Party (CPSU) headed by its General Secretary. It was enforced via governmental bodies that were under the complete party control. Regional, republican and All-Union parliaments (called Soviets) were formed out of the candidates approved by the party units at the respective level. The election of deputies was by ballot, where one or more party-approved candidates participated. The party assigned people to all the key positions in the governmental and non-governmental organizations (the list of these positions is usually referred to as the “nomenklatura”, or the political establishment).

The Communist Party itself was also organized in a strictly centralized manner, where inferior subdivisions followed and performed the decisions of the superior ones. The number of Soviet Communists in the second half of the 1980s reached 19 million people.

The power of the CPSU was based on its total penetration into the society – party units were organized in entities and institutions, party membership was an informal precondition for any career promotion – on the systematic ideological dictatorship and suppression of dissent as well as on the well-developed

structure of the political secret police – the State Security Committee (KGB).

The ideology of the Soviet Communist regime was Marxism-Leninism, which provided for the establishment of the future classless communist society that did not recognize private property and market relations. Individual entrepreneurship was prohibited and prosecuted. Moreover, Marxism-Leninism imposed the fight against religious beliefs and practices. All the parties, except for the communist one, were prohibited. The activities of unauthorized public associations were not allowed.

After the death, in 1982, of Leonid Brezhnev who had headed the CPSU for 18 years, and the short-term rule of Yuri Andropov followed by Konstantin Chernenko, in March 1985 Mikhail Gorbachev became the Communist Party General Secretary and the actual leader of the Soviet Union.

Unlike other republics in the Union, by the beginning of Perestroika the RSFSR did not have its own communist party. According to the 1978 Constitution the highest state authority was the Supreme Soviet. It passed laws and was called for time-limited sessions. The regular body of the Supreme Soviet was its Presidium. Similarly to other soviets of different levels, the deputies of the RSFSR Supreme Soviet were in fact appointed by the Communist Party and then “elected” with no alternatives. The RSFSR executive power was headed by the Council of Ministers. The RSFSR authorities enjoyed the powers assigned to them by the Constitution of the Soviet Union.

THE MILESTONES OF PERESTROIKA IN THE USSR BEFORE THE POLITICAL SEPARATION OF THE RSFSR

The political understanding of Perestroika in the Soviet Union may be generally described as the search for new political means to reform the state management system, which brought in new public powers that were out of the regime’s control, and the CPSU first lost its monopoly on power, followed by the power itself. One of the Soviet system institutions, which had been just a fiction for years, but had gradually attained a larger political significance, was the republics of the Soviet Union, including the Russian one. The process of gaining independence from the Union centre began only during the fifth year of Perestroika, in 1989. It had been preceded by a number of important events.

In early 1986 Mikhail Gorbachev announced the policy of Glasnost, which initially meant revealing and publishing the drawbacks hampering Perestroika and the acceleration of the technological and socioeconomic development in the Soviet press. After the Chernobyl nuclear power station catastrophe on April 26, 1986, the prohibition of showing negative news on the situation in the country was removed as well as on the public debate of the flaws and problems of the Soviet society. Over

two years, glasnost led to a drastic change in the attitudes in the Soviet society. The changes, however, seemed insufficient for Gorbachev's team, who expected to rely on the public support and encourage the party bureaucracy to adopt the policy of socioeconomic reforms. Therefore, in the middle of 1988 it was decided to move forward from the freedom of speech to the democratization of the political system. At the 19th CPSU Conference the principle of "alternative" elections (i.e. involving competition) to the soviets at all levels was proclaimed as well as granting them real powers. It was also planned to expand the rights of the Union republics.

For the purpose of these principles in December 1988 the USSR Constitution was amended: the Supreme legislative body of the Union was the Congress of People's Deputies, elected for 5 years and convened once a year. The Supreme Soviet was turned into the Congress regular body, elected by it. The first election of the People's deputies was scheduled for spring 1989.

Gorbachev's line towards democratization led to the rapid growth of independent non-communist movements and groups, which were first informal. Though at the 1989 election the CPSU did not have organized party opponents yet, in many districts its members were defeated by popular independent public figures. At the Congress they organized the first Soviet legal political opposition – the Interregional Deputies' Group. One of its co-founders and the actual leader was Boris Yeltsin. He came from the top level of the party and headed the CPSU committee of Moscow during the first years of Perestroika. In 1987 he publicly criticized conservative members of the political bureau and was dismissed from office. Nonetheless, despite Soviet traditions, Yeltsin's political career did not terminate at that point: 18 months later he gained a clear victory at the election of the People's deputies in the Moscow district and was elected to the Supreme Soviet.

At the Congress of People's deputies the opposition united demanding to terminate Article 6 of the USSR Constitution, which stipulated the "leading and guiding" role of the CPSU in the Soviet state and society. This demand grew in popularity, and early in 1990 unprecedented mass demonstrations were held in Moscow to support it. In these conditions Mikhail Gorbachev, mainly following his own tactical reasons, agreed to abolish the CPSU monopoly on power and to introduce a multi-party system along with establishing the post of the USSR president. Thus, Gorbachev, though allowing for limitations in the political positions of the Communist Party, took the highest newly created office in the state. The abolishment of Article 6 of the Constitution was a vital step in the emancipation of once strictly and centrally controlled Soviet regional and industrial elites, whereas now they were becoming increasingly independent. It also opened the way to establishing new political parties.

DEMOCRATIZATION AND THE POLITICAL SEPARATION OF RUSSIA

In autumn 1989 the RSFSR performed the constitutional reforms, following the previous year's changes in the All-Union Constitution: a two-chamber parliament was introduced, elections of people's deputies by the universal, equal, and direct suffrage and secret ballot were declared. Parliamentary elections were held in March 1990. The candidates of the Democratic Russia opposition

bloc won in many large cities. Boris Yeltsin managed to become the chairman of the RSFSR Supreme Soviet.

Further political separation of Russia was influenced by the personal ambitions of the new RSFSR leader and his team as well as by the wide public support of the measures to dismantle the communist system in politics and economics, which forced Russian politicians to oppose the cautious and hesitating position of the Union centrists. The first and brightest manifestation of the Russian republic as a new political subject was the Declaration of Sovereignty adopted on June 12, 1990 by the overwhelming majority of the RSFSR Supreme Soviet. The declaration announced the supremacy of the Constitution and laws of the RSFSR across its territory. As a result there emerged the "war of laws" between the RSFSR and the Union centre. In October 1990 the RSFSR Supreme Soviet introduced liability for the enforcement on its territory of the USSR regulations, which were not ratified by the Russian parliament. After that the entities which were subordinate to the centre were transferred to the RSFSR jurisdiction. The 1991 budget law introduced a single channel tax system, depriving the Union centre of its own revenues.

Another manifestation of the growing significance of the RSFSR was the establishment of the Russian Communist Party in summer 1990. It united the representatives of the CPSU conservative wing, who did not agree with Gorbachev's weak and inconsistent policies. At the same time Boris Yeltsin declared that he was leaving the CPSU and moving on to a clearly anticommunist position. He was followed by many democratic politicians, including the mayors of Moscow and Saint-Petersburg Gavriil Popov and Anatoly Sobchak.

Mikhail Gorbachev attempted to stabilize a USSR that was gradually falling apart by encouraging the republics to sign a new union treaty. One of the remedies in his fight for the Union was the referendum in March 1991. Three quarters of the Soviet voters opted for its preservation. In Russia the referendum was completed with a question on introducing the post of the president of the republic, elected by universal suffrage (and not by the Supreme Soviet, as it was at the All-Union level). This proposition was supported, thus opening the way to electing Boris Yeltsin the president of Russia. At the election of June 12, 1991, he won in the first round with 57.3 % of the votes. Now Yeltsin's power was based on the will of the people, and not on the semi-communist Supreme Soviet. Along with the presidential election there was a referendum in Leningrad. The majority of the northern Russian capital's citizens voted for a return of the city's historic name of Saint-Petersburg instead of the name given by the Bolsheviks after the founder of their party.

By summer 1991 there was a tense political and socioeconomic situation in the country. Prices were soaring. Even in Moscow it was hard to find foods and consumer goods. Negotiations on signing the new union treaty were close to completion. According to the draft, the USSR was to turn into a loose confederation, fully dependent on funding from the republics. After signing the new union treaty, Mikhail Gorbachev expected to get rid of the conservative people in the union government who stood for the idea of preserving the "strong" USSR. In response, they proceeded to plot a coup d'état, aiming to prevent the reforms and fully restore the central power and the power of the Soviet Communist Party.

The coup attempt commenced on August 19, 1991 and lasted three days. A state of emergency was announced across the country as well as the transfer of the country leadership to the State Committee for the State of Emergency (which was immediately

informally called a “junta”). The State Committee for the State of Emergency was headed by the USSR vice-president Gennady Yanayev. He was joined by the chairman of the USSR Cabinet of Ministers, the Minister of Defense, the Head of the KGB and a number of other Soviet high officials and public persons. Armed troops were sent to Moscow.

However, the conspirers were indecisive. Boris Yeltsin was not arrested. The “White House”, the seat of the Supreme Soviet of Russia became the centre of resistance to the coup. Tens of thousands of people gathered to protect it and built barricades. Meetings protesting against the State Committee for the State of Emergency were held in many cities of the USSR.

Yeltsin entered into negotiations with the commanders and officers of military units that had been sent to Moscow. By the morning of the third day of resistance it became clear that the troops would not fire. Representatives of the State Committee for the State of Emergency flew for negotiations to Gorbachev, who had earlier been isolated by them in the Crimea, but the latter refused to meet them. Upon returning they were arrested on Yeltsin’s order.

From August 22, Yeltsin and Russian democrats began reaping the rewards of their political victory. The Russian national white-blue-red flag was lifted at the “White House”. On August 23, Yeltsin announced the suspension of the activity of the RSFSR Communist Party in Russia, forced Gorbachev to appoint loyal people to the Russian Government such as the Defense Minister, Foreign Minister and the Head of the KGB, as well as dissolve the Union government. Union ministries were resubordinated to the Russian Council of Ministers. At the same time Gorbachev resigned as the General Secretary of the Central Committee of the CPSU and offered the Central Committee to dissolve itself. The buildings of the Central Committee and the Moscow city committee of the CPSU were vacated and sealed. On August 29, an extraordinary session of the USSR Supreme Soviet suspended the activity of the CPSU across the Soviet Union. In September the Congress of the USSR People’s Deputies dismissed the supreme authorities of the USSR (except the president) and terminated its activity.

On November 6, Yeltsin ended the story of the Communist Party that had ruled Russia for nearly 74 years. Pursuant to his Decree, the activities of the CPSU and the RSFSR Communist Party were terminated, and their organizational units were dismissed. The dissolution of the 19-million Soviet Communist Party did not lead to any attempt at resistance or protest, in particular, due to the fact that the president specifically prohibited any prosecution of citizens for membership of the party. One of the brightest symbols of the democratic victory and the final failure of the communist power was the demolition of the Moscow monument to the founder of the VchK-KGB, Feliks Dzerzhinsky. However, the larger part of the public communist symbols are still there.

Despite the thumping victory, many recollect that in the first months after the coup Yeltsin and his supporters were rather passive. In particular, he did not try and hold new elections to the RSFSR Supreme Soviet. As a result the following two years the president sought to carry out radical reforms having the old Soviet parliament, elected early in 1990 under the considerable influence of the CPSU.

Nevertheless, in spite of Gorbachev’s efforts, it became impossible to preserve the Soviet Union after the August events in 1991. The final verdict on the USSR was the referendum on the independence of the Ukraine, held on December 1, 1991.

90 % of referendum voters were for independence. On December 8, the presidents of Russia, Ukraine and Belarus signed an agreement, where they called the republics represented by them independent states and established the Commonwealth of Independent States (CIS) in lieu of the USSR. On December 21, in Almaty, the CIS was joined by eight more Soviet republics. In one of the Almaty decisions it was declared that the foundation of the CIS meant the termination of the USSR as a state.

DISMANTLING SOVIET POLITICAL INSTITUTIONS IN AN INDEPENDENT RUSSIA

The RSFSR independence coincided with the removal of the references to the Soviet regime and socialism from its name. The new state was named the Russian Federation – Russia.

The new name, however, did not free Russia from the vast Soviet political and legal heritage in the form of the Constitution, legislation, parliament, state borders (repeatedly changed during the Soviet times under the transfer of Soviet territories between the Union republics) and administrative division. Radical economic reforms that began in 1992 were performed almost exclusively with the support of President Yeltsin, who, for some time, even assumed the duties of the Head of the Government.

Former leaders of the RSFSR Communist Party tried to appeal in the Constitutional court (the new judicial body, established in 1991) against the validity of President Yeltsin’s decrees on terminating the activity of the CPSU and nationalization of its property. In response a group of the Supreme Soviet deputies asked the court to recognize the CPSU and the RSFSR Communist Party as non-constitutional. After a large number of hearings and having heard various witnesses the court passed a compromise decision: it dismissed the claim for recognising the party as non-constitutional, referring to the actual termination of its activities, but it substantially ruled for the validity of the decrees on its dissolution. Nonetheless, the court position enabled the restoration of the party under the name of the Communist Party of the Russian Federation (KPRF).

At the end of Perestroika the RSFSR-RF Constitution was subject to numerous and frequently controversial changes, therefore, the president’s and the Supreme Soviet powers were often contradictory. The conflict between the parliament, Soviet in its origin, tending to conserve old economic rules and even nationalistic revenge, and the president, who adhered to building the market and privatization of state property, was inevitable. This confrontation lasted from spring 1992 till autumn 1993 and brought about a range of acute political crises, including an attempt to dismiss the president from his office. As a means of strengthening his own legitimacy, in 1993 Yeltsin used a referendum again. This time it was a vote of confidence in him as the head of state and the need to hold new elections to the Supreme Soviet. The president managed to win the support of most voters, but the result was insufficient to adopt a legally binding decision on the early parliamentary elections.

The political crisis was accompanied by work on the draft Russian Constitution. However, The prospects of its adoption were uncertain. In the end Yeltsin decided to untangle the deadlock. On September 21, 1993, referring to the impossibility of further cooperation with the legislative branch of power, which allegedly hampered economic reforms, and to the transformation of the Supreme Soviet into the “headquarters of the deconstructive

opposition,” he issued a decree on gradual constitutional reform, ordering the Congress of People’s deputies and the Supreme Soviet to terminate their activities. The powers of the people’s deputies became invalid. The decree scheduled the elections to the new legislative body – the Federal Assembly – on December 11–12, 1993.

The majority of the people’s deputies did not obey the decree. The parliament was also supported by the Constitutional court, which announced the president’s actions non-compliant with the Constitution. The Supreme Soviet declared Yeltsin’s dismissal from office and transferred his powers to the vice-president Aleksandr Rutskoi. Nevertheless, the government, Moscow city and regional administrations stayed loyal to Yeltsin. There emerged an armed hot spot around the “White House” (still the seat of the Russian Supreme Soviet). Inside the building armed groups supporting the parliament were formed, the militia tried to block passages to it, municipal services cut off the power supply and other utilities. The attempts at demonstrations to support the parliament were roughly prevented by the militia. The acute phase of the conflict lasted two weeks and reached its climax on October 3–4, when the supporters of the Supreme Soviet started attacking: they seized the building of the Moscow mayor’s office and tried to take the television centre by storm. This attempt was stopped by the army and special police units. Dozens of people died. The following morning Yeltsin ordered the commencement of the counterattack on the “White House”, using tanks there. By the end of the day the resistance of the Supreme Soviet supporters was suppressed, its leaders surrendered and were taken into custody.

Nonetheless, there were no further repressions against the losers. As had been announced, on December 12 Russia held the elections to the State Duma and the referendum on the new Constitution, which resulted in its adoption.

LESSONS LEARNT

The history of the political transition of Russia from the communist totalitarian regime was not completed in 1993. It cannot be

firmly stated that this transition has yet been completed, because the sustainable democratic order in Russia was never formed, and over the recent decade the power has been kept to a large extent by non-democratic means by the former CPSU officials, Komsomol (Young Communist league) and the KGB people. When naming the reasons for promoting this development, many usually mention the model of the state power originating from the struggle between Yeltsin and the Supreme Soviet, stipulated in the 1993 Constitution, where the president was given the leading role and the balances to his power were obviously insufficient. The very political crisis of 1992–93 could have been avoided if the Soviet constitutional form had been abandoned two years earlier, after the victory over the coup of the State Committee for the State of Emergency and the fall of the communist power. The possibilities which opened up to the country in autumn 1991 were soon irreversibly lost, the old political and economic elite, unlimited in terms of the political competition and lustration, rapidly restored its positions. The power ratio during the post-Soviet period was also influenced by the dramatic lack of non-Soviet human resources in the new Russian state authorities. Emigrants, who actively participated in the life of many other post-socialist countries, actually did not come back to Russia: due to the length of the communist rule in the USSR and the gradual assimilation by the early 1990s the Russian political emigration mainly dissipated. However, they were not specifically invited to Russia, only some people originating from the Russian Empire and the USSR were granted their citizenship back.

On the other hand, it cannot be denied that the political transformations were relatively peaceful. Unlike in the former Yugoslavia, in Russia, no full-scale civil war started at the initial stage. Unfortunately, in 1994 a war did begin – in Chechnya. This blood-drenched conflict took up significant resources and efforts as well as strengthened public disappointment in the new power.

Thus, in a nutshell, we could mention the following political transition lessons that post-Soviet Russia gave to the world: try to gain democratic legitimacy promptly, even at the cost of breaking the existing well-established rules. Invite people with experience of life and work abroad, mainly emigrants. And avoid wars.

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DISMANTLING THE STATE SECURITY APPARATUS

TRANSFORMATIONS OF THE SOVIET STATE SECURITY BODIES IN POST-SOVIET RUSSIA

EVGENIA LEZINA

THE STATE SECURITY APPARATUS DURING PERESTROIKA

Russian Intelligence Services originate from the Soviet Committee for State Security (the Soviet KGB), established on March 13, 1954, and the successor of, founded in 1917, the repeatedly transformed and renamed security bodies of the All-Russian Special Commission for Combating Counter-revolution, Sabotage, and Speculation (Cheka) – the State Political Department (GPU) – the Unified State Political Department (OGPU) – the People's Commissariat of Internal Affairs (NKVD) – the People's Commissariat for State Security (NKGB) – the Ministry for State Security (MSS) – the Ministry of Internal Affairs (MVD).

“The Committee for State Security at the USSR Council of Ministers and its local bodies are political bodies, performing the guidelines of the Central Committee of the Party (CPSU) and Government on the protection of the Socialist state from attacks of foreign and domestic enemies, as well as the defense of the USSR state border. Their mission is to thoroughly monitor the secret activities of the Soviet state enemies, reveal their intentions, prevent criminal activities of imperialistic intelligence services against the Soviet state”, as defined in the Soviet KGB Regulations dated January 9, 1959.

The accurate data of the Committee for State Security workforce were never disclosed. By the early 1990s western sources estimated it at 490,000–700,000 people.¹ According to Vadim Bakatin, the last Head of the Committee, in August 1991 the KGB staff equaled 480,000 people, including 220,000–240,000 border security forces and 60,000 government communications troops² (there is an opinion, however, that border security forces were not included in the 480,000).³ 90,000 employees, according to Bakatin, worked in the security bodies of the Soviet Republics. In addition, numerous agents collaborated with the KGB (informers, secret agents (*seksofyy*)), but their number has not been revealed.

At the end of Perestroika the KGB headquarters included about 30 units – chief directorates, divisions and departments. It should be noted that the operational structure, functions and principles of the late-Soviet State Security apparatus were established during the period when the KGB was headed by Yuri Andropov (May 18, 1967 – May 26, 1982). In fact the KGB was directly subordinate to the CPSU Central Committee and its Political Bureau, which caused the “fusion of the CPSU and state security bodies” and turned the Committee into the “armed party forces that protected the CPSU power physically and politically, allowing the party to control the society effectively and closely”.⁴

KGB local units included 14 committees in the Soviet Republics (except for the Russian Soviet Federative Socialist Republic (RSFSR)); state security bodies in autonomous republics, regions, krais, cities and districts. Moreover, the Soviet KGB included

security bodies of the armed forces, fleet and internal troops, transport; border security forces; government communications troops; educational and research institutions; as well as the so-called “First Departments” of the Soviet establishments, organizations and entities.

KGB key functions before the USSR collapsed were foreign intelligence (First Chief Directorate, PGU), Counterintelligence (Second Chief Directorate), military counterintelligence (Third Chief Directorate), transport and communications counterintelligence (Fourth Directorate), economic counterintelligence (Sixth Directorate), field surveillance (Seventh Directorate), cryptographic operations (Eighth Chief Directorate), wiretapping and room eavesdropping (Twelfth department), electronic intelligence (Sixteenth directorate), fighting organized crime (OC Directorate), USSR state border guard (Chief Directorate of Border security forces), security guards of the CPSU leaders (until 1990) and the Soviet Government (Ninth Directorate, from February 29, 1990 – Security Guard Service), government communications management (Government Communications Directorate), Investigation Department etc.

The most important activity of the secret police was the fight against the “hostile activities of anti-Soviet and nationalistic elements inside the USSR”, in other words, the silencing of dissent. The notorious Fifth Directorate was responsible for that. It was founded in 1967 upon Yuri Andropov's personal initiative. As stated in his note to the CPSU Central Committee dated April 17, 1968, “the newly established fifth divisions are designed to fight ideological subversion, inspired by our foreign foes”.⁵

By the mid-1980s the Fifth Directorate had established 15 departments: the First department was responsible for

1 Amy Knight, *The KGB: Police and Politics in the Soviet Union*, New York: Unwin Hyman, 1990, 122; John Barron, *KGB Today: The Hidden Hand*, New York: Reader's Digest Press, 1983, 41; Yevgenia Albats, Catherine A. Fitzpatrick, *The State within a State: The KGB and Its Hold on Russia – Past, Present, and Future*, New York: Farrar Straus Giroux, 1994, 23. David Wise, Closing Down the K.G.B., in *New York Times*, 24 November, 1991. <<http://www.nytimes.com/1991/11/24/magazine/closing-down-the-kgb.html>>

2 В. В. Бакагин, *Избавление от КГБ*, Москва: Новости, 1992, 46; А. И. Колпакиди, ed., *Энциклопедия секретных служб России*, Москва: АСТ, Астрель, Транзиткнига, 2003, 267.

3 J. Michael Waller, *Secret Empire: The KGB in Russia Today*, Boulder: Westview, 1994, 111.

4 The Committee of the Presidium of the Russian Federation Supreme Soviet a committee for transferring the CPSU and KGB archives to the state storage and their use (established by the decision of the RSFSR Presidium dated October 14, 1991, No. 1746-I). Expert's opinion to the hearing of the Russian Federation Constitutional Court dated May 26, 1992. <<http://memo.ru/history/exp-kpss/>>

5 Yuri Andropov's note to the CPSU Central Committee of April 17, 1968 “On the objectives of the state security bodies in fighting against hostile ideological subversion”. Cited by: А. И. Кокурин, Н. В. Петров, *Лубянка: ВЧК-ОГПУ-НКВД-КГБ-МГБ-МВД-КТБ. 1917–1991. Справочник*, Москва: Международный фонд “Демократия”, 2003, 724.

the operations in “artistic associations, research institutes, cultural and health care establishments”; the Second planned and performed jointly with PGU operations against foreign national centres; the Third supervised operations in higher educational establishments, preventing any “hostile activities of students and teaching staff”; the Fourth was responsible for religious organizations; the Fifth assisted the local KGB bodies in preventing any mass anti-social activities; the Sixth was engaged in analytics; the Seventh was in charge of “detecting and verifying the persons, intending to use explosive materials and devices for anti-Soviet purposes”; for searching for the authors of anti-Soviet documents and counterterrorism (understood as any verbal and written threats to the state leaders); the Eighth department was responsible for “detecting and preventing ideological subversion activities of Zion centres” (and it mainly fought against Jews seeking repatriation to Israel); the Ninth was in charge of the investigation of “those, suspected of organized anti-Soviet activity (except for nationalists, clergy, sectarians); detecting and preventing hostile activities of the persons, who make and distribute anti-Soviet materials; carrying out secret operations on revealing anti-Soviet activities of foreign revisionist centres in the USSR”; the Tenth jointly with the PGU worked on counter-intelligence “against the ideological subversion centres of imperialistic states and foreign anti-Soviet organizations (except for the hostile organizations of Ukrainian and Baltic nationalists)”; the Eleventh department was initially engaged in ensuring the security of the Olympic Games, and after 1980 it switched over to the surveillance of sport, health care and scientific organizations; the Twelfth group (with the rights of a department) was responsible for the communications with the security bodies of socialist countries; the Thirteenth department fought against informal youth movements; the Fourteenth supervised the mass media and the Association of Journalists, and, finally, the Fifteenth focused on the Dynamo sports society.⁶ Though at the end of Perestroika, in August 1989, the Fifth Directorate was renamed the “Directorate for Constitutional Order Protection” (Directorate “Z”), its main goals remained unchanged.

Furthermore, the KGB supplied the CPSU Central Committee (until March 14, 1990) and the Soviet supreme authorities with information, related to the state security and defense, the social and economic situation in the Soviet Union, the issues of foreign policy and the economy. In September 1989 the Operational Analysis and Information Service was set up in the Committee, and on October 30, 1990, it was transformed into the Analytical Directorate.

It is to be added that the KGB routine activities were supported with the deliberate establishment of the secret services positive image, the cult of chekism.⁷

During Perestroika the state security headquarters managed to maintain their powers and their “weight”, not being subject to any significant changes in structure or human resources.⁸ In 1985 at the April plenum of the CPSU Central Committee the Head of the KGB Viktor Chebrikov (December 17, 1982 – October, 1 1988), who earlier supported the nomination of Mikhail Gorbachev as the General Secretary, was elected a member of the Political Bureau of the CPSU Central Committee. Being granted this high status, which had earlier been held only by the long-reigning KGB Head Andropov, “gave Chebrikov himself and his closest KGB entourage, a sense of significance and a special political role in the renovated party leadership.”⁹

It may be mentioned that Gorbachev saw the KGB not as a threat to his transformations, but rather as a support for them. There is a good reason why in his Perestroika programme report at the 27th CPSU Congress in 1986 Gorbachev specifically emphasized the remaining role and significance of the political secret police: “In the conditions of the growing subversive activities of the imperialistic intelligence services against the Soviet Union and other socialist states the responsibility level of the state security services is increasing dramatically. Being governed by the party, strictly complying with the Soviet laws, they put lots of efforts into revealing hostile schemes, preventing any subversive actions, and securing the sacred borders of our Motherland.”¹⁰

The rhetoric of the people from the secret police during the Perestroika period also stayed largely the same. In their reports the heads of the KGB gave assurances that their agency sought to ensure and encourage successful Perestroika development and “adapted their activities by improving their applied practices”. However, in these speeches there were increasingly strong condemnations, well-known from Andropov’s times: the chekists more and more often blamed foreign intelligence services and their agents in the USSR for the growing internal crisis.¹¹

For instance, speaking in September 1987 at the formal meeting devoted to the 110-year anniversary of the birth of the VChK founder Feliks Dzerzhinsky, Viktor Chebrikov declared: “All the social strata of our country are under the focus of attention of the imperialistic intelligence services... Our foes are trying to push individual representatives of art intelligentsia to the marginal positions of criticism, demagoguery and nihilism, demonization of some historic periods in the development of our society...”¹²

On October 1, 1988 Chebrikov, as the Head of the KGB, was replaced by Vladimir Kryuchkov, while Chebrikov was appointed the Secretary of the CPSU Central Committee supervising administrative and law-enforcement bodies, including the KGB. Until September 20, 1989 he was also the Head of the Commission of the CPSU Central Committee for legal policy. In this position Chebrikov initiated a number of repressive decrees, signed by Gorbachev, in particular, the one dated April 8, 1989, toughening liability for “anti-state crimes.”¹³

The Head of the KGB Vladimir Kryuchkov (October 1, 1988 – August 22, 1991), elected in October 1989 a member of the Political Bureau, also stayed loyal to *chekist* principles and rhetoric. For example, in August 1989 the hateful Fifth KGB Directorate was

6 Ibid, 166–167.

7 More on the CheKa Cult see in Julie Fedor, *Russia and the Cult of State Security: The Chekist Tradition, From Lenin to Putin*, London: Routledge, 2013.

8 Waller, *Secret Empire: The KGB in Russia Today*; Бакатин, *Избавление от КГБ*, 37–38.

9 Н. В. Петров, Подразделения КГБ СССР по борьбе с инакомыслием 1967–1991 годов, in Я. Берендс, и др., eds. *Повседневная жизнь при социализме. Немецкие и российские подходы*, Москва: Политическая энциклопедия, 2015, 158–184.

10 М. С. Горбачев, Политический доклад Центрального Комитета КПСС XXVII Съезду Коммунистической партии Советского Союза, in *Материалы XXVII съезда Коммунистической партии Советского Союза*, Москва: Политиздат, 1986, 62.

11 Waller, *Secret Empire: The KGB in Russia Today*, 227.

12 Ibid.

13 Decree of the Presidium of the USSR Supreme Soviet dated April 8, 1989 “On amendments to the USSR Law ‘On Criminal Liability for Crimes against the State’ and some other legal regulations of the USSR”, in *Gazette of the RSFSR Supreme Soviet*, 1989, (16), 397.

renamed the “Directorate for Constitutional Order Protection”, which was supported with a propaganda campaign, manifesting the rift from the old goals and methods. However, justifying the need of this renaming, Kryuchkov stated in the letter to CPSU Central Committee that the “intelligence services and subversive centres of the foe” were trying to “inspire the spots of social tension, anti-socialist actions and civil unrest, provoke hostile elements to the actions, aiming at the violent overthrow of the Soviet power”.¹⁴

Being headed by Kryuchkov, the KGB took part in the forced suppression of mass protests in April 1989 in Georgia and in Lithuania in January 1991, which resulted in dozens of deaths.¹⁵

Finally, on Kryuchkov’s initiative, the law on the state security bodies in the USSR was adopted in May 1991. This law had been developed jointly with the KGB key people. It ensured nearly complete independence of the Committee from the Soviet political leaders, preserving its structure and powers, as well as providing it with full control of any documents related to the state security.¹⁶ The law was supported by the Defense and State Security Committee of the Supreme Soviet, which was controlled by the KGB and consisted mainly of secret police officers.

This way the secret political police successfully adapted to the changing conditions while maintaining their major goals and supporting the pace of their activities.¹⁷ The Committee sought to improve its image and therefore on April 22, 1990, the KGB Public Relations Centre was set up (based on the former Press Office but considerably expanding its workforce and structure). One of the propaganda techniques was the focus on fighting against crime and “economic sabotage”. In December 1990 the KGB established a separate Directorate for Combating Organized Crime (Organized Crime Directorate, or OP) to deal with these issues.

According to the state security retired Major General Oleg Kalugin, dismissed in 1990 for criticizing the secret services, the Committee remained the most untouchable compared to the other law-enforcement bodies: “And after five years of Perestroika the KGB was a state in the state, a body, enjoying huge powers, theoretically capable of crushing any government”.¹⁸

USSR KGB REORGANIZATION AFTER THE 1991 AUGUST COUP

The reason for reforming the existing state security services structure was an attempted putsch in August 1991 by the high officials, who set up the State Committee for the State of Emergency (GKChP). The KGB Head Kryuchkov was one of the main coup organizers, supported during the preparation by a number of Committee people.¹⁹

After the loss of the putsch, the arrest of Kryuchkov and other former GKChP members (all of them were accused of “high treason”, but then were granted amnesty in February 1994), on August 23, Vadim Bakatin was appointed the Head of the KGB. He had been the First Secretary of the CPSU Kirov regional committee (1985–1987), CPSU Kemerovo regional committee (1987–1988) as well as the Soviet Minister of Internal Affairs in 1988–1990. Bakatin was commissioned to launch a reorganization of the State Security system.

Though being aware of the threat his agency was to society, the new KGB Head refused to implement both serious structural transformations and the Committee staff lustration. “I have not considered it possible for us to reform the KGB fundamentally

– following the German or Czech examples, that is to destroy it completely and rebuild it anew. Not to dismiss but reform. That was, so to say, a humane direction I opted for”, wrote Bakatin in 1992 in his book “Liberation from KGB”.²⁰

The main principles of Bakatin’s reforms were *disintegration*, *decentralization* and *de-ideologization*. Disintegration implied “the division of the KGB into different independent departments and a deprivation of its monopoly on all the activities related to security: to tear the Committee apart into parts, which, directly subordinate to the Head of State, would balance one another, compete with one another”.²¹ Decentralization, according to Bakatin’s idea, was to “provide full independence to the Republican security bodies mainly combined with coordination and to some extent operative activities of inter-republican units”.²² At the same time Bakatin realized that the achievement of the above target was determined not by his will, but rather by the developing Union disintegration processes. The third of Bakatin’s reorganization lines was in the KGB de-ideologization. “The traditions of *chekism* are to be eradicated, *chekism* as an ideology must terminate its existence. We must comply with the law, but not ideology”, declared the new Head of the Committee.²³ However, it is unclear how he thought to achieve that goal without any radical reforms of the most repressive Soviet institution. In early 1992, summarizing the results of his activities after retiring from the state security bodies, Bakatin acknowledged: “No success was achieved. I do not believe that the security services have already become safe for the citizens. There are no laws, no controls and no professional internal security services”.²⁴

Nevertheless, just after the August putsch, the KGB workforce started shrinking and a number of departments were separated and became independent. In August 1991 the Security Guard Service was transformed into the Security Guard Directorate at the USSR Presidential Executive Office. On August 29, based on the Eighth Chief Directorate (cryptographic), Sixteenth

14 Note of the Head of the USSR KGB V. A. Kryuchkov to the CPSU Central Committee dated August 4, 1989 “On establishing the Directorate for Constitutional Order Protection in KGB”. Russian State Archive on Contemporary History (RGANI), Coll. 89, Op. 18, D. 127, 1–4. Cit. by: Кокурин, Петров, Лубянка, 730–732.

15 The events mentioned include a special operation to break up an opposition meeting near the Government building of the Georgian SSR in Tbilisi, carried out at night on April 9, 1989 by the internal troops and the Soviet army, with an ensuing death toll of 21 protesters. And also chekist military operation at night on January 12–13, 1991, in Vilnius, during which Alpha special forces unit of the Seventh KGB Directorate, an Air-Borne unit and a special police unit seized the TV tower and a radio station, which led to 13 deaths.

16 The Law of the USSR No. 2159-1 “On the State Security Bodies in the USSR”, dated May 16, 1991, in *Gazette of the Congress of People’s Deputies and Supreme Soviet of the USSR*, 1991, (22), 630. See: Waller, *Secret Empire: The KGB in Russia Today*, 168–178.

17 Andreas Hilger, Sowjetunion (1945–1991), in: Jens Gieseke, Łukasz Kamiński, Krzysztof Persak, eds., *Handbuch der kommunistischen Geheimdienste in Osteuropa 1944–1991*, Göttingen: Vandenhoeck & Ruprecht, 2009, 113.

18 О. Д. Калугин, “Дело” бывшего генерала КГБ. Месяц первый, Москва: ПИК, 1990, 41–42.

19 Findings of the investigation materials on the role and involvement of KGB officials in the events of August 19–21, 1991. <<http://constitutions.ru/?p=7018>>

20 Бакатин, *Избавление от КГБ*, 238.

21 Ibid, 77.

22 Ibid.

23 Cit. by: Л. М. Млечин, *КГБ. Председатели органов госбезопасности. Раскрытые судьбы*. Москва: Центрполиграф, 2011.

24 Бакатин, *Избавление от КГБ*, 239.

Directorate (electronic intelligence) and the KGB Government Communications Directorate the Government Communications Committee at the USSR Presidential Office was set up.²⁵ In September dismantling reached the Directorate for the Constitutional Order Protection “Z”, the former Fifth Directorate, responsible for the counterintelligence to combat a foe’s ideological subversion.

On October 22 the USSR State Council issued a resolution suggesting the dissolution of the Union KGB and establishing in its place the USSR Central Intelligence Service (based on the First Chief Directorate), the Inter-Republican Security Service (Vadim Bakatin stayed on as its head) and the Committee for the USSR State Border Security Guard with the common command of the border forces based on the Chief Directorate of the State Border forces.²⁶ De jure these units were set up after the USSR President Mikhail Gorbachev signed the law on reorganizing the state security bodies on December 3, 1991. It was the date when the USSR KGB formally terminated its operations, whereas the security bodies shifted to the “exclusive jurisdiction of the sovereign republics (states).”²⁷ The story of the national security services began.

RUSSIAN KGB REORGANIZATION

The RSFSR was the only republic of the Union that had not had its own Committee for State Security before May 1991, when on the initiative of the Head of the RSFSR Supreme Soviet Boris Yeltsin, it was decided to establish the republican KGB by dividing the RSFSR State Committee for Security and Defense. At first the staff of the RSFSR KGB was around twenty people, but along with the dissolution of the Union Committee its powers and workforce increased. After the August putsch the competence of the Russian Committee included separate units of the Union KGB: on August 21 – the KGB Directorate in Moscow and Moscow region, on September 5 – the bodies of state security of most subjects of the RSFSR, earlier directly subordinate to the USSR KGB, and from November 1, 1991 – the Seventh Directorate (field surveillance), Operations and Technology Directorate, the Twelfth Department (wiretapping and room eavesdropping) as well as the pretrial detention centre.²⁸

On November 26, 1991 the KGB of the RSFSR was transformed under Presidential Decree into the Federal Security Agency (FSA) of the RSFSR.²⁹ By that time the staff of the Russian security service headquarters had grown to 20,000 employees with another 22,000 working locally.³⁰

After the termination of the Union KGB on December 3, the Russian Federation, which stayed with the bulk of material and human resources of the Soviet state security apparatus, was able to take advantage and use the inherited structures by itself.

POST-SOVIET TRANSFORMATIONS OF RUSSIAN INTELLIGENCE SERVICES

Yeltsin’s strategy was to preserve the secret police organization, but minimize its ability to challenge his presidential power. As a result, five separate security services were set up based on the former KGB. However, no personnel purges were carried out. On the contrary, the continuity with the Soviet Committee for State Security was observed both in human resources and functions.

First of all, on December 18, 1991 the USSR Central Intelligence Service was reorganized as the **Foreign Intelligence Service (FIS)**.³¹ It inherited the structural units and staff of the KGB First Chief Directorate, where, according to different estimates, during the late-Soviet period the workforce was from 12,000 to 16,000.³² Yevgeny Primakov remained the Head of the FIS. On September 30, 1991, he was appointed the Head of the First Chief Directorate while previously he had been an agent of the KGB foreign intelligence for many years.³³

On December 19, President Boris Yeltsin signed the Decree establishing the **Ministry of Security and Internal Affairs of the Russian Federation (MBVD)**, which was designed to become the key Russian intelligence service, uniting the Soviet Inter-Republican Security Service, the Russian Federal Security Agency, as well as the Ministry of Internal Affairs of the USSR and the Ministry of Internal Affairs of the RSFSR.³⁴ The new ministry was headed by Yeltsin’s close associate, the former Soviet Interior Minister Viktor Barannikov.

On December 24, based on the Government Communications Committee at the USSR Presidential Office and some other KGB units, responsible for radio-electronic intelligence and cryptography, the **Federal Agency for Government Communications and Information (FAPSI)** was founded.³⁵ It was headed by a former chekist, the Head of the Government Communications

25 Decree of the President of the USSR No. UP-2484 dated August 29, 1991 “On Establishing the Government Communications Committee at the USSR Presidential Office”, in *Gazette of the Congress of People’s Deputies and Supreme Soviet of the USSR*, 1991, (36), art. 1059.

26 Resolution of the USSR State Council No. GS-8 dated October 22 1991 “On reorganizing state security bodies”, in *Gazette of the Congress of People’s Deputies and Supreme Soviet of the USSR*, 1991, (44), art. 1239. The President of the USSR also approved of the temporary Regulation of the Central Intelligence Service (25. 11. 1991), Inter-Republican Security Service (28. 11. 1991 the), Committee for the USSR State Border Security Guard (3. 12. 1991).

27 Law of the USSR No. 124-N dated December 3, 1991 “On reorganizing State Security Bodies”, *Gazette of the USSR Supreme Soviet*, 1991, (50), art. 1411.

28 Бакатин, *Избавление от КГБ*, 125; Albats, Fitzpatrick, *The State within a State: The KGB*, 23.

29 The Decree of the President of the RSFSR No. 233 dated November 26, 1991 “On reorganizing the RSFSR Committee for State Security as the RSFSR Federal Security Agency”, in *Gazette of the Congress of People’s Deputies and Supreme Soviet of the RSFSR*, 1991, (48), art. 1683.

30 Gordon Bennett, *The Federal Security Service of the Russian Federation*, Watchfield: Conflict Studies Research Centre, Defence Academy of the UK, March 2000, 8.

31 The Decree of the President of the RSFSR No. 293 dated December 18, 1991 “On Establishing the RSFSR Foreign Intelligence Service”, in *Gazette of the Congress of People’s Deputies and Supreme Soviet of the RSFSR*, 1991, (52), art. 1890.

32 Andrew Christopher, Oleg Gordievsky, *KGB: The Inside Story of Its Foreign Operations from Lenin to Gorbachev*, New York: Harper Collins, 1990; Amy Knight, Russian Security Services Under Yel’tsin, in *Post-Soviet Affairs*, 1993 (9), 1, 44; Waller, *Secret Empire: The KGB in Russia Today*, 113.

33 Steel and Shadows. Obituary: Yevgeny Primakov, in *Economist*, 18 July 2015. <<http://www.economist.com/node/21657755>>

34 The Decree of the President of the RSFSR No. 289 dated December 19, 1991 “On Establishing the Ministry of Security and Internal Affairs of the Russian Federation”, in *Rossiyskaya Gazeta*, No. 284–285, December 25, 1991.

35 The Decree of the President of the RSFSR No. 313 dated December 24, 1991 “On establishing the Federal Agency for Government Communications at the RSFSR Presidential Office”, in *Gazette of the Congress of People’s Deputies and Supreme Soviet of the RSFSR*, 1992, (1), art. 39. The status and mission of the FAPSI were specified in RF Law No. 4524-1 dated February 19, 1993 “On Federal Bodies of Government Communications and Information”, in *Gazette of the Congress of People’s Deputies and Supreme Soviet of the RSFSR*, 1993, 12, art. 423.

Committee at the USSR Presidential Office Aleksandr Starovoytov, who from May 1986 until August 1991 was the deputy head of the KGB Government Communications Directorate for Science and Technology.

In addition, at the end of 1991 the Security Guard Directorate at the USSR Presidential Executive Office was dissolved and used as the basis for establishing the **Chief Guard Directorate (GUO)**. Earlier, in July 1991 the Presidential Security Service started its operations. Both organizations originated from the Ninth Directorate of the Soviet KGB, responsible for the security of the top party officials and statesmen whose workforce reached, as some estimates say, approximately 15,000 employees.³⁶

Before June 1992 the GUO was headed by the former Ninth directorate officer Vladimir Redkoborody, followed by Mikhail Barsukov, who from 1964 had served in the Kremlin KGB regiment.

The Head of the President's Security Service (September 3, 1991 – June 20, 1996) and also the first deputy head of the GUO was Aleksandr Korzhakov, who had also worked in the Ninth Directorate in 1970–1989, where at the end of this period he was one of the three bodyguards of Boris Yeltsin, then the First Secretary of the CPSU Moscow City Committee.

In late 1992 additional functions were delegated to the GUO – they were related to the organization of secured communications for the Russian leader. For this purpose the Federal Agency for Government Communications and Information was re-subordinated to it.

In June 1996 the GUO was renamed as the **Federal Guard Service** (its chief was general lieutenant Yuri Krapivin, whose career from 1972 was also related to the KGB, including the Ninth Directorate), whereas the President's Security Service merged with the Federal Guard Service.³⁷ According to some sources, by 1996 the staff of the GUO had grown from 8,000 to 20,000, and the executives took the functions, not directly associated with the physical security of the leaders: according to the laws adopted in the early 1990s, the GUO was entitled to perform operational-investigation activities, including covert surveillance and wiretapping.³⁸

The President's decision to unite the secret services in the Ministry of Security and Internal Affairs was violently criticized: this idea reminded people of Stalin's terrifying People's Commissariat for Defense (NKVD) headed by Lavrenty Beria. As a result Yeltsin's Decree dated December 19, 1991, was appealed against in the Constitutional Court of Russia and on January 14, 1992, it was recognized as contradictory to the Constitution. The Constitutional Court order served as the basis to establish two separate Ministries – the Ministry of Internal Affairs of the Russian Federation led by Viktor Yerin and the Ministry of Security led by Viktor Barannikov (December 19, 1991 – July 27, 1993).

The **Ministry of Security (MB)**, founded on January 24, 1992, became the essential and largest successor of the KGB, inheriting the functions of the Second Chief Directorate (counterintelligence), the Third Chief Directorate (military counterintelligence), Directorate “Z” (internal political security), Organized Crime Directorate (combating organized crime), the Fourth Directorate (transport counterintelligence), the Sixth Directorate (economic counterintelligence), and the Seventh Directorate (field surveillance).

In total, according to Michael Waller's estimates the MB comprised of at least 17 large KGB units, including those responsible for political internal security, economic security, counterintelligence, military counterintelligence, nuclear weapons storage,

the underground, the railways, the marine fleet and the state-owned Aeroflot airlines security, combating organized crime, drug control, the security of the majority of governmental facilities, military construction, technological laboratories, mail interception, archives, wiretapping, analysis, investigation and training. In addition, the Ministry of Security “was responsible for monitoring the public, cooperative and private business in transport, the industrial and communications sectors, the monitoring of the mass media, the analysis of social and political issues and patent protection. The only important duties of the former KGB that the MB did not perform were foreign intelligence, cryptography, communications and presidential security.”³⁹ The ministerial workforce reached 135,000, out of which 50,000 were engaged in counterintelligence.⁴⁰

Similarly to the KGB leaders of the late-Soviet period, the Minister of Security Barannikov focused on combating crime, which became a part of the image efforts to provide security bodies with a clear meaning of their activities, and “a political tool, with which to ruin opponents in and out of government.”⁴¹

At the same time it became common practice to *delegate* state security people from the *active reserve* to public and commercial entities in order to informally control them.

In 1992–1993, at Barannikov's suggestion of Yeltsin's approval, an array of laws regulating the secret services activities were adopted. Acting similarly to the KGB Head Kryuchkov in 1991, the Minister of Security demanded from the Supreme Soviet the urgent adoption of his bills. And, like in 1991, the initiative was endorsed by the State Committee for Security and Defense of the Supreme Soviet, run by the future Head of the State Security bodies Sergey Stepashin.

The array of Yeltsin-Barannikov laws included a law on operative investigation activity, on security, on federal state security bodies, on foreign intelligence, on state secrets and on the Russian Federation state border. Their distinguishing features included the width of powers, granted to the secret services, and their guaranteed tough control by the president. On the contrary, the possibilities of public and parliamentary control weakened dramatically.

The Law on Operative Investigation Activity, adopted in April 1992, entitled five governmental agencies to carry out operative investigation activities: bodies of the Internal Affairs, the Ministry of Security, Border Security, the Foreign Intelligence Service and operative units of the Chief Security Directorate (art. 11).⁴²

36 “Знаю их всех”. Говорит Александр Коржаков, in *Медиазона*, September 5, 2016. <<https://zona.media/article/2016/05/09/korzhakov>>

37 Federal Law No. 57-FZ dated May 27, 1996 “On State Security”, in *Rossiyskaya Gazeta*, No. 106, June 6, 1996. The Decree of RF President No. 938 dated June 19, 1996 “On the Federal Security Service of the Russian Federation”, in *Rossiyskaya Gazeta*, No. 118, June 25, 1996. The Decree of RF President No. 1136 dated August 2, 1996 “On Approving the Provision of the Federal Security Service of the Russian Federation”, in *Russian Federation Code*, 1996, (32), art. 3901.

38 Amy Knight, *The Security Services and the Decline of Democracy in Russia: 1996–1999*, The Donald W. Treadgold Papers in Russian, East European, and Central Asian Studies, No. 23, October 1999, 14, The Henry M. Jackson School of International Studies, The University of Washington, Seattle. 14. <<https://digital.lib.washington.edu/researchworks/handle/1773/35343>>

39 Waller, *Secret Empire: The KGB in Russia Today*, 116.

40 Richard Sakwa, *Russian Politics and Society*, Fourth ed., London: Routledge, 2008, 96.

41 Waller, *Secret Empire: The KGB in Russia Today*, 117.

42 Law of the Russian Federation No. 2506-1 dated March 13 1992 “On operative investigation activities”, in *Rossiyskaya Gazeta*, No. 99, April 29, 1992.

It is notable that the Law on Federal State Security Bodies which became effective in July 1992 appeared nearly identical to the law, adopted in 1991 on the KGB initiative: in several places the wording was absolutely the same. The sections of the law, describing the rights and responsibilities of the federal state security bodies, provided the Russian intelligence services with functions that were similar to those of the Soviet secret police. In particular, the law reserved their right to delegate their employees to any institutions, organizations and enterprises “to solve security issues” (art. 11).⁴³ It meant that the intelligence services could still freely infiltrate the mass media, civil groups and political alliances. In addition, the secret services could “provide the security” for “federal, interstate and international public-political and religious events” held in Russia, which allowed for broader interpretations (art. 12 (l)). To ensure state security under natural disasters and riots, and under the prevention of some crimes the state security bodies were empowered to “freely enter housing and other premises owned by citizens, land plots owned by them, the areas and premises of companies, institutions and organizations regardless of their forms of property”. The only condition for these entrances was the need to notify the prosecutor of them within 24 hours (art. 12 (e)). Taking into consideration the unaccountability of the secret services and the specifics of the Russian law-enforcement practices, this form of the law could also become subject to abuse.

The law on security established that the Russian president “controlled and coordinated the activities of the state security bodies”, and also “made day-to-day decisions on security provision” (art. 11).⁴⁴

The law on state secrets, adopted in July 1993, introduced an extremely wide definition of the term *state secret*, which significantly reduced the rights of the citizens to get information on the activities of the governmental authorities – both in the past (using archive data), and in the present.⁴⁵

During the escalation of the presidential and parliamentary antagonism in 1992–1993 and the deepening economic crisis, Boris Yeltsin was seeking support in the law-enforcement bodies, whose significance in domestic Russian politics was continuously growing. At the same time the President feared that an exaggerated strengthening of the secret services could potentially be a threat to his power.

After a two-year confrontation between Yeltsin and the Supreme Soviet, which ended up in dissolving the parliament on September 21 and the seizure of the House of Soviet (Russian White House) on October 4, 1993, the Ministry of Security was reorganized into the **Federal Counterintelligence Service (FSK)** in December that year. A Presidential Decree on the MB dissolution stated that “it appeared to be impossible to reform the system of VChK-OGPU-NKVD-NKGB-MGB-KGB-MB bodies” and that “the recently taken measures to attempt to reorganize them were mainly formal and decorative”.⁴⁶ These tough words, however, did not at all mean rethinking the role of the security bodies. They just showed Yeltsin’s dissatisfaction with the willful secret services, which took the side of the Supreme Soviet and did not provide the President with sufficient support in his opposition to the parliament.

Despite the loud statements, instead of qualitative reforms, Yeltsin again used intelligence services to strengthen his personal power and to prevent any attempts by parliament to challenge him in the future. Hence the FSK was fully controlled by him: under the Service Regulation, it was subordinate directly to

the president.⁴⁷ According to the appointed Secretary of the Presidential Security Council Oleg Lobov, Yeltsin’s right-hand man from the times of Sverdlovsk (now Yekaterinburg) regional committee, “the counterintelligence service is designed to protect the new presidential rule”, it must “support the president”.⁴⁸

The personnel policy of the renamed body also confirmed the continuity with the Soviet past. Colonel General Nikolay Golushko was appointed the Head of the Service (December 21, 1993 – February 28, 1994) – a former Ukrainian SSR KGB Chairman (1987–1991), who distinguished himself by especially cruel repressions of dissidents and dissenters. In addition, from 1974 to 1978 Golushko ran the department “combating nationalism” in the KGB Fifth Directorate.

The announced then FSK re-attestation of the service leaders did not lead to changes of key people in the counterintelligence headquarters and its regional directorates. Out of 277 top officials subject to re-attestation, only 13 failed, moreover, partly due to the retirement age. Sergey Stepashin, who replaced Golushko as the FSK Director (March 3, 1994 – June 30, 1995), summarizing the results of the re-attestation in March 1994, was pleased to note that “we did not follow the Eastern European example and did not fully destroy Russian Intelligence Services”.⁴⁹ Being one of the main organizers of the First Chechen War that started in 1994, Stepashin consistently advocated the expansion of secret services powers, at the same time insisting on the priority of the state interests over civil rights. In an interview given in June 1994 he made a claim that would be incompatible with a democratic state of law: “We will infringe upon the human rights of a person if this person is a criminal”.⁵⁰

The FSK included nearly all units of the dissolved Ministry of Security, except for the Border Security Forces, which were singled out as an independent **Federal Border Service – Chief Command of the Russian Federation Border Security Forces (FPS – glavkomat)**. Pursuant to the FSK Regulation, the tasks of the counterintelligence service bodies were: detecting, preventing and suppressing intelligence, surveillance and reconnaissance of foreign secret services and organizations against the RF; seeking intelligence information on security threats; providing the President with information on RF security threats; the war on terror, arms and drug trafficking, illegal armed groups, as well as illegally established or prohibited non-governmental

43 Law of the Russian Federation No. 3246/1-1 dated July 8, 1992 “On federal state security bodies”, in *Rossiyskaya Gazeta*, No. 180, August 12, 1992.

44 Law of the Russian Federation No. 2446-1 dated March 5, 1992 “On Security”, in *Rossiyskaya Gazeta*, No. 103, May 6, 1992.

45 Law of the Russian Federation No. 5485-1 dated July 21, 1993 “On State Secrets”, in *Rossiyskaya Gazeta*, No. 182, September 21, 1993.

46 Decree of RF President No. 2233 dated December 21, 1993 “On the Dissolution of the Russian Federation Ministry of Security and the Establishment of the Russian Federal Counterintelligence Service”, in *Collected President’s Decrees and Russian Federation Government Resolutions*, 1993, (52), art. 5062.

47 Decree of RF President No. 19 dated January 5, 1994 “On Approving Provisions of Russian Federal Counterintelligence Service”, in *Collected President’s Decrees and Russian Federation Government Resolutions*, 1994, (2), 1994, art. 76.

48 Interview with O. Lobov, in *Nezavisimaya gazeta*, February 2, 1994, 1.

49 Максим Вырывин, Контрразведка переаттестована, in *Kommersant*, No. 54, March 26, 1994. <<http://www.kommersant.ru/doc/74594>>

50 TV interview with S. Stepashin dated June 23, 1994. Cit. by: Amy Knight, *Spies without Cloaks. KGB’s Successors*, Princeton: Princeton University Press, 1996, 25, 29. See also interview with S. Stepashin, in *Nezavisimaya gazeta*, May 26, 1994, 1–5.

organizations, encroaching on the RF constitutional order; ensuring state secrets protection within their competence; counterintelligence operative cover of the RF state border.⁵¹

FSK leaders initially claimed an expected staff downsizing from 135,000 to 75,000 due to the delegation of some functions to other institutions. However, it is impossible to establish the fact of staff cuts because the information has been classified. At least, in early July the officials themselves mentioned a workforce of 100,000 people.⁵² Most likely, Yeltsin's strategy was to weaken the central national security body politically, distributing chekists in different governmental authorities. Nonetheless, according to Michael Waller, it was similar to the effect of fungi growth: spores were not restrained any more, but "distributed through the entire society".⁵³

The Chechen War made Yeltsin increasingly rely on law-enforcement bodies. There were new transformations, further strengthening the role of the state security bodies. In early 1995 the Law on the Federal Security Service Bodies in the Russian Federation was signed and became effective on April 12.⁵⁴ From this day the FSK was renamed the **Federal Security Service (FSB)**, and its powers were significantly expanded.⁵⁵ According to the law, FSB core activities included counterintelligence and intelligence, the war on terror and high-threat crimes, border security activity, information security, and the control of corruption (art. 8).

In July 1995 Sergey Stepashin was dismissed and his post was taken over by the former Head of the Chief Guard Directorate Mikhail Barsukov (July 24, 1995 – June 20, 1996). One of his first steps in the new office was setting up an FSB counterterrorism centre (FSB ATC) to coordinate different counterterrorist services. The centre was the successor of the former Soviet KGB Counterterrorism Directorate (UBT). It included two famous special forces units – Alpha group, before 1995 it had been a part of the Chief Guard Directorate (Department "A"), and Vypmel group, a part of which had been subordinate to the Ministry of Internal Affairs since 1993, while the other made up the Special Operations Directorate (Department "V"). In October 1998 special forces were united in the newly established FSB Special Forces Centre (FSB CSN).

On December 20 1995, the anniversary of the VChK foundation, a public holiday was established – the Day of Security Bodies.⁵⁶ Before that, December 20 had been celebrated for decades informally by the state security staff as the Day of the Chekist. And two years later on December 20 President Yeltsin delivered a speech, which was considered by many as the final "rehabilitation" of the secret services. According to Yeltsin, "we nearly pushed too far in revealing the crimes of the state security bodies. Their history included not only black periods, but also glorious ones, which are something to be proud of". The President also noted that "today our security services people are genuine patriots. They work not for the glory and awards, but – I dare say – for an idea. For the state security. For the peace and quiet of our citizens. And we must respect the work done by the security service officers. Their hard and often heroic work".⁵⁷

After the first round of the presidential election, held on June 16, 1996, Yeltsin dismissed the head of FSB Barsukov, replacing him with Nikolay Kovalev (July 9, 1996 – July 25, 1998), who had served in the KGB from 1974 – first as a field officer of the district department of the KGB Directorate in Moscow and Moscow region, and then an officer and later the head of the Fifth service of the KGB Moscow Directorate (combating ideological subversion).

From the mid-1990s observers continuously mentioned a deterioration of the human rights situation in Russia.⁵⁸ In the background of concerns about the potential return of the political investigation system on July 6, 1998, President Yeltsin issued a decree setting up a Constitutional Security Directorate in the FSB, being, in fact, the reincarnation of the Constitutional Order Protection Directorate, the former KGB Fifth Directorate.

The Head of the new unit Gennady Zotov in his interview to "Nezavisimaya Gazeta" in November that year described the objectives of his directorate as follows: "The state sought to establish an FSB separate unit, 'specialized in' combating security threats to the Russian Federation in the social and political area. <...> Owing to a number of objectives, related to the fundamental specifics of Russia, reasons special attention has always been paid to the protection of the state against 'internal revolt', i.e., in other words, against the security threats in the social and political areas, since the 'internal revolt' for Russia has always been more terrifying than any military invasion".⁵⁹

Thus, President Yeltsin did not opt for the path of dissolving the Soviet secret services, but, divided the KGB into several individual organizations, preserving most of their functions and personnel. According to the secret services researchers Andrei Soldatov and Irina Borogan, Yeltsin's idea was "to encourage rivalry in the splintered intelligence community, providing a precarious system of checks and balances": "Under Yeltsin, the foreign intelligence agency remained in direct competition with military intelligence; the FSB struggled with the communications agency, which kept a close on political and social situation in Russia. After obtaining a report from the FSB Director, Yeltsin could compare it with the report from the communications director".⁶⁰ In any case, according to Soldatov and Borogan, in 1998 there appeared changes in the secret services competitive system created by Yeltsin: "First, the founding fathers of agencies lost their posts, independent people who had become accustomed to fiercely defending the interests of their structures. <...> Then there began to appear stubborn rumors about a draft decree being walked

51 Decree of RF President No. 19 dated January 5, 1994 "On Approving Regulation of Russian Federal Counterintelligence Service", in *Collected President's Decrees and Russian Federation Government Resolutions*, 1994, (2), art. 76.

52 Amy Knight, *Russia's New Security Services: An Assessment*, Washington, D.C.: Library of Congress, 1994, 24; <<https://www.hsdl.org/?view&did=457727>>

53 Waller, *Secret Empire: The KGB in Russia Today*, 121–122.

54 Federal Law No. 40-FZ dated April 3, 1995 "On Federal Security Service Bodies in Russian Federation", in *Rossiyskaya Gazeta*, No. 72, April 12, 1995.

55 Bennett, *The Federal Security Service of the Russian Federation*, 16; Bettina Renz, Russia's 'Force Structures' and the Study of Civil-Military Relations, in *Journal of Slavic Military Studies*, 2005, (18), 4, 570–572.

56 Decree of RF President No. 1280 dated December 20, 1995 "On establishing the Day of the Russian Federation Security Bodies", in RF Code, 1995, (52), art. 5135.

57 Boris Yeltsin, "The secret services will never be 'watchdogs' any more", in *Radio Adress, Kommersant*, No. 220, December 20, 1997, 2.

58 Michael J. Waller, "Russia's Security Services: A Checklist for Reforms", in *Perspective*, 10 September 1997; Knight, *The Security Services and the Decline of Democracy in Russia*, 21–25.

59 "Защита личности, общества, государства". Так определяет приоритеты своего подразделения начальник Управления конституционной безопасности ФСБ России Геннадий Зотов, in *Независимое военное обозрение*, No. 044 (118), November 20, 1998, 1.

60 Andrei Soldatov, Irina Borogan, "The New Nobility: The Restoration of Russia's Security State and the Enduring Legacy of the KGB", in New York: *PublicAffairs*, 2011, 14.

through the Kremlin corridors which would combine all the fragments of the KGB into one agency.”⁶¹

On July 25, 1998, Vladimir Putin was appointed the FSB Director (July 25, 1998 – August 9, 1999), the former KGB officer, who served from 1975 to 1991 first in the Leningrad KGB Directorate working in counterintelligence, and then, from 1985 to 1990, in the local intelligence centre in Dresden under the cover of the position of Dresden USSR–GDR Friendship Centre Director. Later Putin was appointed the head of the Government, leaving his colleague from the Leningrad KGB Directorate Nikolay Patrushev as the FSB leader (August 9, 1999 – May 5, 2008).

On December 20, 1999, at a formal meeting devoted to the Day of the Security Services, Prime-Minister Vladimir Putin addressed the security services officers in the following way: “A group of FSB people, sent by you on a mission to work under cover in the government, is performing well at the initial stage”. Soon after that he was elected by Boris Yeltsin as the successor for the presidential post.

Putin’s rise to power in 2000 meant the appointment of former state security people to the key political offices. Since the 2000s nearly all the top positions in the presidential office, government and economic area have been controlled by the people from the law-enforcement bodies. Though this process commenced when Yeltsin was still in office, and the number of high officials with a law-enforcement background (top leadership, government, regional elite, parliament) grew from 11.2 % to 17.4 %, during the first years of Putin’s reign by 2004 this figure reached 24.7 %.⁶² According to some estimates, by 2007 the share of direct or indirect intelligence presence in authorities could have been above 75 %.⁶³

The consolidation and reinforcement of the secret services under Putin’s rule became truly large-scale. On March 11, 2003 the president dissolved the Federal Agency for Government Communications and Information (FAPSI) and the Federal Border Service (as well as the Federal Tax Police Service) as separate organizations. Consequently, the border security service was fully integrated into the FSB, while parts of the dissolved FAPSI were divided between the FSB and the Federal Guard Service. Furthermore, informally the Ministry of Internal Affairs became fully FSB-controlled. All the key people appointed in the Ministry – from the Minister to the Head of the Internal Security Directorate – were from the secret services.⁶⁴

The workforce of the Russian intelligence service during Putin’s reign has also been growing steadily. As mentioned above, formal data on the workforce of the state security bodies were not disclosed. Nevertheless, by the end of the 1990s, according to available data, the FSB employed from 80,000–90,000 to 120,000–130,000 people, including two elite special operations units.⁶⁵ After the merge of the FPS and a part of the FAPSI with the FSB, the staff of the latter could have grown and reached 350,000 people.⁶⁶ At the same time experts say that the Federal Border Service included some 180,000 people in the 1990s.⁶⁷ However, from the early 2000s it appears that the figure rose to 200,000–210,000.⁶⁸ The workforce of the Federal Guard Service was within the 13,000–20,000 range according to different estimates by the late period of Yeltsin’s rule and it might well have considerably grown after Putin’s arrival.⁶⁹ According to other estimates, in the mid-2000s the Federal Guard Service staff included approximately 20,000–30,000 people, inter alia, 3,000–5,000 of the presidential guard.⁷⁰ And, finally, according to 2008 data, the Foreign Intelligence Service employed about 13,000 people.⁷¹

Despite being in the focus of public attention during Perestroika and forced to adapt to the new situation, the KGB and

then the Russian state security, partially changing their methods and increasing their propaganda efforts, were never actually challenged and pressed by the public. It is true that the monument to the founder of VChK Feliks Dzerzhinsky was spontaneously dismantled during the strife between GKChP members and the RSFSR President Boris Yeltsin. However, neither during nor after the putsch was it demanded to take similar action to the very state security structures and to ban their members from taking positions in the new democratic authorities and institutions. In spite of a long-lasting repressive policy towards the citizens (forced regulation of their life, long isolation, civil rights restrictions, pressure against dissent etc.), the Soviet Committee for State Security, unlike its analogues in most countries in Central and Eastern Europe, was not so discredited as to disrupt its functional, personnel and symbolic continuity with the past. The Russian secret services openly admit and emphasize their role as followers of the Soviet secret state security services traditions.

A poll, conducted during the last year of the USSR existence, showed that the KGB had higher public trust (62 %), than other institutions (police, courts, the mass media etc.).⁷² And 10 years later, when the Levada-Centre asked people if it bothered respondents that President Vladimir Putin who took office in 2000 had long been in the KGB and FSB, 78 % confessed that this fact was not of any concern to them and only 5 % stated that it was a high concern to them.⁷³ Sociologist Lev Gudkov noted in 2003 that “Putin’s relation to the state security and armed forces looks for many Russians a merit rather than a flaw for his reputation.”⁷⁴

61 Andrei Soldatov, Irina Borogan, The Mutation of the Russian Secret Services, in *Agentura.ru*, August 25 2016. <www.agentura.ru/english/dosie/mutation/>

62 О. В. Крыштановская, *Анатомия российской элиты*, Москва: Захаров, 2005, 269–270.

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64 Andrei Soldatov, Irina Borogan, The Mutation of the Russian Secret Services, in *Agentura.ru*, 2007 <<http://agentura.ru/english/dosie/mutation/>>

65 Bennett, *The Federal Security Service of the Russian Federation*, 22; Eberhard Schneider, *The Russian Federal Security Service under President Putin*, in: Stephen White, *Politics and the Ruling Group in Putin’s Russia*, Basingstoke – New York: Palgrave Macmillan, 2008, 43; Knight, *Spies without Cloaks*, 14; Knight, *The Security Services and the Decline of Democracy in Russia*, 14.

66 *Spionage gegen Deutschland – Aktuelle Entwicklungen*, Bundesamt für Verfassungsschutz, November 2008, 6. <<http://www.verfassungsschutz.brandenburg.de/cms/detail.php/bb1.c.162958.de>>

67 Waller, *Secret Empire: The KGB in Russia Today*, 7; Knight, *The Security Services and the Decline of Democracy in Russia*, 14.

68 Schneider, *The Russian Federal Security Service under President Putin*, 43; Bettina Renz, “The *Siloviki* in Russian Politics: Political Strategy or a Product of the System?”, in *Russian Analytical Digest*, No. 17, 20 March 2007, 6.

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73 Press releases of Levada Centre dated September 15 2000 <<http://www.levada.ru/2000/09/14/15-sentyabrya-2000-goda/>> and July 3 2001. <<http://www.levada.ru/2001/07/02/3-iyulya-2001-goda/>>

74 Л. Д. Гудков, “Массовая идентичность и институциональное насилие. Статья вторая: Армия в постсоветской России”, in *Bulletin of Public opinion: Data. Analysis. Discussions*, 2003, (68), 2, 35–51.

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REGIME ARCHIVES

SVETLANA SHURANOVA

INTRODUCTION

The breakthroughs in historical, source and archaeographic studies, made using the Russian archives in the 1990s are a generally recognized phenomenon. Before that Soviet archives had long been appendices to the administrative system, which accumulated classified documents. A necessary element of Perestroika after August 1991 was a leap to the information culture, including the removal of unjustified limitations on the access to archive documents. Changes in the political situation triggered the advent of resolutions, temporary provisions and laws, which bridged the existing gap in the issues related to declassifying and using archive documents. Nevertheless, the historical scientific model has not been implemented yet, it is this model that is oriented on involving *shady* documents about the past into the public sociocultural interaction.

In today's Russia it is possible to observe the return of a departmental monopoly on archive documents, the selective approach to users using unforeseeable and subjective criteria. Compared to the openness of the archives in the early 1990s, currently Russia is experiencing a real regress. Therefore, many key aspects of the Soviet past and, first of all, the history of public terror, actually stay unstudied, citizens are not always able to learn information about the fate of their own relatives out of those who suffered from political repressions. The clusters of classified data, the availability of unprocessed documents, partial accessibility of the scientific-reference sources, restrictions arbitrarily imposed by archivists under protectionist ideas, – all this is today's reality. The archive user has to experience the barriers of state order limitations, subjective decisions and technical possibilities.

REGULATION AND FUNCTIONING OF ARCHIVES IN RUSSIA

Archives are valuable storage facilities, which are designed to provide access to historical knowledge, as well as to keep a database. According to the law an archive is an institution, which stores, systematizes and releases the documents, being within its archive fund. The tasks of open usage of documents, in particular, to dispel historical myths are always opposed by the “protective” function of the archive service. An archive document operates in the system, oriented on different values and legal criteria for making decisions. For instance, one and the same document must be accessible for scientific use, but following the administrative logic, it must be protected from attacks against “personal data”, “personal secrets”, and “state secrets”. This is where controversy emerges – on the crossroads of the academic, educational and administrative systems. The conflict of state, corporate, personal and public interests is inevitable: opening and concealing powerful archive resources is an instrument for public conscience manipulation. The infrastructure of storing, searching for archive information and legal regulations are also essential aspects of archive operations as an institution.

There are state (national) archives, departmental archives, municipal archives and non-governmental archives. State archives include federal archives and the archives of the Russian Federation subjects – regional archives. Federal archives are subordinate to Rosarchive – the Federal Archive Agency, – while regional archives are subordinate to the regional administration and Rosarchive. Departmental archives are divisions within different departments (ministries), and are subordinate to them. They may keep documents of the RF Archive funds only temporarily, according to article 18 of the Federal Law on archives in the Russian Federation (dated October 22, 2004). For example, the FSB is a successor of the documents on mass repressions and declassified documents of VChK-OGPU-NKVD-MGB-KGB, and the archives of FSB Directorates store the overwhelming majority of these cases. It is formally clarified whether these documents belong to Rosarchive now, but the period of temporary storage of these documents is specified in article 22 of the law on archives and is 15 years. In the 1990s the transfer of archive investigation cases of the rehabilitated persons from the FSB to the public archives started, but so far it has been implemented only partially. Many departmental archives still enjoy the right of unlimited-period document storage.

Archive operations are mainly regulated by the above mentioned federal law on archives in the Russian Federation. According to part 1 article 24 of this law the user is entitled to freely seek and receive archive documents for studying. In addition, legal bases of the archivists and archive activities are regulated by a great number of other regulations. Pursuant to part 4 article 29 of the RF Constitution, every person is entitled to freely seek and receive information in any legal way. The provision of services on releasing archive documents is regulated by numerous federal laws, decrees of the RF President, resolutions of the RF Government and orders of the Russian FSB.

The issues, arising out of the information being a state secret, its classification or disclosure is regulated by the Law on State Secrets dated July 21, 1993. According to the law the maximum document classification period is 30 years. It means that in 30 years the documents must be disclosed or the classification is to be renewed. As an exception, this period may be extended on the opinion of the Interdepartmental Commission for the Protection of State Secrets. In March 2014 the commission's opinion extended the classification period for a huge volume of information of the state security bodies by another 30 years. Until 2044 the classification will be marked on any documents containing information regarding intelligence, counterintelligence, operative investigation activities, on the persons collaborating confidentially with the state security bodies, on state security staff taking part in special operations, – the list of information categories consisting of 23 points enables it to extend the classification period of any document, executed by the state security bodies between 1917 and 1991.

The term *personal data* should be specifically indicated. It was introduced by the Federal Law on Personal Data, adopted by the State Duma. This federal law does not touch upon

the procedure of accessing archive information. Moreover, according to article 1 of this law, it is not applied to

- processing personal data by individuals for personal and family needs only;
- the issues of storing, completing, recording and using archive documents containing personal data.

In turn, the connection between the “personal data” and access to archive investigation cases of the repressed persons is regulated by order of the Russian Ministry of Culture, the Ministry of Internal Affairs, the Russian Federal Security Service (hereinafter “order of three ministries”) dated July 25, 2006 on approving the procedure of access to the materials stored in the state archive and the archives of the governmental bodies of the Russian Federation, terminated criminal and civil cases against the persons subject to political repressions, as well as filtration and control cases. According to this order, personal data include the information on personal and family secrets, facts, events and circumstances of the private lives of the repressed persons. Personal data can be found in nearly all the documents related to repressed people. Personal secrets include: the secret of intimate relations, the secret of property and financial standing (including bribery), medical secrets (e.g. alcohol addiction), and children adoption secrets. The access to the documents containing personal data is provided to the relatives of the people mentioned in the document, provided the relationship is confirmed. When at least 75 years have passed from the time of executing the document, access to the materials for the researchers, not being relatives, is possible only provided the written consent of the repressed persons, and after their death – their successor. In particular, the research into the materials of the cases against millions of people who were subject to repressions during the Soviet period is given according to the procedure, established in the RF law dated October 18, 1991 on the rehabilitation of victims of political repressions. The rehabilitation process is a powerful foundation for searching for and discovering archive documents on the activities of the repressive bodies, repression campaigns and individual lives.

The provision of access to archives is generally vital for studying the twentieth century history. Today the situation with the publication of the archive documents, related to the evolution and operations of the Soviet totalitarian system, which deprived a person of their basic rights and freedoms, is of the greatest interest. Archive documents of the operative holdings of the Soviet KGB, the holdings of archive criminal investigation cases, classified document management holdings, and the holdings of dossiers of the KGB-NKVD staff members have not been revealed and made public yet. This deprives us of the possibility to reevaluate the past, and estimate the scale of ongoing and expected changes. This, in particular, damages the development of history as a science.

BETWEEN STATE CONTROL AND PUBLIC PROPERTY

The legal restriction on using archive information in the twentieth century started in 1924–26 and gradually the problem of archive and archive document accessibility faded away from the legal public conscience. An interesting case, which took place in 1951, was described by a Candidate of Sciences (PhD) in History and archivist M. A. Leushin: the administration of Moscow

State University contacted the Central Committee of the All-Union Communist Party requesting classification of professors, post-graduate students and undergraduates due to the difficulties in accessing old archive holdings of the 19th–20th centuries and the total secrecy of documents. In response to the letter, archivists prepared a report, approved by the USSR Ministry of Internal Affairs, substantiating the access denial by the fact that most documents were written by “counterrevolutionary elements with the spirit of hatred and hostility to the Bolshevik party and the Soviet state”. The report also refused to classify the university faculty and students.¹

Historians Arseniy Roginsky and Nikita Okhotin remark that over the whole period of its history the Soviet power actually destroyed archive documents with a limited storage time when there was no operative need for them any longer, but, as a rule, it was routine destruction according to the archive management instructions published in the state security bodies. The exception was the mass destruction of documents under L. P. Beria’s order of 1940 to clean the archives of “unrecorded” materials, and also the destruction of archive documents during WWII under the threat of being seized by the enemy. A part of the documents did not survive the evacuation. It is known that in 1954–55 archives were cleaned of the documents “discrediting honest Soviet citizens” along with the starting liberation of the Gulag prisoners. According to the total estimates, out of approximately 20 million of the Soviet KGB archive cases only some 5 million cases had survived by 1991.²

During Perestroika there appeared a number of large-scale programs on reevaluating the past. In the conditions of the dramatically democratized conscience in the early 1990s the issues of accessing the documents and discovering Soviet secrets were in the focus of public attention. In 1992 the decree of the Russian President on protecting state secrets and the resolution of the Russian Government on the issues of organizing the protection of state secrets of the Russian Federation were issued. The work on declassifying archive documents, related to the state archive policy, commenced following the decree of the Russian President of June 23, 1992, on declassifying legal and other regulations, serving the basis for mass repressions and attacks on human rights. The Rosarchive order of June 15, 1992, introduced the temporary procedure of accessing archive documents and the rules of their use, where it declared the principle of general accessibility of Russian archive documents. This document for the first time established a 30-year document access restriction period, provided they contain state secrets, and a 75-year personal document access restriction period. Its essential provisions were confirmed by the resolution of the Supreme Soviet of the Russian Federation on the temporary procedure of accessing archive documents and their use. At that time the Supreme Soviet set up a commission for preparing the guidelines on accessing terminated criminal and filtration control cases, which began being submitted from the Soviet KGB archives to the national storage. In 1992–1993 whole sets of archive cases were declassified. These were related to the CPSU ideological

1 М. А. Леушин, “Проблемы доступности архивов в начале 50-х годов”, in *Вестник архивиста*, 1996, (4), 41–45.

2 А. Рогинский, Н. Охотин, Архивы КГБ: год после путча, in *Современная Россия: взгляд изнутри. Политика. Право. Культура. Сборник статей российских исследователей к 10-летию Института Восточной Европы при Бременском университете*, 1992.

fight against dissidence in the USSR etc. In 1993 the commission on accepting KGB and CPSU documents into the national storage was dissolved, while the law on the state secrets was adopted, and the functions of declassification were delegated to the Interdepartmental Commission for the Protection of State Secrets. In 1994 Boris Yeltsin signed the resolution, according to which the ministries had to delegate the powers to declassify their documents to the heads of the state national archives, but it was never implemented. By 1997 the implementation of the presidential decree on declassifying had slowed down notably, and the archives lost their right to declassify documents themselves. In many governmental bodies at the levels of all subdivisions, declassification expert commissions were established. Groundless secrecy period extensions for most documents became normal again, while declassifying became exceptional. The unlimited authority of ministries and other governmental bodies enabled them to create the full image of the criminal policy of the USSR and led to the inaccessibility of the most valuable information sources for researchers.

Today it is possible to state that there is an expressed institutional conflict between archive users and archivists. The archive is more often considered by users either under the *secular* logic (as a service provider), or under the “messianist” logic as a social institution, designed to store (but not protect) the public knowledge of the society of itself. In turn, archive staff, vice versa, tend to “de-routinize” their professional activities, and do it based on evidence. The minutes of formal meetings document the codes of ethical rules for the archivists and enable them to say that the primary mission of the archives is to protect the integrity and safety of the documents to be stored.³ The protective trends in the archive operations intensify along with a toughening up of archive law. However, the top-bottom legal regulation of the archive practices brings a number of unexpected effects.

The protective trends in the archive institution activities were determined due to the adoption in 2004 of the law on archives, inclusion of the norms of criminal and administrative liability for stealing documents in the Criminal Code, and the adoption of the federal law on information, information technologies and information protection. It is also worth mentioning the *order of three ministries* dated July 25, 2006. It is owing to this order that the access of researchers to the archive investigation cases became highly complicated.

In practice today users face limitations, which are not included in the regulations restricting access to regulations. This can be explained by an ambiguity of wording in the regulations, which leave space for interpretation. From the standpoint of practical relations between archive users and archivists the situation looks as follows: the discrepancies between mutual expectations and rigid regulation of the archive agenda on the one hand, led to “shallowing” the bureaucratic form of the archive on the one hand, on the other – to too much paperwork.

It is known that there have been cases, where the access to information was organized to avoid the formal access procedure – the user with “contacts”, a network in the archive staff, has an opportunity, for example, to get information without being involved in the bureaucratic procedures accompanying the access to information ensuing from a formal request. One of the effects of this situation is the dependence of the research field on the possibility to access relevant materials. When choosing the topic to study, the researcher, experienced in working with archives, looks into the availability of the materials and

the freedom of access to them. The researcher may avoid touching upon a topic, knowing that basically no access may be received to the materials.

The chances to access information are unequal, and the very historical knowledge can still be a manipulation tool, always depending on the will of authorities and bureaucrats.

CURRENT STATUS

At present the practices of providing and rejecting access in Russia differ depending on the region, type of archives, type of documents and other circumstances. To justify rejections different archives may use different regulations as well as arbitrary administration decisions. This is also related to the possibility of the free interpretation of regulations in various regional archive institutions, with the departmental specifics of the archives, and with the role the requested topic plays in the public political discourse. The violation of the rights of researchers and citizens trying to gain access to the collections of archive documents is systematic, and it is deeply rooted in the following practices:

- **Refusal to provide a scientific reference base** (the full list of the holdings, lists, reference cards and other materials, enabling the researcher to get oriented in the volume of archive materials and identify what is generally stored in the archive). Most often it is the case of departmental archives, which are absolutely *non-transparent* to researchers. Article 24, paragraph 1, subparagraph 1.1 of the law on archive activities in the Russian Federation says that the access to archive documents is provided by giving the archive documents user reference search tools and information on these tools, including as an electronic document. This provision is also available in the rules of storing, collecting, recording, and using archive documents, approved by the Order of the RF Ministry of Culture and Mass Communications in 2007. In practice, archives do not always provide full lists of their available holdings and the lists of the written-off cases. National archives frequently do not mention the holdings containing the cases of the repressed persons, at all. It is to be noted that the law on the archive activities in the Russian Federation does not include the term “closed storage”, and the law on the state secrets in the RF does not include this term either. FSB archive subdivisions also do not provide any reference information materials on the documents stored by them. The lists of declassified and partially declassified FSB documents of the secret document management in 1936–1937 are unavailable, because they are documents “for restricted use” upon the decision of the FSB Central expert commission dated January 9, 2014. Regarding departmental archives, the procedure works based on the following principle: in your request indicate the name, or full name and year of birth of the person you are interested in, and we will see if we have the respective documents. In 2016 within the research carried out by the International Memorial, I interviewed a historian, who mentioned the case when he was not given an archive dossier, since it did not have the list of the documents included therein. That means that in the alphabetical index this archive of the specific person was there,

3 А. А. Пронин, М. Н. Швидко, *О международном этическом кодексе архивистов*, Документ. Архив. История. Современность, Екатеринбург: Изд-во Урал. ун-та, 2015.

but it had not been analyzed, therefore, the access to it was not provided. “Actually I know that there is the material, which is of potential interest to me, I know the person in whose archive this material is stored, but I cannot be given access as long as there is an archivist who will analyze and record the elements of the archive”, the researcher told me.

- **Refusal to provide requested materials for imaginary reasons or without any reasons.** Most frequently the reason to refuse access is the reference to the *personal secret* information contained in the case. This secret is not strictly identified legally and the decision on whether there are indeed these data in the case or not is arbitrarily made by the archivist. Other reasons include references to “decay”, “a missing case”, “fungi on the case materials” etc. In addition, the rejection may also be based on various intradepartmental or archive guidelines and instructions contained therein.
- **Restriction of access due to the order of “three ministries” dated July 25, 2006.** The point is about a 75-year limitation period for accessing the documents, under which it is possible to gain access only by providing the archive with a notarized permission of the person whose name is mentioned in the document, or, in the case of his/her death, the permission of his/her descendants.
- **Refusal to provide cases referring to the confidential character of the data therein.** In archives the process of declassification has been nearly terminated. Scheduled declassification of materials, whose classification period has expired, is not in place at all. Researchers’ access is limited even to those archive documents whose maximum classification period has already expired. The requirements of the RF law on the state secrets are not fulfilled in terms of the need to justify the present damage to the security of the Russian Federation by distributing the data, which were referred by the authorities to the state secrets. Pursuant to article 6 of the RF law on the state secrets, the reference of the data to the state secrets is made in compliance with the principles of legality, relevancy and timeliness. The data may be regarded as a state secret following the expert’s findings, which identify the reason for classifying specific data, probable economic and other effects of this action considering the balance of the vital interests of the state, society and citizens. Furthermore, article 8 states that the classification level degree of the data being a state secret must correspond to the severity of the damage which may be caused to the RF security due to the distribution of these data. Currently the legal practice allows for referring the data to the state secret provided no justification is given regarding the security damage due to the distribution of these data.

As was mentioned above, one of the main problems is the absence of a dynamic balance of priorities and interaction in the archive-related administrative and research aspects. In 2014–2016 the International Memorial interviewed archive researchers to analyze well-established routine norms and phenomena, which comprise routine practices of accessing archive documents and materials in Russia. On the level of applying certain provisions, regulating archive activities, researchers singled out common problems related to the influence of specific archive institutions staff to the possibility for citizens to get materials. Several examples are given below:

“Since 2006 the access to archive investigation cases has been closed completely. For relatives only. The point is about the so-called

‘order of three ministries’. And, since we started working on the Memory Book in 2003, before this order, we managed to work a little with archive investigation cases. Despite the fact that I am the head of a working group on creating the Memory Book, that is I was appointed by the regional administration, and I have a kind of FSB representative, who is a member of the working group, as a subordinate, I am not entitled to work with archive investigation cases under this order”. – Anonymous researcher

“Considering regional archives, you can be well prepared legally, know all your rights, understand what you are allowed to receive and what not, but the paragraph ‘at a director’s discretion’ kills all the rules.” – Anonymous researcher

“When my request for cases was rejected, it was not even at the level of the archive administration, these were just some employees who worked in the former special fund. They themselves looked at the cases and at their discretion told me that they would not give them to me, since there may be some personal data. Naturally, it is still an open question what their grounds were not to provide me with those cases.” – Anonymous researcher

Among the most significant for the user and archivist communication practices, the interviewed respondents also singled out insufficient archive funding, overloading archivists with work, inefficient work management, unsatisfactory condition of archive materials, premises, and the problem of digitalizing archive sources.

LESSONS LEARNT

Legal claims against archives in the case of their refusal to provide access are a rare phenomenon. In a number of specific cases justice is very hard to achieve. It is also extremely hard to create the legal field and support infrastructure for the claims from those, whose rights to access information were infringed. The remedies for accessing archives are still legally sought by the researchers who cooperate with the Memorial. As regards the success of this work, in terms of the Russian court orders positive for claimants, it is impossible to expect quick success, but it is the fight against abuses of specific archives that may establish pre-conditions for gradual changes to the situation for the better. Here the legal cases on the access to archive information will be considered.

Archive users regularly face the problem of copying documents they need. Archives under different pretexts prohibit the use of photocopying and offer their often expensive services. In January 2016 Andrey Galinichev submitted a claim where he demanded to recognize paragraph 3.1.12 as partially invalid in the 2013 Procedure of using archive documents in the national and municipal archives of the Russian Federation, which prohibits copying using any technical devices. Part 4 Article 29 of the Russian Constitution says: “Each person is entitled to freely search, receive, transmit, produce and distribute information by any legal means”. Andrey Galinichev and Dmitry Poslavsky appealed to this article and also to the laws on the archive activities and on information when they decided to stand their ground and seek free document copying via the Supreme Court. In March 2016 Galinichev and Poslavsky won the case: the Court recognized limitations on copying archive documents with a user’s technical devices as invalid. The fact of the court decision has already been included into the order issued by the Ministry of

Culture. Now an archive user is entitled to use his or her own technical devices to photocopy documents. Thus, owing to a private civil initiative, users have been legally provided with the right to the free photographing of an unlimited number of documents at their own discretion.

In practice archives continue refusing researchers access to a huge volume of archive documents of the Soviet period, whose maximum classification period has already expired, without referring to the availability of the respective opinion of the Interdepartmental Commission for the Protection of State Secrets. In 2010 the FSB Central archive refused to fulfill a request from the historian Nikita Petrov on declassification and providing him for studying a few archive orders of the USSR MGB dated 1940–1950 referring to the fact that the documents include data that are a state secret. In 2014 it refused the researcher Nikita Astashin access to the documents, related to mass riots in the Union Republics in 1961–1982, stored in the departmental archive. In both cases governmental bodies made decisions on restricting access to information without any legal powers to do so.

The experience of court trials shows that in the law application practice there may be free interpretation of recognizing data as a state secret provided no proof of any damage to the state security. The same may be said about the restriction on a researcher's access to archive documents whose maximum classification period has expired. In March 2014 the Interdepartmental Commission for the Protection of State Secrets decided to extend the classification period of a vast scope of documents of the state security bodies by 30 years. The requirement of the law on the exclusive and exceptional nature of classifying has obviously been violated. The petition requesting the cancellation of the commission's opinion was signed by over sixty thousand people. In response to the petition the commission responded that the decision on extending the classification period does not apply to the materials related to mass repressions. They must be accessible according to the presidential decree of 1992 on declassifying legal and other regulations serving the grounds for mass repressions. However, in practice archives continue refusing access to archive documents of the Soviet period. Researcher Sergey Prudovsky sought the declassification of a letter of the People's Commissar for Internal Affairs of the USSR, Nikolai Yezhov, one of the main organizers of mass repressions. The FSB refused to declassify the document referring to that very opinion of the Commission for the Protection of State Secrets as the one containing "information sensitive for Russia". Moscow city court took the side of the FSB, and later the decision was also supported by the Supreme Court.

Equally topical are still the problems of restricting researchers' access to documents under the pretext of a personal or family secret. According to the existing legislation, the right to access information (including archive documents) may be restricted only under the federal law. However, currently archive legislation includes regulations establishing restrictions on accessing archive information which are not specified in the federal laws. These regulations include the order on approving the procedure of accessing documents dated July 25, 2006, mentioned above. The provisions of this regulation were appealed against by the Memorial organization in the Supreme Court. Nonetheless, the court did not see any controversies. In practice archives often refuse researchers access to any materials of the cases related to

the repressed persons without clarifying the issue of actual *personal data* availability in the requested materials. This is shown by the numerous refusals to provide access to documents received by the Memorial from different archives. The absence of clear criteria of "personal and family secrets" creates the risk of holding people criminally liable groundlessly. A vivid example is the criminal prosecution of the historian Mikhail Suprun for the preparation of Memory Books of the repressed Germans in the USSR. Suprun was accused under Article 137 of the RF Criminal Code of the illegal collection of data on citizens' private lives, which were their personal and family secrets, since the collected information contained different biographical data of repressed persons.

Another problematic provision is paragraph 5 of the "order of three ministries": "This Provision does not regulate the issues of access to the materials of criminal and administrative cases against the persons who were not granted rehabilitation, or the cases which have not been reconsidered according to the procedure established by Russian law. To the applications from citizens regarding the access to the materials of criminal and administrative cases with negative decisions on rehabilitation of the persons mentioned therein, archives issue certificates on the reconsideration findings". This is the basis for refusing to provide researchers with the materials, if the citizens involved were not rehabilitated. Archives reject even relatives' requests to provide the materials on non-rehabilitated persons. A recent example of restricting access on these grounds: Sergey Prudovsky tried to get personal records on three convicted NKVD members, who themselves once took part in organizing repressions. The FSB Directorate in Moscow and Moscow region rejected the request referring to Article 11 of the RF law on the rehabilitation of the victims of political repressions, according to which the case can be studied wither by the rehabilitated person himself/herself or by his/her relatives (at the same time the NKVD employees in question were not rehabilitated and this law does not apply to them).

In 2015 an important effort was made to support the interests of the civil society in Ukraine: the Verkhovna Rada adopted the law on the access to archives of the repressive bodies of the Communist totalitarian regime of 1917–1991. All the documents, related to repressions, violation of human rights and freedoms, are submitted to the national archive at the institute of the national memory of Ukraine. It opened the opportunity to study these materials for all those who wish, including Russian historians. However, this has not been the grounds for declassifying similar documents in Russia. Moreover, Moscow courts refuse to recognize extending the document classification period as illegal, despite the fact that such documents were made public in Kiev and published on the Internet. The Supreme Court does not recognize the documents, which obviously show repressive campaigns, as those referring to repressions.

Today few academic community historians and researchers risk speaking in the courts and in the mass media against well-established access restriction practices. To develop the archive users activity to protect their rights in 2014 Memorial launched the project and an online resource <http://dostup.memo.ru/> designed to inform the public of the status quo and existing access to the archive information. It is also a platform for providing legal advice to citizens and researchers seeking to get information in the state national archives.

RECOMMENDATIONS

At present the trend indicates an intensification of the mechanisms, deepening the political and cultural problems of working with archive evidence and supporting formal conservative memory policy. Therefore, the focus is to be on the public domain, where the issues of access to archive documents are articulated and viewpoints of an active social group of researchers are expressed.

The fight for the researcher's entitlement to be freely granted access and distribute information from archives is among the top priority issues related to solving the tasks of ensuring subordination and transparency of the state management. To seek higher openness of the data related to the crimes of the Soviet regime it

is necessary to take actions in the legal field, the expert's domain and to appeal to the public (and, which is equally important) by actively working with specific cases of violating citizens' rights to access information.

To solve the issue of the access to archive information it is required to comply with the idea of freedom of information, as one of the vital human and civil rights. It means the opportunity to gain free access to the archives for any individual or any legal entity avoiding the use of a selective approach, compliance with the conditions of departmental storage of archive documents, disclosing the documents that are to be declassified, an opportunity to get access to the quality scientific reference base, the possibility of any forms and kinds of using archive information.

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LUSTRATION: MISSED OPPORTUNITY

NIKOLAI BOBRINSKY

INTRODUCTION

The concept of lustration embraces a wide range of measures designed as remedial action for the repressive policy of former authoritarian regimes, including the detection of their Intelligence agents, publication of their names and various restrictions to taking public offices (normally, those of civil servants). In the post-Soviet Russia none of these measures has ever been introduced. Therefore, the chapter discussing lustration in Russia will be limited to the cases of unsuccessful attempts to launch it and the description of the effects of refusing it.

ATTEMPTS TO PUBLISH KGB AGENTS' NAMES

The start of lustration public discussions dates back to the coup d'état loss of the State Committee of the State of Emergency (GKChP) in August 1991. The winner of the political crisis, Russian President Boris Yeltsin, tried to remove the two main pillars of the Soviet Communist regime – the party and the secret services. Though it turned out rather easy to deal with the former, the latter appeared highly resistant. For this purpose, a person new to the state security bodies, Vadim Bakatin, was assigned the Head of the KGB. A number of parliamentary and ministerial committees were set up to investigate and verify the constitutionality of various Committee activities.¹ It was decided to withdraw the archives from the KGB.² In October 1991 a Committee for the Party and KGB archives transferring was set up. It included members of the democratic movement and representatives of the Memorial society.³

At that moment the idea of revealing the names of KGB secret informers became popular. Despite accepting the role of the state security bodies *liquidator*, V. Bakatin rejected the above proposal by stating just a week after the loss of the GKChP putsch that “it was not people to be blamed but the system that made them” and that the appeals to open the archives might divide the society even deeper.⁴ Some members of the inspection committees working in the KGB decided to take the initiative and in early 1992 they published excerpts of the reports of KGB department 5 (ideological counterintelligence) with informers' agent names.⁵

Alongside these chaotic revelations, the Committee for the archives of the CPSU and the KGB prepared a proposal to transfer the personal records of the former members of the state security bodies (stored for at least 30 years), dossiers and agents' personal records to the state archives. However, these courageous projects did not enjoy the required public and political support. Those who objected to lustration took advantage of the situation and as early as in March 1992 they ensured the passing of the Law of the Russian Federation On criminal investigation activities in the Russian Federation.⁶ It stipulated the provision of classifying the data of the organization and the tactics of criminal investigation activities (part six, article 6). Thus, the issue of disclosing the names of the KGB employees and informers was taken off the political agenda just seven months after the putsch loss.

CPSU CASE AND LUSTRATION BILL

The next opportunity to carry out lustration was related to the consideration of the so-called CPSU case in the Russian Constitutional Court, where the issue of the constitutionality of the very CPSU was raised. The recognition of the Communist Party as unconstitutional could entail the prohibition of its restoration in Russia, and, as the chief justice Valery Zorkin confessed subsequently, to lustration – the ineligibility of its members for official positions. Nevertheless, CPSU constitutionality was not considered, which gave the chief justice of the Constitutional Court the grounds to credit himself with saving the country from civil war, which, according to him, lustration could have provoked.⁷ The communist party was successfully revived as the Communist Party of the Russian Federation (CPRF) and it started playing a significant part in Russian political life.

Later attempts to implement lustration in Russia were related to the name of Galina Starovoytova, who was the deputy of the Soviet and then Russian parliament for many years. It was she who was the first to put forward the bill on lustration at the end of 1992.⁸ She understood lustration as a measure to fight antidemocratic revenge and a return to totalitarianism.

In one of the further versions of the bill, Starovoytova offered to introduce temporary (5–10 years) professional restrictions for the following categories of people:

- all former dismissed secretaries of party, industrial and regional organizations of the CPSU;
- former first, second and third secretaries of district, city, regional and krai committees of the CPSU;
- employees of the central republican and all-union committees of the communist parties, acting prior to the decree of President Yeltsin on the CPSU prohibition (including the secretaries of the respective central committees, but excluding service personnel).

1 See A. Кичихин А., Привело ли расследование августовского путча к трансформациям в работе КГБ?, in *КГБ: вчера, сегодня, завтра. Сборник докладов*, Москва: Общественный фонд “Гласность”, 1993.

2 Decree of the President of the RSFSR dated August 24, 1991 No. 82 On Archives of the USSR State Security Committee.

3 Resolution of the Presidium of the Supreme Soviet of the RSFSR dated October 14, 1991, No. 1746-I On establishing a committee for transferring the archives of the Communist Party of the Soviet Union (CPSU) and the KGB to the state storage and use.

4 В. В. Бакатин, *Избавление от КГБ*, Москва: Новости, 1992.

5 Н. В. Петров, Десятилетие архивных реформ в России, in *Индекс*, 2001, (14); <http://index.org.ru/journal/14/petrov1401.html>; *Как они работали с нами*. Блог Андрея Мальгина, 20. 6. 2007; <http://avmalgin.livejournal.com/566420.html>; *Истории к портрету*. Блог Андрея Мальгина, 26. 11. 2006; <http://avmalgin.livejournal.com/695124.html>

6 Law of the Russian Federation On criminal investigation activities in the Russian Federation dated 13. 3. 1992 No. 2506-1.

7 *Имеем Право*. Интервью с Валерием Зорькиным, in *Российская газета*, No. 4210, 31. 10. 2006; <https://rg.ru/2006/10/31/zorkin-ks.html>

8 Galina Starovoytova's bill on lustration. Website of Nizhny Novgorod regional department of RPR-PARNAS, 15. 8. 2014; <http://parnasnn.ru/proekt-zakona-o-lyustracii-galiny-starovojtovoj/2014/08/>

The restrictions were to be applied to these people not unconditionally, but only in one of the cases below:

- if the total work experience in these positions was at least 10 years;
- if as of the date of the GKChP putsch they were in one of the above positions and did not voluntarily declare their departure from the CPSU, or
- if they were employees of the bodies of the People's Commissariat for Internal Affairs, (NKVD) – the Ministry of State Security (MGB) – the KGB, including those in the reserve, or if they had agreed to collaborate with them, or had been working in these bodies during the last ten years prior to adopting the new Russian constitution (1993).

Professional restrictions, according to Starovoytova's bill, had to apply to the civil services (starting with the heads of district and city administrations and finishing with federal ministers), education and the mass media. At the same time for the "active carriers of totalitarian regime policy" (as those subject to lustration were jointly called) it was allowed to take directly and publicly elected offices.

The project separately specified measures to ensure loyalty to the new Russian constitution from the armed forces and intelligence services – as examinations on the knowledge of constitutional provisions and an oath of fealty to it.

FINAL FAILURE OF LUSTRATION, ITS CAUSES AND EFFECTS

Starovoytova's attempts to push the bill through parliament, the last of which was made in 1997, completely failed. A year later the very supporter of the lustration ideas was shot dead near her house in Saint-Petersburg.

The failure of her efforts was caused, inter alia, by the skeptical attitude to lustration of many respected democrats. For instance, a founder of the Memorial Society and the first human-rights ombudsman in Russia Sergey Kovalev was always against it.⁹ The veteran of the Russian democratic movement Yuliy Rybakov, who was first a deputy of the Leningrad council, and then of the State Duma, later regretted this decision of his fellow-thinkers to lustration: "Both Sergey Kovalev and I, as well as dozens of democrats who had undergone repressions, knowing their people, were afraid of a wave of score-settling, which could get out of control and, as it seemed to us, would terminate the movement for freedom altogether. Today it is clear to me that the failure to support Starovoytova, to force the President to make this necessary step was our fatal mistake".¹⁰

Since there were no lustration measures, Russian successors of the KGB (the Ministry for State Security – the Federal Counterintelligence Service – Federal Security Service and a number of other bodies) started restoring their influence on sociopolitical life. As early as in 1993 it was reported that the security reserve officers institute would be revived in the ministries and departments and their representatives would be sent off to commercial entities. For example, in 1992 the former head of the 5th department of the KGB Filipp Bobkov became the head of the analytical department of JSC Group Most owned by oligarch Vladimir Gusinsky, who held, inter alia, the leading national TV channel NTV.

The climax of the state security staff return to the state leadership was the race for power in the second half of 1999, when Boris

Yeltsin's political appointee KGB lieutenant-colonel Vladimir Putin defeated the former head of the KGB first central board Eugeny Primakov. Vladimir Putin's 17-year reign has been under the full-scale influence of the former Soviet security services on the political and economic life of the country.

During Putin's first two presidential terms lustration and decommunization became marginal ideas on the whole. The gradual return to them occurred at the end of the first decade of the 21st century. In 2011 the council for civic society and human rights development, during the tenure of Putin's successor Medvedev, offered to prohibit for civil servants the rejection or justification of totalitarian regime crimes¹¹ and reschedule the Federal Security Service professional day, as it was celebrated on the date of the establishing of the CheKa (All-Russian Special Commission for Combating Counter-revolution, Sabotage, and Speculation), which laid the basis of Soviet punitive agencies. However, these projects were not supported politically.

NEW RISE OF THE LUSTRATION ISSUE IN RUSSIA

Along with the advent of the political opposition to Putin's regime in Russia the issue of lustration gained new significance. Now Putin's opponents see there a means to overcome power abuse and systematic impunity, which became established in the governmental machine. There are attempts to carry out "public lustration" or at least prepare the materials for it in the future. In 2012 the Yabloko party and an informal association "The League of Voters" collected data on over 1000 persons, involved, according to the observers, in falsification at the elections.¹² One of the leading opposition leaders of Russia, Aleksey Navalny, who announced his intent to race for the presidential post in 2018, launched a special website "The Black Notebook", which includes judges and officers of law-enforcement bodies, participating in violations of human rights.¹³

LESSONS LEARNT

The lack of any lustration in post-Soviet Russia is an independent and important symbol of the country's failure to transit to democracy. The Communist Party power was, actually, replaced by the power of its major intelligence service, which for nearly eight decades eradicated domestic foes of the party and, finally, took its place. Perhaps, it was the rejection of lustration and the dismissal of the Soviet punitive agencies that was one of the main causes of the democracy loss in Russia.

9 Вечно сомневающийся Ковалев. Интервью с правозащитником Сергеем Адамовичем Ковалевым, in *Gazeta.ru*, 1. 9. 1999; http://gazeta.lenta.ru/interview/01-09-1999_kovalev.htm; Свобода в обществе Мемориал. Декоммунизация и люстрация, in *Радио Свобода*, 22. 4. 2012; <http://www.svoboda.org/a/24557575.html>

10 Рыбаков Ю. Законопроект Галины Старовойтовой о люстрации. Блог Андрея Илларионова, 18. 5. 1985; <http://echo.msk.ru/blog/aillar/1767702-echo/>

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12 Учителя пошли по спискам, in *Радио свобода*, 3. 4. 2012; <http://www.svoboda.org/a/24535300.html>

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INVESTIGATION AND PROSECUTION OF THE CRIMES OF THE REGIME

NIKOLAI BOBRINSKY

INTRODUCTION

In the field of criminal justice the results of the Russian transition are negligible: no person involved in organizing and implementing repressive communist regime policy in the USSR was convicted by Russian courts. Criminal investigation materials, initiated following political repressions, are not available to the public, and in some cases – classified. The main reasons for this outcome are the lack of political will of the new Russian government, weak social demand for holding Soviet officials liable as well as different legal constraints.

STATE VIOLENCE AND DISCRIMINATION IN THE USSR FROM THE STANDPOINT OF CRIMINAL LAW

It is not a stretch to state that the repressive policy against its own people was always inherent in the Soviet regime, except, perhaps, for the last few years of its existence. Its content, scale and victims underwent significant changes over time.

The law “On rehabilitation of victims of political repressions” adopted in October 1991 (hereinafter the Rehabilitation Law) provides the general definition of political repressions. They are understood as various coercive measures, applied by the state under political motives, and represented by the deprivation of life or freedom, placement for coercive treatment in mental health institutions, forced emigration and deprivation of citizenship, deportation of population groups from their places of permanent residence, exile, forced relocation to special settlements, forced labor under the restriction of freedom, as well as other ways of depriving or restricting the rights and freedoms of the persons who were recognized as socially dangerous to the state or political order in terms of the strata, social, national, religious and other features, implemented under resolutions of judicial and extrajudicial bodies, or administratively by local executive bodies and non-governmental organizations exercising administrative powers.

Obviously, according to the law authors this definition was to cover most cases of political violence and discrimination from the Soviet authorities. A sample of the description (incomplete) of the key Soviet repressive practices may be found in the report by Nikita Petrov “Crimes of the Soviet regime: Legal assessment and punishment of the guilty ones”.¹

Following the fundamental legal principle of *nullum crimen sine lege*, criminal liability for political repressions may be based either on Soviet laws or on international law. The very fact that the political repressions were ordered by the Soviet state leaders would seem to exclude the possibility of their contradiction to the Soviet laws and, moreover, criminal liability for their committing. However, in fact, their relation to the positive law of the USSR varied during different historic periods of the Soviet regime and depending on

the content of the repressive measures. According to the criterion of compliance with the Soviet law, political repressions may be roughly divided into those legalized, implemented under administrative regulations non-compliant with the law, and those fully deprived of any legal grounds, i.e. illegal ones. The issue of factual justification of repressive measures was not considered here.

An example of the first category is a criminal sentence on anti-Soviet agitation and propaganda, the second category – repressions applied by illegal extrajudicial bodies, the third – murders committed by the officers of the KGB without any legal records.

In the latter case it is evident that the Soviet law was violated. Since these political repressions were applied by public officers, their actions should be characterized as excess of power² (in the example above – combined with willful murder³). Nevertheless, it should be noted here that the Soviet criminal law, unlike the contemporary Russian law, did not stipulate criminal liability for carrying out an illegal order.⁴ This way, the performers of even quite arbitrary acts of political violence, in case they were held criminally liable could refer to the unavailability of legal opportunity to avoid carrying out the order with no risk of being criminally prosecuted themselves.

In the second case the law might be violated due to the contradiction of administrative regulations, which served the grounds for non-judicial bodies, to the provisions of the Soviet Constitution and legislation. However, in this case repression performers could also refer to the fact that the correspondent administrative regulations were not considered illegal at the time of their application. They were unconditionally binding, otherwise the above performers could face criminal liability for negligence or for sabotage. These reasons, nonetheless, do not relieve of responsibility the persons who adopted the respective illegal regulations, who could be recognized accomplices of excess of power regardless of the actual perpetrators’ liability.

1 Nikita V. Petrov, Crimes of the Soviet regime: Legal assessment and punishment of the guilty ones, in *Crimes of the Communist Regimes. An assessment by historians and legal experts. Proceedings of international conference.*, Prague: Institute for the Study of Totalitarian Regimes, 2011, 87–92: <https://www.ustrcr.cz/data/pdf/publikace/sborniky/crime/sbornik.pdf>

2 In particular, art. 110 (“abuse of authority or office”), art. 193.17 (“abuse of power, excess of authority, omission of power, and negligence to the office of the high officials of the Workers’ and Peasants’ Red Army, Workers’ and Peasants’ Militia and the Directorate of the NKVD State security service”) of the RSFSR Criminal Code of 1926, art. 171 (“abuse of power or office”), art. 179 (“compulsion of evidence”) of the RSFSR Criminal Code of 1926.

3 Art. 102 (“aggravated willful murder”) and 103 (“murder”) of the RSFSR Criminal Code of and similar articles (136 and 137) of the RSFSR Criminal Code of 1926.

4 According to article 193.2 of the RSFSR Criminal Code of 1926 (as revised in 20. 10. 1934) non-fulfilment of any “order in the course of service” was punished, and in articles 238 “Defiance” and 239 “Non-fulfilment of Order” of the RSFSR Criminal Code of 1960 there was no criterion of connection between the order and service. In particular, officers of the state security bodies could have been held accountable under these articles of the Criminal Code.

Political repressions stipulated in the Soviet laws cannot be deemed wrongful and therefore are not criminal. In the above example the well-founded application of the criminal law on responsibility for anti-Soviet agitation and propaganda (article 70 of the RSFSR Criminal Code of 1960) by the investigator and judge may not be considered a crime under Soviet legislation.

In addition to the abuse of power, Soviet legislation established liability for governmental officials to be prosecuted for applying the repressive regulations in case of their obvious unfoundedness – abuse of authority, criminally prosecuting a person who is known to be innocent, wrongful sentence, arbitrary arrest or detention, compulsion of evidence.

Pursuant to international law, many episodes of Soviet political repressions may be characterized as war crimes or crimes against humanity. Those actions, being crimes against humanity (various acts of violence and discrimination under large-scale or systematic attacks against civilians), are recognized as such, regardless of whether they contradicted national law or not. However, the practical possibility of criminal prosecution under international law depends on the implementation of international crimes in the national law. In the USSR little was done in this respect: only some war crimes were subject to prosecution (in particular, looting, violence against civilians, ill-treatment of the prisoners of war).⁵

CRIMINAL PROSECUTION OF POLITICAL REPRESSION PARTICIPANTS IN THE USSR BEFORE PERESTROIKA

Some of the organizers of political repressions were prosecuted as early as during Stalin's years. In March 1938 the former director of NKVD (People's Commissariat for Internal Affairs), one of the Gulag (Central Administration of Corrective Labor Camps) organizers Genrikh Yagoda was convicted at the third "Moscow Trial" and several days later executed for his involvement in the plot of the "right-Trotskyist bloc". Two years later his successor Nikolay Yezhov, who headed the NKVD during the "Great Purge", was executed too. Some other leading officers of Stalin's secret police were purged during his rule. The race for power after Stalin's death resulted in prosecution of the ex-minister of Internal Affairs Lavrenty Beria and his subordinates in the state security bodies. In total, the policy of "denouncing Stalin's personality cult" in the years of Nikita Khrushchev's rule (1953–1964) led to 62 former *chekists* being repressed.⁶

It is hard to consider these criminal proceedings as just retribution for the Stalin epoch crimes. Except for Yagoda, the cases of purged *chekists* were considered in closed court hearings. They were convicted not for murders or the abuse of power, but for various counterrevolutionary crimes.

ATTEMPTS TO INVESTIGATE POLITICAL REPRESSIONS DURING PERESTROIKA AND THE FIRST YEARS AFTER THE USSR COLLAPSE

The Rehabilitation Law, which was passed two months prior to the collapse of the Soviet Union, contained the provision on liability for the prosecution of those involved in political

repressions. "Officers of the VChK, GPU-OGPU, UNKVD-NKVD, MGB bodies, Prosecutor's Office, judges, members of committees, 'special meetings', 'dvoikas', 'troikas' (two- and three-person extrajudicial commissions, respectively), members of other bodies exercising judicial power, judges involved in investigating and considering cases on political repressions, are liable for prosecution under the existing criminal law" (part two, article 18). It was expected that the lists of the persons, duly recognized as guilty in framing-up cases, applying illegal investigation methods and in obstructing justice, would be published regularly.

This provision of the Rehabilitation Law, however, was not to be implemented. Even before adopting the law, starting from 1989⁷ investigation bodies commenced criminal proceedings related to the political repressions of Stalin's times, mainly in response to finding the graves of their victims. By the time of initiating criminal proceedings at least 45 years had passed after the time of the mass executions. Most of the main organizers of Stalin's repressions had already died (those who lived longest among the Stalin period members of the Political Bureau of the Central Committee of the Communist Party, Vyacheslav Molotov and Georgy Malenkov died in 1986 and 1988, respectively, and Lazar Kaganovich died in 1991). Nonetheless, some of the rank and file members of Stalin's security bodies were still alive and were questioned as witnesses.⁸ However, no information on indictments or trials related to Soviet political repressions has been published. Normally, investigative bodies used to terminate criminal proceedings due to the death of the guilty party. For instance, the investigation of the workers' demonstration shooting in Novochoerkassk was terminated in 1994, while a well-known criminal case of the Katyn massacre of Polish prisoners of war was terminated in 2004. Afterwards, the practice of initiating criminal proceedings following the detection of buried victims of political repressions died out, too.⁹

To terminate a criminal case due to the death of the persons who had committed crimes, the investigator had to indicate those people in the resolution and describe their unlawful acts. This way, even after the death of those involved in political repressions the state could formally establish the circumstances of their offences. However, publishing resolutions on terminating criminal proceedings of political repressions was not stipulated by law. As a result, the facts found during the investigation stayed unknown to the public and are still often controversial. In some cases, such as the Katyn massacre, the resolutions on

5 Г. И. Богуш, Г. А. Есаков, В. Н. Русинова, *Международные преступления: модель имплементации в российское уголовное законодательство*, Москва: Проспект, 2017, 6–7.

6 Petrov, 91.

7 В. Филичкин, Репрессии на Южном Урале: правда или вымысел? *Полит* 74, 20. 1. 2014; <https://www.polit74.ru/comments/detail.php?ID=39787>; Мемориальное кладбище "Пивовариха". Виртуальный музей ГУЛАГа; <http://www.gulagmuseum.org/showObject.do?object=126753&language=1>; The place of execution and burials in the town of Kursk (Solyanka area). Necropolis of Terror and Gulag. The Card index of burials and memorial places (Место расстрелов и захоронений в городе Курск (урочище Солянка). Некрополь террора и ГУЛАГа. Картоотека захоронений и памятных мест); <http://www.mapofmemory.org/46-01>;

8 А. Черкасов, Крот истории, in *Polit.ru*, 3. 9. 2004; <http://polit.ru/article/2004/09/03/khaibakh/>

9 И. Смирнова, Расстрел Великих князей: дело положено под сукно, in *Свободная Пресса*, 16. 2. 2010; <http://svpressa.ru/society/article/21258/>; <http://tayga.info/120423>.

case termination were even classified due to the availability of the documents being state secrets in the materials of these cases.

The judicial assessment of Soviet political repressions in post-Soviet Russia was limited merely to the recharacterization of the actions committed by those OGPU-NKVD-MGB officers, who had been repressed in Stalin's and Khrushchev's times. As stated above, they were convicted of various counterrevolutionary crimes. The adoption of the Rehabilitation Law gave an opportunity to their relatives to apply for the quashing of the sentences in those cases. Rehabilitation was denied to such OGPU-NKVD-MGB leaders as Genrikh Yagoda, Nikolay Yezhov, Viktor Abakumov, Lavrenty Beria and a number of other senior officials of these bodies.¹⁰ For these cases the law provided for judicial review of the reasons for the denial. Russian courts recognized rehabilitation denials as valid. However, pursuant to some published court rulings in cases of rehabilitation denial, the subsumption of wrongful acts was changed from counterrevolutionary crimes to the abuse of power (or excess of authority), entailing severe consequences, heavily aggravated, according to article 193-17-b of the RSFSR Criminal Code of 1926. In particular, Abakumov was postmortem recognized by the RF Supreme Court as guilty that he and MGB officials subordinate to him "for a prolonged period of time systematically abused power, which was expressed in framing up criminal cases and applying illegal ways of physical coercion during the investigation", and entailed heavily aggravated effects – "prosecution of many innocent citizens".¹¹

The practice of changing Soviet court sentences postmortem, was, in fact, a compromise between the need for rehabilitation of purged officials of the Soviet secret police (due to groundless accusations of counterrevolutionary crimes against them) and the impossibility of denying their responsibility for abuse of power during repressions.

REASONS FOR REJECTING CRIMINAL PROSECUTION OF COMMUNIST REGIME CRIMES

It appears that the key reason for rejecting the prosecution of the living perpetrators of political repressions in post-Soviet Russia was the lack of political will in the new state leadership and weak social demand for restoring justice by means of criminal justice. The latter may be explained, inter alia, by the mistrust in the impartiality of the former Soviet judges who kept their positions after the fall of the Soviet power.¹² President Yeltsin's Government decided to be limited to the trial of the persons involved in the defeated coup attempt of the GKChP in August 1991. These people included high Soviet officials, who tried to prevent dismantling the CPSU power and the USSR disintegration. However, even this trial, which began in 1993, was not completed due to amnesty passed by the State Duma at the beginning of the next year. In addition, a kind of *ersatz* criminal justice for the Communist crimes in the USSR was the so called "CPSU process" – a trial in the Constitutional Court regarding the Constitution compliance of President Yeltsin's decrees, by which the Communist Party was actually dismissed. Under this trial the court was offered to verify the compliance with the Constitution of the very CPSU. During the long court hearings dozens of witnesses were interrogated and various secret documents were studied regarding the activities of the Communist Party highest bodies. Nevertheless, this trial did not come up to the expectations of

those who wanted it to become the *Russian Nuremberg*. In its ruling, the Constitutional Court, though on the whole recognizing the President's decrees on the dissolution of the Communist Party compliant with the Constitution, rejected settling the issue of the CPSU constitutionality, which was the essential hope for recognizing the crimes committed by the Party leaders. The description given by the Russian Constitutional Court to the power of the Communist Party in Russia fitted three sentences: "For a long period of time the country was reigned by the regime of unlimited, violence-based power of a clique of Communist functionaries, united in the Political Bureau of the CPSU Central Committee headed by the General Secretary of the CPSU Central Committee. <...> The materials of the case, including evidence provided by witnesses, confirm that the CPSU leading units were initiators, whereas local units were frequently vehicles of the repressive policy towards millions of Soviet people, in particular, towards deported peoples. It lasted for decades". Later the president of the Constitutional Court Valery Zorkin substantiated this cautious decision by the need to find a social compromise.¹³

LEGAL BARRIERS FOR CRIMINAL PROSECUTION

When explaining the rejection of criminal prosecution for political repressions, Russian officials referred to the lack of legal grounds for it. For example, in response to the application submitted by the relatives of Polish prisoners of war killed in 1940 to the European Court of Human Rights regarding inefficient investigation of the circumstances of their deaths, the Russian government declared that the investigation of the Katyn criminal case had been carried out "in breach of the criminal procedure requirements, for political reasons, as a goodwill gesture to the Polish authorities", since the limitation period under 193-17-b of the RSFSR Criminal Code for the aggravated power abuse was 10 years and, in addition, the Soviet NKVD officers involved in the execution had died before the investigation began.¹⁴

Indeed, under the Russian law criminal proceedings are allowed only against a living person. If a suspect of a crime dies, the criminal case may not be initiated, and a criminal case initiated earlier is subject to termination. The exception is provided for considering the issue of rehabilitating the deceased who were criminally prosecuted.

Even if the suspect of a crime is alive, he or she may be kept safe from justice by the limitation period for criminal prosecution. Its expiry is the basis for refusal to initiate a criminal case. The maximum limitation period under the RSFSR Criminal Code of 1960 was 10 years. Thus, the government lost an opportunity to

10 There were also exceptions. For example, Pavel Sudoplatov, a senior official of the state security and the organizer of extra-judiciary killings, convicted in 1958 of high treason as an "accomplice of traitor Beria and his closest cohorts", was rehabilitated in 1992 by the RF Chief Military Prosecutor's Office.

11 Quotation according to the text of the RF Supreme Court Presidium Resolution dated December 17, 1997, placed in the GARANT legal system.

12 See: Ilya Nuzov, "The Role of Political Elite in Transitional Justice in Russia: From False 'Nurembergs' to Failed Desovietization", in *U. C. Davis Journal of International Law & Policy*, 2014, 20 (2), 304.

13 Имеем Право. Интервью с Валерием Зорькиным, in Российская газета No. 4210, 31. 10. 2006; <https://rg.ru/2006/10/31/zorkin-ks.html>

14 European Court of Human Rights. Judgment (GC) of 21. 10. 2013. *Janowiec and Others v. Russia*. Appl. nos. 55508/07 and 29520/09. §§ 109, 111; <http://hudoc.echr.coe.int/eng?i=001-127684>.

criminally prosecute most of the crimes, accompanying political repressions, as early as in the Soviet times and the early 1990s.

The only exception to the limitation period for criminal prosecution is for the crimes which may be punished by the death penalty or life imprisonment. According to part 4 article 78 of the RF Criminal Code the issue of applying a limitation period for such crimes is to be settled by the court. It means that the time that has passed since the offence is not an obstacle to initiating a criminal case and carrying out investigation. Out of political repressions related crimes only aggravated murders can be referred to this category.¹⁵

The scope of political repressions, to which the above murder-related limitation exception applies, depends on the criminal and legal assessment of the “state coercion by means of putting to death”, if the terms of the law on rehabilitation is used. According to the rules of subsumption of crimes used by the Soviet courts, the abuse of power, related to killing, must be assessed cumulatively.¹⁶ For example, this kind of assessment was given to the extra-judicial killing of the residents of the settlement of Khai-bakh by Soviet troops during the Chechen deportation in 1944. At the initiation of the criminal case upon this fact¹⁷ the prosecutor of the Urus-Martan district, Chechen-Ingush Autonomous SSR, having inspected the scene of the crime and having questioned its witness, found sufficient elements of the crimes, specified in part 2 article 136 and article 193-17-b of the RSFSR Criminal Code of 1926 – that is heavily aggravated murder and power abuse (or excess of authority) by a Red Army (or equivalent bodies) commander.

It is to be noted that capital punishment, provided for the aggravated abuse of power and excess of authority under article 193-17-b of the 1926 Criminal Code was later (in the 1960 Criminal Code) replaced by a period of imprisonment from 3 to 10 years (article 260-b). Therefore, this crime is indeed subject to the 10-year limitation period. In other words, even the most cruel and massive Stalin period repressions, not related to willful murder, stayed out of reach of the Russian law enforcement system.

Statutory limitations could be overridden if international law were applied as the grounds for criminal prosecution. As mentioned before, many episodes of the Soviet political repressions correspond to the elements of the crimes against humanity. Limitation periods do not apply to crimes against humanity by virtue of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, ratified by the Soviet Union in 1969.

For instance, in Estonia the officers of the Ministry of Internal Affairs and the Ministry of State Security, involved in deportation from Estonian SSR in 1949 and fighting against anti-Soviet resistance (“forest brothers”) in 1953–54, were convicted of crimes against humanity. In Latvia the Minister of State Security of the Latvian SSR Alfons Noviks was found guilty of crimes against humanity. He was accused of organizing deportation and prisoners’ torture.¹⁸ Similar crimes were committed at that time in other parts of the Soviet Union as well.

The European Court of Human Rights found in two decisions¹⁹ that criminal prosecution for crimes against humanity, committed by Soviet officials in Estonia in the late 40s – early 50s, does not contradict the principle of *nullum crimen, nulla poena sine lege* established in article 7 of the European Convention on Human Rights. Nevertheless, according to Antonio Cassese’s opinion, the arguments of the European Convention on Human Rights in these orders were erroneous: the court did

not take into account that in the late 1940s international law implied a compulsory link between crimes against humanity and an armed conflict (in the case of Estonia, this link was available, since deportation in 1949 was a direct consequence of the USSR aggression against Estonia in 1940). The prohibition of crimes against humanity in peace time first appeared only in the late 60s in the international law.²⁰ This reason is of high importance for the issue of assessment of Soviet political repressions as crimes against humanity since they were normally unrelated to armed conflicts. By accepting Cassese’s viewpoint, international law provides legal grounds for criminal prosecution of the repressions committed only in the 1970–80s. It seems that out of the repressive practices of the period only punitive psychiatry can meet the criteria of the crimes against humanity – it was a widely spread way of fighting against the dissidents of the time.

The above mentioned opportunities of criminal prosecution under international law, have not been of practical significance in Russia, since crimes against humanity have not been implemented in the Russian criminal law.

LESSONS LEARNT AND RECOMMENDATIONS

Assessing the opportunities of criminal prosecution, which the Russian Government had in the early 1990s, it is to be admitted that they were in any case limited by the period that had passed from the time of completion of the most large-scale political repressions. In Latvia, Lithuania and Estonia, where from the first years of independence, attempts were made to investigate and prosecute Stalin’s repressions, investigation bodies managed to bring to court criminal cases only regarding lower rank perpetrators of the repressive policy, whereas its organizers and higher rank perpetrators (with few exceptions) were relieved from liability due to their death. Apparently, the Russian society was not ready to put the blame for the regime crimes upon common people, who “just carried out orders” and were already quite elderly. On the other hand, after Stalin’s death, political repressions were of a much lower scale and mainly referred to a very limited stratum of dissident intelligentsia. The scarce victims of the repressions of that time, even gaining certain power and influence on the rise of democratization,

15 Aggravated murder under article 102 of the RSFSR Criminal Code of 1960 (i.e., in particular, killing two and more people or the one collusively committed by a group of people) and the murder, committed by a military, heavily aggravated, under part 2 article 137 of the RSFSR Criminal Code of 1926.

16 Resolution of the Plenum of the USSR Supreme Court dated March 30, 1990 N 4 “On judicial practices in the cases of the abuse of power or office, authority or misconduct, negligence and forgery in public office”.

17 Черкасов, *Криминалистика*.

18 Latvia Gives K.G.B. Aide A Life Term. New York Times, 14. 12. 1995. URL: <http://www.nytimes.com/1995/12/14/world/latvia-gives-kgb-aide-a-life-term.html>; On criminal prosecution for Communist regime crimes in the Baltic states see: Eva-Clarita Pettai, Vello Pettai, *Transitional and Retrospective Justice in the Baltic States*, Cambridge: Cambridge University Press, 2015

19 European court of human rights: Decision of 17. 1. 2006. Kolk and Lisliy v. Estonia, appl. nos. 23052/04 and 24018/04; Decision of 24. 1. 2006. Penart v. Estonia. Appl. no. 14685/04.

20 Antonio Cassese, *Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law: The Kolk and Kisliy v. Estonia Case before the ECHR. Journal of International Criminal Justice*, 2006, 4 (2), 410–418.

could not or did not wish to demand punishment for their offenders. In particular, the rejection of prosecution against those involved in repressions was the official position of the Memorial society founded in 1989.²¹

However, the unsatisfied need of retribution for the unprecedented Communist regime crimes against its people is still present in the Russian society. In 2016, for example, this need was suddenly manifested in the heated debate on the Memorial

published lists of NKVD members in 1935–1939 and the investigation by Denis Karogodin from Tomsk into the fate and killers of his great-grandfather, who died during the “Great Terror”.

21 Paragraph 5 of the Resolution of the Foundation Conference of the All-Union Voluntary Historical and Educational Society “Memorial”, January 29, 1989. Vyacheslav Igrunov’s website; <http://www.igrunov.ru/cat/vchk-cat-org/memor/hist/docum/vchk-cat-org-memor-docr-resol.html>

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REHABILITATION OF VICTIMS

NIKOLAI BOBRINSKY

INTRODUCTION

The rehabilitation of the victims of repressions is an essential part of the Russian policy to overcome the effects of the crimes of the Soviet totalitarian communist regime. Russia has managed to do a lot in this respect. However, the rehabilitation reflects, brighter than other aspects of the policy on the Soviet past, the ambiguous and compromising nature of the post-Soviet transitional justice in Russia.

THE RUSSIAN REHABILITATION CONCEPT IN AN INTERNATIONAL CONTEXT

At the beginning of this chapter a short remark should be made on what rehabilitation means in the Russian and international contexts. In various UN documents on the transitional justice, rehabilitation is understood as a form of reparation for victims of gross violations of human rights, including the provision of “medical and psychological aid, as well as legal and social services”.¹ At the same time in the Soviet and Russian legislation and legal practices, rehabilitation has a completely different meaning – “firstly, the restoration of the honour and reputation of an unfairly accused or purged person, secondly, the restoration of the previously existing rights by canceling the decision on finding this person guilty and on applying specific legal sanctions against him/her”.² As to the terminology used in the above-mentioned international documents, rehabilitation in this meaning refers, first of all, to satisfaction, and, then, to restitution – two other forms of reparations.

Since in Russia the ways of indemnification to the victims of political repression are not limited to rehabilitation, below you will find the review of all these measures based on their classification suggested in the UN General Assembly Resolution 60/147 dated December 16, 2005 “Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law”.

REHABILITATION IN THE USSR

The first stage in the rehabilitation of the victims of political repressions in the USSR dates back to the mid-1950s – early 1960s, and it is related to overcoming the consequences of Stalin’s personality cult. During that period rehabilitation enabled many prisoners of the Gulag to be released early, freed from limitations on the choice of residence and profession. However, despite the revision of repressive measures, the circumstances of their application and the places of burials were concealed from their relatives and society as a whole. From the mid-1960s the intensity of rehabilitation dropped dramatically. The process was renewed only during Perestroika. That was the first time when the term the “victims of political repressions” was used, and the very image of repressions

gradually extended beyond Stalin’s period. The most significant decisions of that time include the decree of the Presidium of the Supreme Soviet of the USSR dated January 16, 1989, which cancelled (though, with a number of exceptions) all the decisions on applying repressions, made by extra-judiciary bodies in the 1930s – early 1950s. These years also featured the revision of the verdicts of the Moscow show trials in 1936–1938, which became the public symbol of Stalin’s terror towards the contemporaries. The official statistical data of the rehabilitated in the USSR were not published; but according to different estimates, their approximate number was from 1.5 to 1.9 million people.³

REHABILITATION AND OTHER FORMS OF INDEMNIFICATION, CAUSED BY POLITICAL REPRESSIONS, IN RUSSIA

Russian Law on the rehabilitation of the victims of political repressions was adopted in October 1991, before the collapse of the USSR. The failure of the putsch in August 1991 created favourable conditions for passing a rather radical version of the law, which was in many respects ahead of its time.⁴ Members of the Memorial society, founded by those repressed and their relatives to remember the victims’ sufferings, participated in preparing the text of the bill.⁵ The main aim of the law was to

1 The UN commission on Human Rights. Sub-commission on the Prevention of Discrimination and Protection of Minorities. Study concerning the right to restitution, compensation and rehabilitation of the victims of gross violations of human rights and fundamental freedoms. The final report, submitted by Mr. Theo van Boven, UN document E/CN.4/Sub.2/1993/8 dated July 02, 1993, Para. 137; UN commission on Human Rights. Sub-commission on the Prevention of Discrimination and Protection of Minorities. Question of the impunity of perpetrators of human rights violations (civil and political). The final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119. UN document E/CN.4/Sub.2/1997/20/Rev.1 dated October 02, 1997. Para. 41; UN Commission on Human Rights. Updated Set of principles for the protection and promotion of human rights through action to combat impunity. UN document E/CN.4/2005/102/Add.1 dated February 08, 2005. P. 34; Resolution of the UN General Assembly 60/147 dated December 16, 2005. “Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law”. Para. 21

2 А. Л. Кононов, К истории принятия Закона “О реабилитации жертв политических репрессий”, in *Реабилитация и память. Отношение к жертвам советских политических репрессий в странах бывшего СССР*, Москва: “Мемориал” – “Звенья”, 2016.

3 The first indicator was found as a sum of the data, given in a thesis by Ye.G. Putilova, the other – in the work by V. N. Zemskov. See: Е. Г. Путилова, *История государственной реабилитационной политики и общественного движения за увековечение памяти жертв политических репрессий (1953 – начало 2000-х гг.)* – Автореф. дисс. на соиск. уч. ст. к.и.н.), Екатеринбург: 2011, 20–22; В. Н. Земсков, *Сталин и народ. Почему не было восстания*, Москва: Алгоритм, 2014, 62.

4 Кононов, 12–18.

5 Rehabilitation of Victims of Political Repressions. Memorial Society; <https://www.memo.ru/ru-ru/history-of-repressions-and-protest/rehabilitation/>

eradicate the consequences of political repressions. To achieve it, the following measures were stipulated:

- Rehabilitation itself;
- Recognition of those who suffered as victims and condemnation of political repressions;
- Restoration of citizenship;
- Paying damages;
- Paying pecuniary damages for depriving of freedom, forced treatment in mental health institutions;
- Provision of housing;
- Social support;
- Return of the property lost due to repressions, or refunding or paying pecuniary damages for the property.

These reparations were not fully implemented. The 25 years that have passed since the time of adopting the law allow us to review its application practices and provide some interim results.

PERSONAL SCOPE OF APPLICATION OF LAW ON REHABILITATION

The law on rehabilitation applies to two categories of people:

- Victims of political repressions – those, to whom coercion was applied directly, and also children, who were left as minors without parental care (of one or both parents), of the people repressed for political reasons, and those who stayed with them (or the persons, who replaced them) in penitentiaries, exile, expulsion, or a special settlement.
- Those affected by political repressions – children, spouses, parents of people who were executed or died in penitentiaries and then were rehabilitated postmortem, that is the people who were not personally subject to coercion, but were deprived of their close relative as a result of repressions.

The victims of political repressions enjoy more rights than those who were affected by them.

Under the Russian law on rehabilitation the rights are granted only to those victims of political repressions who were subject to them on the territory of the RSFSR. Repressed RF permanent residents may, under certain conditions, also use the law in case the repressions were applied outside the RSFSR. In addition, the law applies to foreigners, repressed by Soviet Union court sentences (including the Supreme Court of the USSR, military tribunals and other national special courts), as well as by the orders of extra-judiciary bodies outside the Soviet Union, provided they were accused of actions against Soviet citizens and the interests of the USSR.

POLITICAL REPRESSIONS AS A CONCEPT

The main criterion of recognizing repressions as political is the respective motive of their application. Some kinds of repressions are specifically indicated in the law on rehabilitation (Article 3). Moreover, five sets of corpus delicti, specified in the Soviet Criminal Codes, are recognized as political repressions *per se* regardless of whether there is any actual evidence for accusation (Article 5). Regarding specific situations of mass repressions – the suppression of the peasants' uprising in 1918–1922 and the Kronstadt Rebellion in 1921, deportation of peoples during the Second World War, repressions against the clergy and believers, shooting protesters at the demonstration in Novocherkassk in 1962 – specific regulations were adopted. They indicated the illegal nature of the repressions against the participants of

the above events and the need to rehabilitate the affected. Since the law on the rehabilitation does not indicate all the applicable coercive measures during collectivization (in particular, expropriation of property, cattle, tools), the practice of its application to de-farming (de-kulakization) remains unstable.⁶

The achievement of the 1991 law compared to the preceding official regulations on rehabilitating victims of political repressions was in recognition of the fact that repressions began at the time of establishing the Soviet power and lasted until its demise, and not during one specific limited period in its history.

The criterion of the political motive for repressing leaves significant freedom to the prosecution and internal affairs bodies in the way of how and whom to recognize as the victims of political repressions, and whom to refuse this status. In practice the first priority of rehabilitation belonged to those whose cases were subject to revision by virtue of law, with no verification of the actual circumstances (e.g., accusations of anti-Soviet campaigning).⁷

In addition, the law provided for the crimes, whose commitment (if proven with evidence) excludes rehabilitation (Article 4). Therewith, the body that passed the verdict is of no importance – whether it was a court or an extra-judiciary body, and what the initial accusations against the repressed person were. From the political point of view, exceptions to the right to rehabilitation mean that the contemporary Russian state recognizes such repressions as grounded, regardless of the way prosecution was carried out against the repressed person.

One of the rehabilitation law developers Anatoly Kononov explained the reason for exceptions as being for political issues: “From the viewpoint of *pure law*, any and all extra-judiciary decisions should have been cancelled immediately – those passed by non-constitutional ‘troikas,’ ‘special councils,’ ‘executive boards’ etc., and the person who underwent criminal repressions because of them, should be considered rehabilitated, since their guilt was not found in court. However, these bodies also punished former military criminals, bandits and raiders. To carry out investigation and legal proceedings anew for their cases many decades after the events was impossible for many reasons. But if they had been rehabilitated, they would have been granted the status of the victims of political repressions automatically as well as given benefits equal to those provided to the veterans of the Great Patriotic War. The social conscience could not put up with it, and the authors of the bill had to introduce exceptions. They referred to such forms of socially dangerous actions, which, though being political, were subject to punishment in any civilized country.”⁸

Among the exceptions specified in the law on rehabilitation there is the organization of armed gangs, committing murders, robberies and other violent actions, as well as personal involvement in committing these actions within armed gangs. Any organized armed resistance would meet this definition. If we consider the Soviet state as a *civilized country*, this attitude to armed combating against it would be quite grounded. Out of the political reasons the developers and supporters of the law

6 See: А. Г. Петров О некоторых проблемах органов прокуратуры по исполнению Закона Российской Федерации “О реабилитации жертв политических репрессий”, in *История государства и права*, 2007, (3), 10–15.

7 Victims of Political Terror in the USSR; <http://lists.memo.ru/>

8 Кононов, 21.

in 1991 did not have an opportunity to recognize any armed resistance to the Soviet power as legal. In this respect it is necessary to mention a paradoxical provision of the decree of the RF President dated June 18, 1996 No. 931 On the peasants' uprising in 1918–1922, according to which peasants participating in the rebellions in 1918–1922 could not be considered members of armed gangs in the meaning given in the law on rehabilitation. To establish legal grounds for rehabilitating peasant rebels, it was required to introduce an exception to the exception especially for them. The overall decision on rehabilitating all the participants of the resistance to the Communist regime in Russia was never adopted. The only retrospectively allowed form of resistance, recognized in the law on rehabilitation, was escape from prisons (paragraph “e” Article 5).

The definition of political repressions in the law on rehabilitation is open and includes “another form of depriving or restricting the rights and freedoms of persons, recognized as socially dangerous for the state or political order by class, social, national, religious or other criteria”. However, according to the consequences of rehabilitation and legal practices prescribed by law, any politically motivated economic and administrative coercion and discrimination unrelated to imprisonment or deportation – in particular, nationalization of property rights, punitive tax system, coercive collectivization and labour in collective farms, professional and job limitations according to social, ethnic and religious criteria – were not recognized political repressions.

REHABILITATION

Rehabilitation means recognizing that enforced coercion against a person was politically motivated and either illegal or groundless. The decision on rehabilitation is made by the bodies of the Prosecutor's Office or internal affairs. Despite certain doubts about delegating the issue of rehabilitation to the competence of legal successors of those Soviet agencies, which were actually involved in political repressions, and the non-transparency of their activities, the problem of establishing a special body responsible for revising political cases of the Soviet epoch was never raised at the national level.

To confirm the restoration of honour, the victim of political repressions was given a certificate on rehabilitation. In addition, it was expected that the lists of rehabilitated persons would be published in official periodicals indicating the main biographic data and accusations under which the people were rehabilitated. However, the state did not publish these lists, instead, non-governmental organizations and individuals have been engaged in this process.

In total, since the effective date of the law on rehabilitation, over 3.5 million people and over 250 thousand children of the repressed people were recognized as affected by political repressions.⁹

RESTITUTION

The law on rehabilitation outlines different measures of restitution, aimed at restoring the status of the repressed, which existed prior to the coercion against them.

Firstly, their sociopolitical and civil rights (rights to vote, freedom of movement and residence and so on), lost due to repressions, were restored, as well as military ranks and special titles. Their state awards are returned.

Secondly, the rehabilitated were given the right to return and reside in the areas and settlements where they used to live before repressions were applied to them. However, after cancelling most of the existing restrictions on the freedom of movement and residence in the USSR this measure lost its practical significance.

Thirdly, according to the law, all the residents of the Russian Federation who were deprived of citizenship without their free determination, were granted the Russian Federation citizenship again.¹⁰ In practice this provision could only be used by those people who resided in the RSFSR “immediately before emigrating from the former USSR for permanent residence”.¹¹ When applying for a Russian national passport they had to provide a “document, confirming their permanent residence in Russia immediately before going away from the former USSR and a certified copy of the certificate of birth in Russia”. Restoration of Russian citizenship on these conditions evidently did not take into account the persons who lost it as a result of emigration from Russia during or after the Civil war of 1917–1922, Soviet displaced persons, refusing to repatriate due to political reasons, as well as the children and other descendants of these people. In particular, the decree of the All-Russian Central Executive Committee and the RSFSR Council of People's Commissars dated December 15, 1921 on terminating the citizenship of certain categories of persons being abroad, was not cancelled. Some of their representatives were granted citizenship by the decrees of the RF President.¹²

Fourthly, rehabilitated persons are given back their property, seized and otherwise alienated from them due to the repressions. In the case of the death of the rehabilitated person, the return, refund or payment of pecuniary damages is to be made to their children, spouse or parents. Besides a relatively narrow pool of candidates for the above return, this measure is limited to some cases of expropriation only, which partly diminishes its value.

Pursuant to the law on rehabilitation, the following items are not subject to return:

- Property, nationalized (municipalized) or subject to nationalization (municipalization) by law, existing as of the time of its confiscation from the rehabilitated person. Therefore, real estate property in towns was not subject to return, except for some cases. The return of residential houses was allowed but carried out only on condition of meeting a number of requirements and in practice depended on the discretion of law-enforcement bodies;
- property, destroyed during the Civil and Great Patriotic Wars, and as a result of natural disasters;

9 The concept of public policy on remembering the victims of political repressions; <http://government.ru/media/files/AR59E5d7yB9LddoPH2RSlhQpSCQDERdP.pdf>

10 Some persons, deprived of the Soviet citizenship for political reasons in the 1960s–1980s, were granted the citizenship again even before adopting the law on rehabilitation, under the decree of the President of the USSR – The decree of the President of the USSR on cancelling decrees of the Presidium of the USSR Supreme Soviet on depriving certain persons, residing outside the USSR of the Soviet citizenship No. 568 dated August 15, 1990.

11 See: The provision on the procedure of considering the issues of the Russian Federation citizenship, approved by the decree of the RF President dated April 10, 1992 No. 386. P. 10–11.

12 Putin restored the Russian citizenship of Denikin's daughter. Lenta.ru, April 26, 2005; <https://lenta.ru/news/2005/04/26/denikin/>; President Vladimir Putin handed the Russian national passport to Andrey Shmeman. Official website of the President of Russia, June 06, 2004; <http://kremlin.ru/events/president/news/31103>

- land, horticultural areas, non-harvested crops;
- property, seized from the civilian circulation (e.g., museum collections).

In our opinion, the nationalization of property, bank accounts, seizure of cultural values also belong to political repressions, in the meaning given to them in the law on rehabilitation. Nevertheless, the results of these coercive measures are not in fact confirmed in the law on rehabilitation. Afterwards, the Parliament and the Constitutional Court of the Russian Federation refused to revise them.¹³

In fact it is possible to seek restitution of movable property, not included in museum collections or otherwise limited in circulation, and buildings in rural areas (e.g., those seized during de-kulakization or lost due to deportation¹⁴).

Provided it is impossible to return the property, its cost is refunded or (provided evaluation is impossible) compensated. The size of the paid damages and compensations are limited to 4,000 roubles for all property, except houses, and 10,000 roubles for all the property, including houses.

COMPENSATIONS AND BENEFITS

The law on rehabilitation provides for a lump sum monetary compensation for the deprivation of liberty, as well as social support.

The size of compensation is calculated depending on the period the person was deprived of liberty. In the original version of the law it was 180 roubles per month, but not more than 25 thousand roubles. Later on the compensation was calculated based on the minimum wages – three quarters of the minimum wages per month and not more than 100 minimum wages in total. Today the law again indicates fixed rates, though they are rather miserable – 75 roubles per month of imprisonment or stay in mental health institutions, but not more than 10,000 roubles.

Initially the law on rehabilitation established a list of non-monetary benefits to be provided to the rehabilitated persons. This was, first of all, the right to high priority housing allocation in case it was lost owing to the repressions. Furthermore, benefits for the disabled and the retired who were subject to the deprivation of liberty, exile or expulsion for political reasons:

- high priority package tour grants for health resort treatment and recreation;
- top priority medical aid and a 50 % price reduction for prescribed medicines;
- free provision of a Zaporozhets automobile upon providing respective medical indications;
- free pass to all means of city public transport (except for taxis), and public motor transport (except for taxis) in rural areas within the local administrative area where the person lives;
- free travel (a return trip) once a year by railway transport, and in the areas where railway transportation is missing, – water, air or intercity motor transportation at 50 % fare reduction;
- 50 % reduced payment rates for accommodation and utilities within the limits, established by the law;
- high priority fixed telephone installation;
- high priority joining of horticultural societies and housing construction cooperatives;
- high priority admission to care homes for the elderly and the disabled, stay and full board fully funded by the state with at least 25 % of the payable pension;

- free prosthetic dentistry including work and repairs, special rates for other prosthetic and orthopedic products;
- special offers for food and non-food products.

Since 2005 the provision of the rehabilitated persons with housing and social support has been within the competence of the RF regions. They identify the scope and procedures of support themselves.

The report prepared by the Presidential Commission on rehabilitating the victims of political repressions in 2013–2014¹⁵ gave an overview of social support elements provided to the rehabilitated people in different regions of Russia. For example, such a social support element as free or a 50 % price reduction on the supply of prescribed medicines was in place in 28 subjects of the Russian Federation. In addition to the benefits earlier provided in the law on rehabilitation, in some regions rehabilitated persons were given monthly allowances. Their size varied considerably: from some hundreds of roubles (Orenburg, Saratov, and Tomsk regions – 300–370 roubles, the Yamal-Nenets autonomous district – 177.5 roubles) to several thousands (4,092 roubles in the Chukotka autonomous district; over 1,000 roubles in the cities of Moscow and Saint-Petersburg, and, taking into account the benefits in paying for housing utilities, public transport, holiday resort packages and specially priced medicines – over 3,300 roubles). The size of the monthly allowance to the persons affected by political repressions is, normally, lower than that to the rehabilitated people: from hundreds of roubles (Republic of Bashkortostan, Buryatia, Vladimir, Voronezh regions etc.) to one thousand roubles (Saint-Petersburg etc.).

An objective of the law on rehabilitation, indicated in its preamble when adopted, was “to ensure currently possible payment of damages” caused by political repressions. In the conditions of the economic collapse in 1991 this clause was clear and justified. However, it stayed unchanged even during the years of rapid economic growth in the early 2000s, when the state could easily afford to pay damages in the scope, significantly higher than that stipulated by law. On the contrary, it was in 2004 under the monetization of benefits that the payment of damages were limited, and the objective of paying also non-pecuniary damages was excluded from the preamble of the law on rehabilitation. It is no coincidence that after the European Court of Human Rights order under the claim submitted by Klaus and Yuri Kiladze versus Georgia in 2010, thousands of repressed persons and members

13 In a number of its rulings, the Constitutional Court of the Russian Federation specified that the revision of the completed nationalization (municipalization) of the property in compliance with the decree of the All-Russian Central Executive Committee dated August 20, 1918 on cancelling the private property right to real estate in towns referred to the competence of the legislature (see, e.g. Ruling dated June 18, 2004 No. 261-O). The legislature recorded its refusal to perform such revision in paragraph 3 Article 25 of the RF Land Code.

14 The Decision of the Novolakskoye district court, Republic of Dagestan, dated December 20, 2010. Rospravosudie; <https://rospravosudie.com/court-novolakskij-rajonnij-sud-respublika-dagestan-s/act-105197490/>

15 The Commission is an advisory body in the RF Presidential Executive Office, which includes representatives of governmental agencies and non-governmental organizations, engaged in remembering the victims of political repressions (<http://www.kremlin.ru/structure/commissions#institution-25>). Unfortunately, the data of its activities are very limited. In particular, its reports on the implementation of the law on rehabilitation are not published. The text of the most recent report is available on the website of the Russian Association of Illegal Political Repressions Victims – rosagr.natm.ru/dynamic/docs/konsol.doc.

of their families filed cases, being mistaken in believing that this order would bind Russia to indemnify for non-pecuniary damages caused by political repressions.¹⁶

MORAL CONSIDERATION (SATISFACTION)

As stated above, rehabilitation, according to its content is, *inter alia*, an individual measure of moral consideration (satisfaction) of the persons affected by political repressions. This objective is achieved via formal recognition of the fact that repressions were applied groundlessly and that the person who suffered from them was innocent. This recognition is documented as a certificate on rehabilitation. The state practice is actually limited to this action in this issue: formally the lists of the rehabilitated people have not been published, and their memory is honoured mainly by non-governmental organization and individuals.

The collective satisfaction to the victims of political repressions is provided as a formal recognition of political repressions in Soviet Russia and their condemnation in the preamble of the law on rehabilitation: "Over the years of Soviet power millions of people became victims of the tyranny of the totalitarian state, were subject to repressions for their political and religious beliefs, as well as due to social, national and other reasons. Condemning the long-lasting terror and mass prosecution of people as incompatible with the idea of law and justice, the Federal Assembly of the Russian Federation expresses profound sympathy to the victims of unjustified repressions and their relatives, declares its steady striving for real guarantees of the protecting legality and human rights".

Besides the overall recognition and discussion of the law on rehabilitation, the Russian authorities published official documents discussing individual cases or kinds of political repressions. A part of these documents is mentioned above. They can include the statement of the State Duma dated April 2, 2008 "to honour the victims of famine in the 1930s in the USSR", where it mentions the reasons of the tragedy, recognizes causative relations between the famine and coercive collectivization and condemns "the regime, which neglected people's lives for the sake of achieving economic and political objectives". The statement of the State Duma dated November 26, 2010 "on the Katyn tragedy and its victims" is also to be mentioned. There the execution of Polish prisoners of war is called a *crime*, committed "upon the direct instructions of Stalin and other Soviet leaders".

In some respects, the CPSU case trial at the Constitutional Court of the Russian Federation was an act of collective satisfaction to the victims of the crimes, committed by the totalitarian Communist regime of the USSR. The documents and materials of the CPSU crimes provided by the RF President during this process may be considered as their formal recognition by the Head of State. However, they are not even mentioned in the text of the RF Constitutional Court order, while the materials of this case were officially published only once in the mid-1990s.¹⁷

ATTEMPTS TO EXTEND THE POLICY OF OVERCOMING THE CONSEQUENCES OF POLITICAL REPRESSIONS

Over the validity period of the law on rehabilitation its gaps and drawbacks became obvious. During Dmitry Medvedev's

presidency there were two attempts to strengthen the measures for overcoming the consequences of political repressions. First in 2009 the Presidential Commission on the rehabilitation of the victims of political repressions suggested revising many provisions of the law on rehabilitation – to recognize the deprivation of property rights during collectivization and punitive tax system as political repressions, apply social support designed for the repressed to their close relatives who survived, increase compensations. In addition, the Commission recommended preparing a state programme of remembering the victims of political repressions, under which it was expected to establish the National Political Repressions Remembrance Book and the Russian National Memorial Museum to the victims of political repressions.¹⁸

The work on the new policy of overcoming the Soviet past was continued by another body at the RF Presidential Executive Office – the Council for Civil Society and Human Rights. It offered even more decisive steps.¹⁹

- to erect monuments to the victims of political repressions in the capital and all large cities across the country and open Memorial Museums to the victims in Moscow and Saint-Petersburg;
- engage the Federal Security Service (the KGB successor) and the Ministry of Internal Affairs in the search for the burials of the repressed persons;
- open the access to all archive documents, related to political repressions;
- establish a unified database of the "victims of the totalitarian regime in the USSR";
- cancel Soviet regulations related to the repression policy;
- officially reveal the persons responsible for mass repressions and ban the use of their names for towns and streets;
- ban officials from denying or justifying the crimes of the totalitarian regime;
- change the dates of professional holidays of law-enforcement bodies to those not related to their Soviet predecessors (in Russia the day of the security services is still the day of the founding of the VChK – the first Soviet punitive body, the forerunner of the OGPU-NKVD-MGB-KGB).

These radical, by Russian standards, ideas were not to come true. Instead of the large-scale public and state programme for remembering the victims of the totalitarian regime and the national reconciliation, it was decided to stay limited to rather modest measures – to open a monument to the victims of political repressions in Moscow, to provide access to non-governmental

16 The European court rejects the claims of the relatives of politically repressed persons in Russia. The website of the legal protection center Memorial, March 22, 2013; <http://memohrc.org/news/evropeyskiy-sud-otklonyaet-zhaloby-rodstvennikov-politicheskikh-repressirovannykh-iz-rossii>

17 The materials of the case on verifying the constitutionality of the decrees of the RF President, related to the activities of the CPSU and RSFSR Communist Party, and on verifying the constitutionality of the CPSU and RSFSR CP. – M.: Publishing House Spark, 1996–1998. In 6 volumes.

18 Formally these suggestions were not published. Their text was placed on different online resources, including websites and blogs, e.g.: <http://arudnitsky.livejournal.com/50732.html>.

19 Suggestions on founding the national public programme on remembering the victims of the totalitarian regime and on the national reconciliation Rossiyskaya Gazeta, April 07, 2001; <https://rg.ru/2011/04/07/totalitarizm-site.html>

organizations engaged in searching for and arranging burials of the repressed persons and archive research into repressions to the public funding of non-profit organizations and protect newly detected burials.²⁰

Other political initiatives include, in particular, a bill, submitted by the LDPR, on rehabilitating participants of the White movement, rejected by the State Duma in 2006.²¹

REHABILITATION AND CONTEMPORARY RUSSIAN SOCIETY

The attitude to the victims in Russian society is still highly controversial. They are on the one hand recognized, while on the other hand they are rejected, remembered or deliberately left in oblivion and even demonized. The examples of positive trends in the public perception of the rehabilitated persons include an annual event called “Returning Names”, being a public reading of the names of the killed people, and the “Last Address” movement, engaged in installing memorial tablets on the houses where the repressed people lived before their arrests. Negative examples are more numerous – the recognition of the Memorial Society as a foreign agent, closing the Gulag Remembrance Museum “Perm-36”, the increasing justification and glorification of Stalin, which cannot but offend the living repressed persons and their families.

LESSONS LEARNT

It appears that rather unsatisfactory results of the state’s efforts to overcome the consequences of repressions have, primarily, political reasons. Even during the first years after the fall of

the Communist regime in Russia the victims of repressions and their societies gradually lost their initial positions in the political process, which they had managed to find on the rise of Perestroika during the last years of the existence of the USSR. Later there was no one to protect their interests at the national level.

Institutional reasons should be mentioned too. The rehabilitation of the victims of repressions and related measures including the payment of damages are within the competence of ordinary governmental agencies – the Prosecutor’s Office, the Ministry of Internal Affairs, Social Security bodies etc. They have always had some issues of higher priority to deal with. No special body, which would be designed to focus on this task only and therefore related to the interests of the repressed persons, has ever been set up to rehabilitate and remember the victims.

Nonetheless, the work carried out over the past twenty-five years by the state and non-governmental organizations deserves deep respect. Millions of innocent affected people have been revealed and saved from oblivion. However, there is still a long way to go to their full public recognition and a condemnation of the repressive Communist regime. And the opportunities for full indemnification have been irreversibly lost in most cases.²²

20 Federal Law dated March 9, 2016 No. 67-FZ on amendments to some regulations of the Russian Federation for remembering the victims of political repressions

21 The State Duma rejected the bill on rehabilitating the victims of the White movement. Newsru.com, 14. 6. 2006; <http://www.newsru.com/russia/14jun2006/whiteguard.html>

22 According to the data of the Presidential Commission on the rehabilitation of the victims of political repressions, as of January 1, 2015, there were 671,738 living rehabilitated victims of political repressions and 8,769 persons affected by political repressions (excluding the data from the Republic of Crimea, Sevastopol and Kirov region).

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EDUCATION AND PRESERVATION OF SITES OF CONSCIENCE

THE MEMORY OF REPRESSIONS. THE ROLE OF EVIDENCE, MEMORABLE PLACES, INSTITUTIONS AND EDUCATIONAL POLICY

NATALIA KOLYAGINA

SOVIET TIMES

In the Soviet times, before the era of Glasnost and Perestroika, the memory of repressions was rather private in nature.

Under Stalin's rule the transfer of the information about repressions was hindered by the environment of fear, suspiciousness and silence. Those few proceedings mentioned in the official press were represented as a necessary step to liberate the society from the internal enemies of the people. A doubt regarding the justifiability of repressions alone could be the reason for detention. Speaking of arrests and the GULAG was often an off-limits subject even inside the family. They were afraid to be informed on by family members or that children could let it slip unintentionally at school, for instance.

When Stalin died in 1953, the era of mass arrests ended. In his report at the 20th Communist Party Congress (1956) Nikita Khrushchev officially explained the past events in the country by the side effects of the cult of personality of Joseph Stalin. The era of the Thaw started. In 1961 after the 22nd congress the body of Stalin was removed from the Mausoleum (the body of Lenin still reposes in the Mausoleum by the Kremlin wall).

It shall be mentioned that the official recognition of repressions alone significantly changed the public views. The Soviet government, however, did not intend to radically change the relationship between the government and the public. Just in a few months after the confidential report, the uprising in Budapest was put down involving Soviet tanks. The rule of Khrushchev did not end the era of repressions, but created a space for talking about it – in private conversations, in self-published press, in public literature, especially poetry, readings (where this topic was often addressed allegorically). Living eyewitnesses began to return from the camps. Most of them first had no right to live in large cities, and in case of rehabilitation they signed a pledge of secrecy promising not to disclose what had happened to them. However, many people started telling what had happened to their friends and relatives, and the information about camps slowly spread. People were slowly becoming aware of the events of the mass terror time. The story by Alexander Solzhenitsyn *One Day in the Life of Ivan Denisovich* (1962) was published. Whereas, lots of literary works about repressions never made it to the official press. However, the fact that Solzhenitsyn's story was published alone gave large hope of the restoration of justice and initiated the writing of many personal memoirs. Eyewitnesses were striving to extend the issues brought up by Solzhenitsyn sharing their experience. All works created in the 1960s contained quite fresh memories including a lot of important details of what happened.

Irina Scherbakova, researcher of the memories of the GULAG, highlights that “it is namely memoirs and other personal documents (letters and diaries) that were the main source of information about the system of repressions then, while archives containing documents concerning repressions were completely secret and historians did not even have a general idea of what could be kept archived”.¹ Yet in the times of Khrushchev and later, camp memoirs and belles-lettres on the topic of camps were still not published, just circulated in script and later were published underground or abroad.²

These manuscripts could see the light of day only under Perestroika. The topic ceased to be taboo, the media started publishing articles about camp experiences and interviews with former prisoners, famous people who had made it through the GULAG.

The dissident movement played a particular role in the commemoration of repressions in the Soviet time. The core of the dissident activity was the fight for the rights of the individual in the USSR. Organizations and non-official print media founded by dissidents documented the arbitrary rule in Russia and in other Soviet countries. Dissidents used the underground press to give coverage to the movement of repressed people for their rights, to tell the readers about the events in modern camps, to publish uncensored works of literature, which information was “parallel” to the official data, testimonies concerning the GULAG, in particular. In this respect the publications prepared for Samizdat (underground publications) and Tamizdat (publications abroad) by the participants of the dissident movement were a dramatic proof of the repressive system that existed in the USSR in the post-Stalinist times. In 1958–1968 Alexander Solzhenitsyn wrote his novel *The Gulag Archipelago* (first published in Paris in 1973, in USSR – since 1989). For this work Solzhenitsyn collected a kind of anthology of eyewitness memories. He used his own experience, but even more leaned on the written and oral testimonies of his contemporaries who had made it through the GULAG.

Summing up, the very reading, storing and distribution of testimonies concerning Soviet repressions in the times before Perestroika can be considered a sort of memory of repressions in the USSR.

1 Irina Shcherbakova, *GULAG Memory Map: Problems and Gaps*, in *Laboratorium*, 2015, (1), 117.

2 Irina Shcherbakova gives a detailed timeline of the transformation of GULAG memories in her article *The GULAG in Memory. An Experience of Researching Memoirs and Oral Testimonies of Former Prisoners*; <http://urokiistorii.ru/memory/oral/2009/05/pamyat-gulaga>

THE PERIOD FROM 1986 TO THE BEGINNING OF THE 2000s

A number of researchers³ point out that the term “transition period” cannot be applied to Russia. This term implies “transition” from totalitarianism to democracy and this scenario has been never implemented in Russia. However, we may speak of an attempt at such a “transition” after the year 1986. Many actions initiated then had a large importance for the social and political climate, influenced the formation of the collective memory of the totalitarian past over time. A variety of significant projects and initiatives started in the 1990s still continue or retain influence in the today’s society.

The period of Perestroika and Glasnost is associated with the boom of recollections of the GULAG and post-Stalinist repressions. At that time, memoirs were published, the public interest to the testimonies grew, first monuments to the victims of repressions were installed. On the one hand, the era of Gorbachev’s “glasnost” rather meant some censor liberalization. It was allowed to speak aloud of the Stalinist times, but prohibited to doubt the “Socialist choice” of the country. But even this was enough to radically change the world perception of the people of that time.

NON-GOVERNMENTAL ORGANIZATIONS

On the wave of the public interest in the tragedy that had been disguised for decades the **Memorial Society** (www.memo.ru) was founded in 1989.

Memorial emerged as an association of sympathetic individuals interested in searching for and filing the scattered data concerning repressions in the USSR and in the commemoration of the victims. The very name of Memorial reflects a social attempt to create the first public memorial to the victims of Soviet repressions. Initially under the conditions of classified archives members of this society were able to collect these data questioning eyewitnesses, analyzing written and oral memories. Gradually the archive of the Society started filling up with originals and copies of personal files, which relatives of the victims and former prisoners have been able to request and receive from the state archives since the end of the 1980s. Memorial represented a network of regional associations connected by the common charter. This network regional type of organization was also imposed by the history. The desire to know the truth about the repressions in the USSR joined thousands of people all over the country, some of them started to study history professionally. Now Memorial is one of the largest and oldest non-profit organizations in Russia where professional historians majoring in the GULAG and secret services of the USSR are engaged. It also includes activists who search for the burial places of the prisoners, identify the remains, arrange reburial, conduct expeditions to the former places of detention, transfer and work of camp prisoners, install memorial signs at the places of terror, collect, publish and study testimonies, collect and investigate documents and items related to the GULAG and the history of the dissident movement in the USSR. The members of Memorial Society were involved in the elaboration of the State Rehabilitation Law (adopted in 1991), developed recommendations for government agencies regarding the actions necessary to change the public consciousness toward repressions in the USSR. The team of the Society

defends human rights and engages in the rehabilitation of repressed persons, renders legal assistance to the victims who applied for recognition and compensation. Sometimes they help with confirmation of the status of participant of the war / victim of Nazi crimes (deportation to Germany for compulsory labor), as very often this was connected with the following repression experience. This work was especially active in the 1990s after the adoption of the Rehabilitation Law. Moreover, until recently Memorial had been collecting contributions to support old people who had lived through camps (now the generation of these people has almost completely passed away). Even today it is essential to consult the relatives of the repressed persons who wish to know the fate of their relatives who had “disappeared” after arrest.

Dealing with the issues of the violation of human rights in the USSR, Memorial could not escape being involved in the mass abuse of the individual rights in contemporary Russia. Therefore, activists of the organization monitored the Chechen wars in the 1990s discovering, disclosing and analyzing the information about crimes against civilians, defending the interests of the aggrieved parties in the ECHR. The members of Memorial Society were involved in peace-making of ethnic conflicts (e.g. Sergey Kovalev and Oleg Orlov, board members of Memorial, took part in the hostages release negotiation in Budyonnovsk).

Memorial stood at the origins of the first public campaigns in memory of the repressed. On October 30, 1989, the proclaimed Day of Remembrance of Victims of Political Repressions, a chain of people holding candles in their hands surrounded the building of the KGB at Lubyanskaya Square in Moscow. In 1990 a stone brought from the islands in the White Sea, where one of the first Soviet camps for political prisoners was situated, was installed on the same Lubyanskaya Square. It became the first memorial to the Soviet regime’s victims.

Already in 1988–1989 newspapers started publishing the lists of victims of Soviet repressions, often according to the information received from the regional divisions of the KGB. Later the researchers from different regions started searching archives, and thus **Memorial Books** appeared containing lists of names with biographical profiles of the victims. Today the consolidated database of the repressed persons numbers 2.6 million names: <http://lists.memo.ru/>

Since the beginning of the 1990s **Associations of Victims of Political Repressions** have been emerging all over the country. These appeared naturally: such associations gave the opportunity to the people with a similar fate to get acquainted, to support each other and to fight for their rights.

In 1990 the first steps were made to found the **Sakharov Center**. In the middle of the 1990s the Archive of the famous Academy Member Andrey Sakharov, a museum and social center were opened. Alongside the museum and archive activity dedicated to the history of freedom and captivity in the USSR, the center has become an essential discussion platform, where cultural and social problems of the past and present are discussed. These discussions are conducted in the form of public lectures, seminars, narrated film shows, theatrical performances, exhibitions (including such famous ones as *Forbidden Art* or *Caution! Religion*).

3 Arseny Roginsky, Lev Ivanov. Watch, for example, the record of the conference *The Long Echo of the Dictatorship* held in September 2014 in Memorial Society, Moscow: <https://www.youtube.com/watch?v=xfqn1lrl7WI&t=25s>

MUSEUMS

There are only a few topical **museums** in Russia **related to the issue of repressions** in the USSR. In the 1990s all these museums emerged owing to the endeavors of local historians who collected the testimonies of their countrymen, examined the burial places of the victims, evidence from the places of detention, searched for documents in local archives, etc. As a rule, these are small museums or small exhibitions in local history museums.

The only museum in the country that was created on the place of a former camp is **Perm-36 Memorial Museum**. It was founded in 1994 in the village of Kuchino, Perm Krai, on the place of the correctional labor colony Perm-36, where political criminals had been “reformed” since the beginning of the 1970s. The museum was founded by a group of local historians. The barracks were renovated (display items were placed there), a part of the camp facilities were rebuilt (flag towers, fences, precautionary facilities, etc.), deep research work was performed. However, under the latest political conditions the museum was literally seized from the group who had founded it and transferred to the state (later in detail).

The **NKVD House of Detention Museum in Tomsk** is located in the basement of the building where the secret prison of the Tomsk city department of OGPU/NKVD was situated in 1923–1944 (200 sq. m display area).

Other topical museums created in the 1990s occupy tiny spaces provided by local authorities. As independent museums they just slightly differ from the exhibitions of the GULAG in local history museums. A perfect example of such museums is the **Memory of Kolyma** Museum, in Yagodnoye settlement, Magadan Oblast, opened by the efforts of the local enthusiast Ivan Panikarov. Until 2005 the museum was located in a two-room apartment bought by Panikarov for this purpose. Panikarov had been personally gathering the museum collection since 1989. The full list of museums can be found on the website Virtual Museum of the GULAG developed by the team of the St. Petersburg division of Memorial Society.⁴

It is remarkable that the former Soviet prisons for political prisoners, which still exist, usually also have their own museums. These possess the spirit of succession – contemporary sentence execution services carry on the “glorious traditions” of the Soviet prisoner oversight bodies. They point out the merit and professionalism of prison employees, portraits and service records of the “veterans of the movement” are displayed at the place of honor, the word “repression” is usually not mentioned and the very phenomenon of political prisoners in the USSR is also concealed. A good example of this is the **Museum of the Butyrka Prison in Moscow**.

NECROPOLEIS

As for today approx. 700 places of execution and/or burial of USSR terror victims have been revealed.⁵ The number of such places of burial of arrested, detained, resettled persons is obviously bigger, most of them are still not found due to the remoteness of the places of detention from the modern populated settlements, due to the unavailability of the archives of the Federal Security Service and of the Ministry of the Interior to the researchers, as well as due to the lack of consistent and centralized actions in this field. Most of the mentioned burial places were found by chance, during excavation works for the construction

of commercial facilities and residential houses. The disinterment and identification of the deceased are usually performed by local historians and public activists who sometimes fail to find out the story of the burial. Some large burials have obtained the status of Memorial Burials of the Victims of Political Repressions by the efforts of non-governmental organizations (e.g. Makarikha (Arkhangelsk Oblast), Sandarmokh (Karelia), Levashovo (Leningrad Oblast), Butovo Firing Range (Moscow) etc.). Memorial signs/monuments (personal – by family members or collective) are installed at the places of discovered burials and memorial events are arranged.

MONUMENTS TO THE VICTIMS OF POLITICAL REPRESSIONS

It is impossible to establish the number of such dedicated monuments, memorial plates and signs installed since 1991. The difficulty is caused by the lack of a uniform register of monuments in Russia, the disunity of organizations (and individuals) initiating the installation of monuments in different regions of Russia and also by the complexity of definition of a monument. Nevertheless, as of today the Sakharov Center recorded on a designated web portal 714 monuments in the country (http://www.sakharov-center.ru/asfcd/pam/?t=list&c=Russia&id_c=1 – this list is constantly updated). In 2007 the St. Petersburg Memorial Society recorded 587 monuments and memorial signs.⁶

Most of these monuments were installed by individuals or non-governmental organizations of victims and their relatives and not by the government. For this purpose, they need to get consent from the authorities regarding the place of installation and the appearance of the monument. Local authorities will usually give their consent to the installation of such monuments on the outskirts or at the places of the discovered burial, rather than on central streets of a city or town. The authorities resist greatly the installation of memorial plates on the existing buildings and facilities related to the history of terror (e.g. places where decisions had been made) or to the deportation of prisoners (railway stations), places where prisoners had worked (secret R&D laboratories, factories) or items constructed by prisoners.

This difficulty inspired the creation of the memorial project The Topography of Terror, where places associated with the history of political repressions in Moscow and the Moscow region are plotted on an online map. The reference map contains descriptions of over 740 locations organized topically.⁷ The project exists online and in the form of signposts installed in the city.

TEXTBOOKS

In the first years of the Russian Federation schools did not receive new Russian history textbooks. Teachers who worked at the very beginning of the 1990s clearly perceived the mismatch between the Soviet textbooks and the reality that was freely discussed in

4 <http://www.gulagmuseum.org/search.do?objectTypeName=museum&page=1&language=1>

5 See the topic section of the website Virtual Museum of the GULAG: <http://www.gulagmuseum.org/search.do?objectTypeName=necropolis&page=1&language=1>

6 <http://www.gulagmuseum.org/search.do?objectTypeName=monuments&language=1&objectTypeName=monuments&language=1&page=1>

7 <http://topos.memo.ru/>

newspapers and books and often looked for the sources of information personally, brought newspaper clippings and available publications to the lessons. By the mid-1990s book houses prepared different teaching aids at the discretion of the school administration.

Before 2000 there was no uniform state educational standard in history, there were only state requirements in respect of the minimum attainment level of the school graduates. There were textbooks “recommended” and “permitted” for teaching at school (the label was given by the Ministry of Education). Thus, in the first 10 years after the collapse of the Soviet Union it was mainly teachers who took responsibility for the contents of the historical education. Textbooks “permitted” for teaching at school included quite brave and pioneering projects. For example, the Soviet history textbook for secondary schools by Igor Dolutsky, a historian from Moscow, was aimed at “education of a responsible citizen” or as the author explained in an interview at “teaching a student to resist the government”. On the other hand, teachers of history could choose textbooks with strong nationalist connotations. An extreme example of this kind was the textbook for high school students of history by A. Barsenkov and A. Vdovin, professors of the Moscow State University (2004). Alongside conspiracy theories, anti-Semitic insults and distasteful opinion regarding the Caucasus people, it found excuses for the crimes of Stalin. The latter were represented as necessary side effects on the way to a radiant future. After a public outcry in 2010 the book lost its label of “recommended textbook”.

At the same time there were attempts to accumulate the best teacher’s experience in the discipline. In 2001 the Sakharov Center launched a national contest for the teachers of history, social science and literature, Lesson Topic – History of Political Repressions and Resistance to the lack of freedom in the USSR. The best guidance papers sent to the contest were published in books and sent out to regions, contest winners were invited to the annual conference in Moscow. This contest has existed for 10 years. Since the beginning of the 2000s the St. Petersburg division of Memorial Society systematically posted study manuals by lessons on the topic of repressions on their website.

In 1999 International Memorial in Moscow launched a contest for school students – A Man in History. Russia 20th century (still exists). The contest induced school students from all Russia to collect evidence from the period of repressions. The contest receives from 1,200 to 3,000 works annually. The participants interview eyewitnesses, work with photographs and documents from family archives and address regional archives. During the years of its existence unique previously unclaimed materials associated with the regional history of repressions have been collected.

Several years were used to elaborate the method of talking about the period of totalitarianism. Many projects were launched when the hope for the possible democratic development of Russia was alive. However, starting from the end of the 2000s the free space for historical studies at school has been gradually getting narrower (later in detail).

2000s–2017 / CURRENT STATUS

As already mentioned above it is impossible to define clearly the time of the “transition period” end in Russia. Basically, speaking of the public climate in the country after the year 2000

the parallel existence of two tendencies may be mentioned – the continued movement toward democratization (especially in the first term of V. Putin and the term of D. Medvedev) and conservative trends. Obviously the democratic course would be impossible in Russia, but for the changes made in the 1990s.

Currently the main civil rights and liberties are obviously restricted. Foreign and Russian foundations engaged in the expansion of liberal education are being gradually forced out of the country.

In 2012 the State Duma of the Russian Federation adopted amendments to the Non-commercial Organization Law, where NCOs engaged in “political activity on the territory of Russia” or receiving “monetary funds and other property from foreign states, international and foreign organizations” were acknowledged as being “foreign agents”. The law predetermined legal prosecution of organizations put on the list of “foreign agents” by force, complicated the procedure of tax inspections and was basically aimed at the reputational damage of a number of NCOs.⁸ In 2015 the Sakharov Center was included in the list of foreign agents, in 2016 – International Memorial. Both organizations are currently in litigation concerning this status.

In 2015 the US embassy in Russia was compelled to close cultural exchange programs, all American foundations stopped their programs on the territory of the Russian Federation.

In 2012 Perm-36 Memorial Museum was basically dissolved and liquidated. Alongside its main role, commemoration of the terror in the USSR, the Museum was gradually becoming a free discussion platform for the problems of the contemporary society. The authorities of the Perm Krai found a formal reason to dismiss the management of the Museum and to appoint their “own people” to the vacant jobs. As a result, the Museum was not closed, but ceased to be the commemoration place of repressions. For example, the guides now are former guards, the exhibition is dedicated to the efficiency of the penal system, only general information from the history of the GULAG is represented.

The current historical period also meant the end of the free press in Russia. Today there are no free TV channels in Russia (except just a few available under paid subscription and working under the risk of being closed at any time). Popular online media experience strong pressure as these may be blocked by internet providers anytime upon the decision of the dedicated state committee (Rospotrebnadzor). In the sense of the policy of memory, all this news means an actual lack of memorial initiatives regarding terror history in the media agenda, the press, especially TV, lacks critical discussion of the Soviet period of history in general, the period of Perestroika and the 1990s is being defamed. And on the contrary we can talk about the nostalgia of the Soviet times fostered in the media. The leading TV channels manipulate the ideas of the imperial glory of the USSR, praise the technical and foreign policy achievements of the Soviet Union, first of all, the victory in the Great Patriotic War or confrontation with the USA in the Cold War. Moreover, some TV channels make an information attack on NGOs engaged in historical education.

Since the end of the 2000s, initiated by the government, the project of introduction of a single history textbook for schools has been actively discussed. In 2009 the so called “Textbook by

⁸ Discussion of the situation in detail – see e.g.: http://www.bbc.com/russian/russia/2016/04/160420_gosduma_ngo_law

Filippov⁹ was introduced as a pilot project. This teaching aid was an attempt to literally rehabilitate the name of Stalin. Repressions and terror were justified in this book by a historical need and declared a rational and pragmatic method of managing politics and the economy, the number of persons repressed by Stalin was decreased approx. 10-fold. The textbook lacked chapters concerning the famines, the deportation of nations inside the USSR, the Katyn massacre. The publication was severely criticized by the academic community, and the Ministry of Education was forced to reject it as a single mandatory textbook for schools.

However, in 2015 the talks about creating a uniform state standard for teaching history, sociology and literature at school recommenced. The elaborated standard was trying to account for the whole diversity of social attitudes in the most controversial issues. Thus, the standard incorporated such painful topics as repressions, the Holocaust and collaborationism during the Great Patriotic War. However, the list of essential topics made the standard so cumbersome that as a matter of fact it is impossible to use it in practical education.

A peculiarity of contemporary schools is their growing political engagement. Since the middle of the 2000s “lessons of courage” and “lessons of patriotic education” have been introduced at schools, where the idea of the necessity to defend the state from external enemies is promoted and military-oriented values are asserted. Representatives of the Russian Orthodox Church, veterans of the Great Patriotic War, of the Afghan and Chechen Wars are invited to such lessons. Today’s programs and out-of-school activities pay special attention to the cult of the Great Patriotic War, and first of all, the victory of 1945, which is perceived as the main achievement in Soviet and Russian history. Celebratory assemblies, parades and meetings with veterans have become compulsory on Victory Day, May 9th. Teachers often have explanatory political conversations with school children during humanitarian lessons – history, sociology and economics.¹⁰

Since the end of the 1990s one more serious actor appeared on the Russian stage of the memorial policy – the Russian Orthodox Church. On the one hand, the ROC is often perceived by the public as an institution joined with government agencies. The government takes a lot of measures aimed at the growth of the material wealth of the church, engages in a declarative advocacy of Christian values in the mass media, education, in the speeches of leading politicians... On behalf of the believers, new legislative initiatives related to the restriction of civil rights and freedoms have been introduced (Law on the Protection of Feelings of Religious Persons, victimization of homosexuals, introduction of Orthodox subjects at school, show trial against Pussy Riot 2012). On the other hand, the Church now is a powerful ally of public institutions in the issues of the commemoration of terror victims and a critical attitude toward the Soviet legacy. In particular, through the mediation of the Church a lot of monuments were installed to the victims of repressions all over the country, cemeteries were defined and consecrated. The point is that the concept of New Martyrs is important for the modern ROC, honoring of the churchmen executed or arrested in the times of terror. The representatives of the Church install memorial signs on the churches (meanwhile only in Moscow and the vicinity of Moscow) in commemoration of those who suffered for their faith. For the first time in Russia the Orthodox church in honor of the New Martyrs was opened at the Butovo Firing Range (in the south of Moscow).¹¹

LESSONS LEARNT

In a very primitive way, we can speak of two antagonistic paradigms of memory present in the community. One of these focuses the historical attention on the individual, his/her inherent rights, and the other on the interests of the state, which sometimes can be more important than the rights and liberties of individuals. Critical comprehension of history, respect for civil values in the past and present are common to the people who dream to see their country on the way of social transformation. Such a trajectory finally implies transparency and responsibility of government institutions in front of the individuals, real functioning of the election system, free press and civil society institutions.

This system of values is alien to the contemporary political elite of Russia. The political agenda itself, the values communicated by the media controlled by the government, the methods of commemoration suggested by the government, all of these evidence that it is rather the idea of the individual development path of Russia, the Eurasian program, the imperial philosophy that are popular.¹²

In practice it means a parallel existence of different commemoration methods in respect of the totalitarian past in society.

The civil society today successfully advances important initiatives in the memorialization of the GULAG experience. There is a whole range of interesting online projects popular among the internet audience. Thus, the project Bessmertny Barak (rus. The Immortal Barrack) created by the efforts of volunteers and financed by donations of the readers gained much interest: <http://bessmertnybarak.ru/> Since May 2015 the biography of one repressed person is posted daily on this web page, including photos and abstracts from available documents. The number of the website readers registered at Facebook amounts now to almost 55,000 persons.

Posledny Adres [rus. The Last Address] (www.poslednyadres.ru) is the most important offline project of recent years. It involves the installation of small memorial plates on the houses where the arrested people were taken from. The installations are initiated by private individuals who have to pay a definite contribution covering the costs of the manufacturing of the plate. The team of the project working in Memorial Society checks the story of the repressed person, agrees on the installation of the plate with the inhabitants or the owner of the house. The first plates of Posledny Adres were installed in Moscow on December 10, 2014. “Until now over 460 plates have been installed in 30 cities, towns and villages of Russia in the framework of the Posledny Adres project,” the website of the project informs us. As of today, the Posledny Adres Foundation has already received and registered over 1,500 applications for the installation of memorial plates in different localities of Russia.¹³

9 A. V. Filippov, *Contemporary History of Russia. 1946–2006. Teacher’s Book*, Moscow: Prosveshcheniye, 2007; A. Filippov, A. Danilov, eds., *The History of Russia. 1900–1945*, Moscow: Prosveshcheniye, 2009.

10 See the article in the Novaya Gazeta: Your Son Took Part in a Meeting. Behavior Unsatisfactory. // <https://www.novayagazeta.ru/articles/2017/04/10/72095-dnevnik-oppozitsii-vash-syn-byl-na-mitinge-zapovedenie-neud>

11 See Church of Russian New Martyrs and Confessors in Butovo: <http://www.patriarchia.ru/db/text/243827.html>

12 On the topic of the two paradigms of the historical consciousness in Russia see the analytical report of the Free Historical Society What Past Does the Russian Future Need (January 2017): <https://komitetgi.ru/analytics/3076/>

13 <https://www.poslednyadres.ru/about/>

The issue of political repressions in the USSR is not popular in the pro-government historical discourse. The memorial policy of the government is aimed rather at the glorification of the achievements of the USSR (victory in the war of 1941–1945, space exploration) or the revelation of cultural heroes of the past. They create the history of the state, which one should be first of all proud of. The fact of repressions cannot be concealed, but it is still preferable not to recall them. The unworked issue of “how one should treat the totalitarian past” induces much stress in the community.

This acute social split in respect of the attitude toward the Soviet legacy results for instance in an ideological confrontation concerning the issue of the installation of Stalin monuments. Since 2010 approx. 100 Stalin monuments emerged in the country (far from all in public spaces of the cities, approximately one third of the total amount is concentrated in the North Caucasus). But even more frequent than the actual installation of Stalin busts, heated discussion of another application for such a monument in different populated localities of Russia is taking place.

According to the polls conducted by sociologists, the ranking of Stalin reached its historical highest point in post-Soviet Russia in February 2017. According to the latest data¹⁴ 46 % of respondents treat the Secretary General of the Central Committee of the All-Union Communist Party Stalin with admiration, respect and affection. At the same time the number of those who treat Stalin absolutely negatively grew compared to the previous years. “Whereas at the beginning of 2016 he was treated with dislike, fear, disgust and hatred by 17 %, in 2017 it was already 21 %,” sociologists of the Levada-Center mention. This evidences the growing polarization of the public moods in the country.

It needs to be said that the government is probably aware of the problem of the society split and makes attempts to balance it. Thus, in 2015 Prime Minister Dmitry Medvedev approved The Concept of the State Policy on Memorializing the Victims of Political Repressions.¹⁵ The concept was initiated by the Human Rights Council under the President of the Russian Federation, Memorial Society and some public persons who approached President Medvedev with the respective proposal in February 2011 announcing the so called Destalinization Program.¹⁶ The discussion of the Program by its authors and the President ended in the same year 2011, however a number of important proposals from this document formed the basis of the Concept of the State Policy adopted already under Putin’s third term as a president. Regretfully this concept is obviously more of a declarative instrument. For example, almost all provisions in the section Lines of Activity to Memorialize the Victims of Repressions are still not implemented. The program of archaeological search for burial places and memorialization of the places of repressions failed to be implemented, we lack free access to archives, developed research and educational programs to teach the respective topics at schools and high schools, and so on according to the document text. Nevertheless, a few steps have been made to implement this program. In particular, the Museum of GULAG underwent significant revamping and they started to work on the creation of a monument to the victims of totalitarianism in Moscow.

The State Museum of GULAG was opened in 2004. Its exhibitions were formed according to the principle of emotional immersion of the visitor in the horror of repressions, the small number of authentic exhibits was compensated for by installations and interactive effects. This place did not enjoy special fame or popularity among city dwellers and tourists. In 2015

the Museum of GULAG received from the government a new modern four-story building and the possibility to increase the area of exhibitions 4-fold, including a library, a conference hall and a teaching center. Basically the new exhibition complies with the standards of a modern Western museum, it is supported by scientific facts, includes oral testimonies, historical exhibits and features a spectacular design. The museum organizes sets of lectures, traveling exhibitions, theatrical performances and readings. In other words, it is designed to catch the fancy of a young sophisticated audience. However, the opened museum faces criticism on the part of the academic community, as well as of public institutions. The criticism is aimed at the general historical concept communicated by the museum. For example, one of the authors writes, “Having walked through all the halls, at the end the visitor sees a video featuring Vladimir Putin, Sergey Sobyenin [the mayor of Moscow] and Patriarch Kirill, where they bless the policy of memory now embodied by the museum. This policy of memory strives to put a symbolic period to the history of repressions. According thereto repressions are something that had happened in the past, and although this past still distresses us, it is only residual pains and all we need is to heal these pains, as the original source of them does not exist anymore. But we know that of all people the current President, the members of the United Russia [political party] and the Patriarch have no moral right to say that political repressions have become a thing of the past, because we see exactly the opposite.”¹⁷

The idea to install the main **Monument to the Victims of Repressions** expressed by Putin personally in 2015 also faced a severe rebuff, in the first place, from the public that seemingly should advocate the installation of such a monument. The community was confused by the extremely brief terms of the best design tender, the ill choice of the place for the future monument and worried that the government would try to close the discussion of the topic of repressions by the installation of the monument. But the main question is the same as for the Museum of GULAG – can the government that continues to exercise political repressions install a monument to the victims of repressions?¹⁸

Meanwhile, the tender has been completed, the design chosen, the foundation established that is collecting the public part of the money for the monument.¹⁹ “The memory of the victims of political repressions unites and reconciles the Russian society, reinforces the sense of responsibility for oneself and for the state”, is included in the motto of the new foundation. The new monument is expected in October 2017.

The Russian society has not lived through the experience of parting with the Soviet past. The state feels like the successor of

14 Poll by the Independent Public Opinion Center Levada-Center: <http://www.levada.ru/2017/02/15/lyubov-rossiyan-k-stalinu-dostigla-maksimuma/>

15 Full text of the concept is available at the RF’s Government website: <http://government.ru/media/files/AR59E5d7yB9LddoPH2RSIhQpSCQDERdP.pdf>

16 The text of the Proposals on the Creation of the National Governmental and Public Program “Memorialization of the Victims of the Totalitarian Regime and National Reconciliation” is available under: <http://urokiistorii.ru/1766>

17 A. Vlasik, M. Esipchuk, G. Nepreyenko. This Museum, Perfectly Functioning. Attractive. What is wrong with the new Museum of the GULAG History // <http://www.colta.ru/articles/art/12980>

18 See detailed analysis of the discussion around the new monument in the material by G. Revzin – Memorable History // <http://kommersant.ru/doc/2678868>

19 Memory Fund: <http://memoryfund.ru/>

the USSR, the government includes people who have previously worked in the KGB.

In Russia it is young people and a scarce number of civilians who are engaged in the elaboration of the topic of the totalitarian legacy of the Soviet Union and governmental violence. The discourse of the elaboration of the totalitarian past is related to the experience of the critical comprehension of the nature of power, discussion of the main human rights and liberties. This is exactly why the handling of the past often becomes the basis for critical discussion of the contemporary social problems related to fundamental rights.

The current government suggests two strategies: to keep a silence in respect of repressions or to reconcile with the past. Both ignore the public trauma of the modern society. Instead

of a thorough understanding of what happened to the Russian/Soviet community in the 20th century, they suggest accepting what happened, leaving the history in the past and to move on.

At the same time recent years are distinguished by a tougher political regime, enhanced attacks on civil institutions, including organizations engaged in memorial activity. The Concept of the State Policy on Memorializing the Victims of Political Repressions is implemented under such conditions that Stalin is glorified and Memorial Society is called a “foreign agent” and their work is complicated in every possible way. This makes one think that the modern government is attempting to monopolize the right to talk about repressions and fight against the attempts to speak of the past in an alternative way.

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TIMELINE OF THE MAJOR EVENTS

March 11, 1985	Mikhail Gorbachev took the office of the CC CPSS General Secretary
February 1986	M. Gorbachev declares a policy of glasnost at the 17th Communist Party Congress, which marked the beginning of the restoration of freedom of speech and the mass media as well as the reduction of censorship
June 1988	The 19th CPSS Conference decided on the democratization of the political system and holding competitive elections to the new parliaments of the Soviet Union and the Russian Republic (RSFSR) – the Congress of People’s Deputies
January 16, 1989	The Decree of the Presidium of the Supreme Soviet of the USSR on additional measures to restore justice for the victims of the Stalin period repressions. The verdicts of Stalin-era quasi-judiciary repressive bodies were annulled
January 1989	The Memorial society was founded
March–May 1989	Elections of the USSR People’s Deputies
October 27, 1989	The Constitutional reform in the RSFSR. The Congress of the RSFSR People’s Deputies became the supreme state body elected by the universal, equal, and direct suffrage and secret ballot
February 1990	Foundation of the Democratic Russia Election Bloc
March 14, 1990	Article 6 of the USSR Constitution on the “leading and guiding power” of the Soviet Communist Party in the state and society was changed. A multi-party system was proclaimed
March 1990	The competitive elections of the RSFSR People’s Deputies, Moscow and Leningrad city council deputies were held
May 29, 1990	Boris Yeltsin was elected the chairman of the RSFSR Supreme Soviet
June 12, 1990	The RSFSR Supreme Soviet passed the Declaration of State Sovereignty of the RSFSR
October 9, 1990	The USSR law on public associations legalizing a multi-party system was adopted
March 17, 1991	The Referendum on the preservation of the USSR and holding the election of the RSFSR president
April 26, 1991	The RSFSR law on the rehabilitation of repressed peoples was adopted
June 12, 1991	The first election of the RSFSR president was held. Boris Yeltsin won it. At the same time regional elections were held too, as well as a referendum on restoring the original name of Leningrad
July 20, 1991	President Yeltsin’s decree on the legal prohibition of the activities and influence of the party in governmental bodies, institutions and organizations
August 19–22, 1991	The coup d’etat in the USSR and its failure
August 22, 1991	The replacement of the RSFSR red flag with the Russian historical flag (white-blue-red)
August 23, 1991	Yeltsin suspended the activity of the RSFSR Communist Party
August 24, 1991	President Yeltsin’s decrees on transferring the CPSS and KGB archives to the public archive storage
September 1991	The restoration of the historical names of Leningrad and Sverdlovsk cities
November 6, 1991	The CPSS was prohibited in the territory of Russia
August–December 1991	Dissolution and winding up of KGB
October 18, 1991	The RSFSR law on the rehabilitation of the victims of political repressions was adopted
October 24, 1991	The concept of the RSFSR judicial reform was passed
December 1991	The complete collapse of the USSR and the establishment of Russia as the successor of the USSR in international relations
December 25, 1991	Renaming the RSFSR as the Russian Federation
May–November 1992	The CPSS case in the Russian Constitutional court
March 29, 1993	The failure to impeach President Yeltsin

April 25, 1993	The referendum on confidence in President Yeltsin and the need of early presidential and parliamentary elections
June–July 1993	Constitutional meeting
September 21, 1993	President Yeltsin's decree on the gradual constitutional reform which terminated the activity of the Congress of People's Deputies and the new parliamentary elections to the State Duma were scheduled
September 22, 1993	The Supreme Soviet dismissed President Yeltsin from office
October 3–4, 1993	The armed confrontation between President Yeltsin and the Supreme Soviet in Moscow. The actual dissolution of the Supreme Soviet and arrests of its leaders
October 10, 1993	Opening of the first memorial sign on the former NKVD training area in Butovo, Moscow region
December 12, 1993	The referendum on adopting the draft RF Constitution, elections of the State Duma deputies and members of the Federation Council
February 23, 1994	Newly elected State Duma announced political and economic amnesty applied, in particular, to the participants of the 1991 Coup and the supporters of the Supreme Soviet
December 1994	A war in Chechnya broke out
November 7, 1996	Declaring the day of the October Revolution the Day of Accord and Reconciliation
July 17, 1998	The reburial of the remains of Tsar Nicholas II and his family
July–September 2000	Opening of the memorial complexes in the burial places of killed Polish prisoners of war in Katyń and Mednoye
2001	Opening of the GULAG Museum in Moscow
2004	The transfer of the funding powers for the reparations to the victims of political repressions under the benefits monetization policy
October 29, 2007	The first event of Restoring names in Lubyanskaya square in Moscow
April 2011	The preparation and publication of the program to commemorate the victims of political repressions and reach national reconciliation
2014	The launch of the Final address program
2015	Shutting down the Perm-36 Museum under the pressure of the authorities

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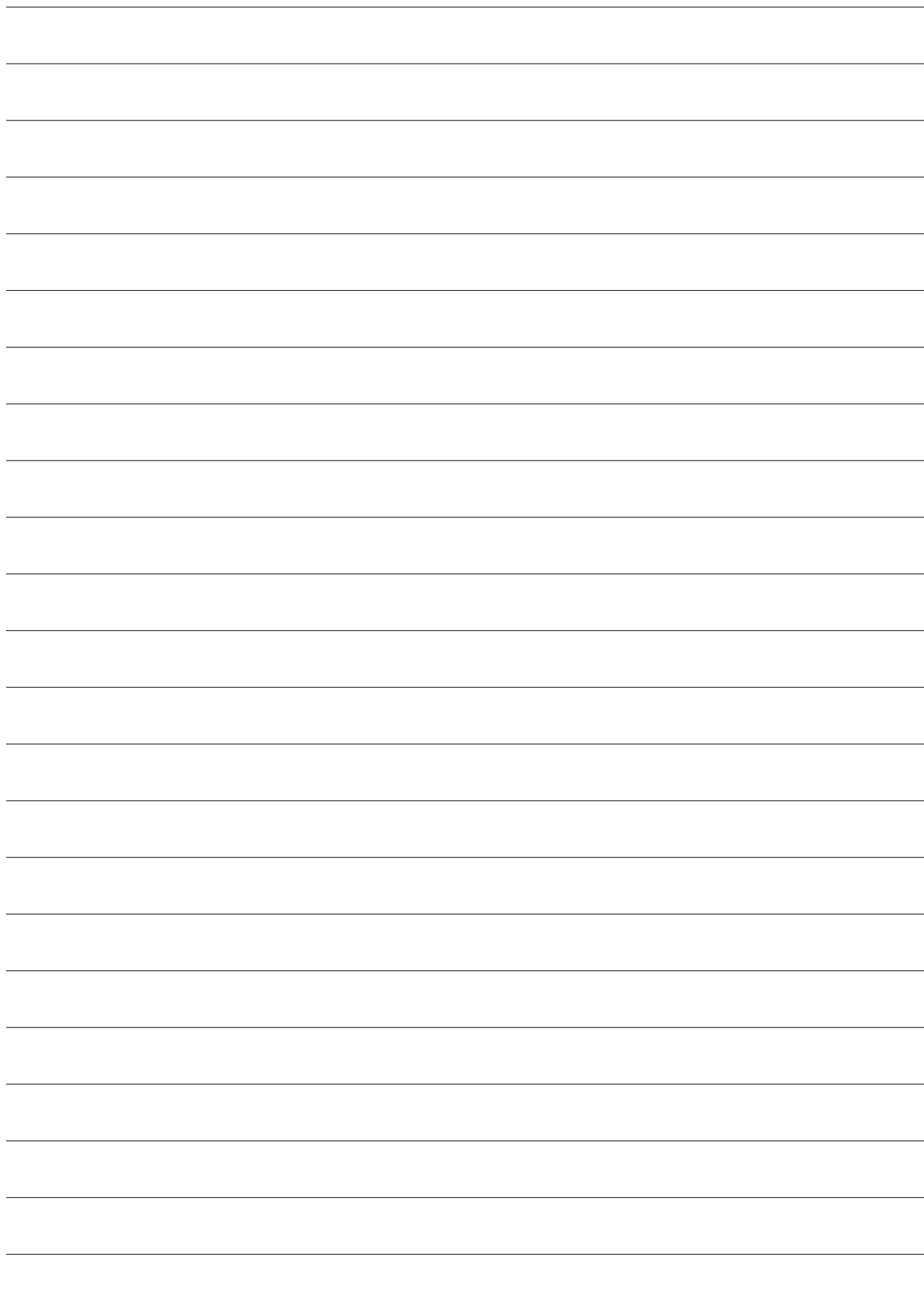
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MEMORY OF NATIONS

Democratic Transition Guide

[The South African Experience]



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AUTHORS

DAVID BRUCE

South African independent researcher specialising in the field of policing, public security, corruption, violence and crime in South and Southern Africa. From 1996 to 2011 worked at the South African Centre for the Study of Violence and Reconciliation (CSVR). He is a visiting research fellow at the School of Governance at the University of the Witwatersrand.

GERALDINE FRIESLAAR

Director of South African History Archive (SAHA). She is also the coordinator of the Struggle for Justice Program at SAHA. Her research and professional interests are the cultivation of critical citizenship and advocacy for social justice through archival activism.

TASNEEM KALLA

An international human rights activist and a Research Fellow at Centre for the Study of Violence and Reconciliation (CSVR).

GUY LAMB

Director of the Safety and Violence Initiative at the University of Cape Town. He has served as an advisor to various South African government departments and has advised the South African Cities Network's Urban Safety Reference Group. In the past he was a Senior Research Fellow and Programme Head at the Institute for Security Studies.

HUGO VAN DER MERWE

Director of Research, Learning and Knowledge at the Centre for the Study of Violence and Reconciliation (CSVR). Editor in Chief of the International Journal of Transitional Justice.

CHRIS SAUNDERS

Emeritus Professor of the University of Cape Town (UCT), where he was Professor in the Department of Historical Studies. He is now attached to the Institute for Democracy, Citizenship and Public Policy in Africa at UCT.

NOBUKHOSI ZULU

Legal practitioner and the former Freedom of Information program manager at the South African History Archive. Her work focused on transitional justices, access to information on apartheid era files and the prosecution of apartheid era crimes.

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TRANSFORMATION OF THE POLITICAL SYSTEM

CHRIS SAUNDERS

INTRODUCTION

The South African political system was transformed in the early 1990s with the introduction of a new constitution and the transfer of power from the National Party (NP) to the African National Congress (ANC). This meant a transition from apartheid to democracy, and from white minority rule to majority rule. As we shall see, the transition occurred through a constitutional process and did not involve the bloody racial civil war that many had predicted. Along with the political transformation, outlined here, went one from a state that had been to some extent excluded from the world economy to one now welcomed by the international community and which sought to be an integral part of the world economy.

The entire process of transformation was extremely complex, and its history and meaning remains contested.

THE APARTHEID SYSTEM

The South African political system that was transformed in the early 1990s was based on apartheid, the idea that racial classification mattered and determined one's political as well as other rights. In its most advanced form, apartheid was the most elaborate system of racial discrimination ever implemented anywhere. A system of racial segregation had developed over centuries, with its roots in the racism of the early settlers from Europe. Apartheid, a more comprehensive form of earlier segregation, began to be introduced by the NP government after it came to power in 1948. At its heart was a system of racial classification and racial ordering that was extended into almost all areas of life. The system began to break down in the mid-1970s and was substantially modified in 1984 with the introduction of a new constitution that provided that those classified Coloured (people of mixed descent) and Indian (people whose forbears came from India) could also participate in central government. The majority of South Africans, those classified as "Bantu" under apartheid, remained excluded from Parliament, which under the Westminster system inherited from Britain could pass whatever legislation it wished.

Black Africans had formed a South African Native National Congress in 1912 to try to win acceptance as citizens of the country but their representations over decades had no effect and instead they progressively lost what limited rights they had possessed when the Union of South Africa was formed in 1910. In the 1950s, responding to the decolonization of tropical Africa, and to try to justify denying black Africans political rights in most of South Africa, the Minister of Native Affairs, Hendrik Verwoerd, who became Prime Minister in 1958, developed the idea that black Africans should be given such rights in small areas of the country. Millions were forcibly resettled in these areas, which became known as the Bantustans. By the late 1980s, four of these had been led by the South African government to self-government and nominal "independence": the Transkei,

Bophuthatswana, Ciskei and Venda. Despite some modifications to apartheid, as the 1990s began, the pillars of apartheid remained in place: the Population Registration Act of 1950, providing for a system of racial classification; the Group Areas Act of 1950, which required residential segregation in urban areas (though it was no longer implemented with any rigour); and the Land Act of 1913, which divided South Africa between areas in which black Africans could own land and the vast majority of the country, in which they could not. As protest against apartheid mounted, its repressive nature became ever more apparent, and the 1980s was its most repressive phase, involving military occupation of townships along with mass detentions and assassinations during successive states of emergency. Yet at the same time a few skillful anti-apartheid judges were able to interpret some apartheid legislation in the interests of human rights.

Throughout the apartheid period, the NP dominated the whites-only political system. In the early 1980s there was a break-away to the right, with the formation of the Conservative Party (CP), which rejected any watering-down of strict apartheid. On the other end of the parliamentary political spectrum, the small Progressive Federal Party was critical of many aspects of apartheid and called for reform. It grew in strength as apartheid came under pressure and was transformed into the Democratic Party (DP) in 1989. In the general election among whites held in September that year, the NP lost support to both the CP and the DP. Though from 1984 there was increasing violence and a break-down of order in some parts of the country, the government retained the support of the security forces and poured vast resources into the police and the army. As the decade of the 1980s ended it was difficult to see how the government could be forced to give up power, for it was not seriously challenged by the armed struggle being waged against it by the exiled ANC.

Opposition to apartheid had taken new forms after the massacre of non-violent protestors at Sharpeville in 1960. Leading members of the ANC and the South African Communist Party (SACP) formed Umkhonto we Sizwe (known as MK; Spear of the Nation) in 1961 to wage an armed struggle, but after a campaign of sabotage the MK leadership was arrested, and Nelson Mandela and others were imprisoned on Robben Island. The ANC's struggle against apartheid was then led from exile, as was one by the rival Pan Africanist Congress. The ANC's close links to the SACP meant it long had difficulty winning support in the West, but by the late 1980s, with the winding down of the global Cold War, it had received significant recognition as the likely successor government in the West as well as in the countries of the so-called Eastern Bloc.

THE BEGININGS OF THE PROCESS OF TRANSFORMATION

It is not easy to say when the process of transformation began. The harsh suppression of the Soweto Uprising of 1976, which spread from Johannesburg to other major centres, brought new

international pressures for change, and in its aftermath the exiled ANC's armed struggle grew in significance, while the NP government began to introduce reforms, including the recognition of black African trade unions and the ending of the system of passes that restricted black African movement. A group within the NP that rejected these reforms broke away to form the far-right Conservative Party. At the same time, resistance to apartheid grew, in the non-violent form of the United Democratic Front, formed in 1983, and then the countrywide Township Revolt that began in 1984. The declaration of a state of emergency brought new international condemnation of apartheid. Some argue, however, that the financial sanctions imposed on South Africa in 1985 by international banks was the most important tipping point. Though they produced a major economic crisis, President P.W. Botha remained unwilling to jettison the major pillars of apartheid or to release Nelson Mandela, now a global icon as South Africa's leading political prisoner, unconditionally. As the 1980s ended, international pressure was building for further sanctions. But the settlement reached in 1988 in the major conflict in southern Angola, providing for the process to begin leading to the independence of South West Africa/Namibia, weakened MK by removing its military bases from Angola, and the Soviet Union now made clear to the ANC that it no longer supported its armed struggle and urged it to negotiate a settlement with the ruling white minority. Oliver Tambo, the President of the ANC, then won the approval of the Organisation of African Unity in August 1989 for a declaration, issued at Harare, Zimbabwe, setting out the conditions for negotiations with the South African regime.

REACTIONS TO A CHANGING SITUATION

1989 was a key year in the process of transformation. After President Botha suffered a stroke, F.W. de Klerk emerged as the new leader of the NP, taking over as President in September, a month after the Harare Declaration. De Klerk almost immediately allowed a major march in Cape Town, led by a leading anti-apartheid figure, Archbishop Desmond Tutu. Then in October De Klerk allowed the release of all the remaining ANC leaders from jail except Mandela, who by then had been allowed a measure of freedom to consult with colleagues on the way forward. A series of talks had been held between leading members of the ANC in exile and white South Africans, and in September a first meeting, held in Switzerland, took place between two ANC leaders and South African government officials. The various informal "talks about talks" helped break down stereotypical views of each other and laid the foundation for formal negotiations by helping to promote understanding between the parties of how a negotiated settlement could be reached. A necessary preliminary to negotiations was liberalisation of the political scene by unbanning the organisations that were prohibited, releasing political prisoners, and allowing the return of exiles, to enable them to participate in the making of the new order. The key breakthrough came after the collapse of the communist regimes in Eastern Europe in late 1989. Influenced by that, and realising that it was in his interests to try to retain control of the process, De Klerk announced in February 1990 that the ANC and other organisations would be unbanned, and Mandela released unconditionally. There then began a process leading to the formal multi-party talks.

Nineteen parties and organisations participated in what was called Convention for a Democratic South Africa (CODESA), held at the World Trade Centre outside Johannesburg, in December 1991.

ESTABLISHING THE NEW SYSTEM

Initially, after Mandela's release, the ANC refused to say that it would end the armed struggle, and it continued to accuse the government of using violence against it, but an agreement that both sides would work for the elimination of violence enabled a series of bilateral talks to begin. At one of these talks, in August 1990, the ANC agreed to suspend its armed struggle, after which, De Klerk lifted the five-year state of emergency. These steps helped make it possible for CODESA to begin. There, De Klerk berated Mandela for not having disbanded MK, to which Mandela replied by accusing the President of using the security forces to destabilise the ANC. Though the multi-party talks ended in November 1993, with an agreement on a new interim constitution for the country, the process to achieve this was by no means straight-forward. In May 1992, the talks broke down, and only a series of compromises enabled them to resume. One of these was the acceptance, by both the government and the ANC, of a Government of National Unity for a five-year period.

On 10 April 1993 Chris Hani, MK chief of staff and Secretary General of the SACP, was assassinated. Two right-wingers were speedily arrested, and Mandela's leadership prevented a descent into chaos; he called for the negotiation process to be speeded up. On 25 June, a group of armed right-wingers broke into the World Trade Centre where the multi-party negotiations were taking place. They were persuaded to retreat, and their intervention led the negotiators to decide to agree to a date for the first democratic elections, April 1994. An interim constitution would come into effect to provide for that election, and the new Parliament, then elected, would also be a Constitutional Assembly tasked to draw up a final constitution within two years. The final constitution had to be in line with a set of Constitutional Principles enumerated in the interim constitution. These proposals went from the unelected multi-party talks to the existing Parliament, which accepted them, providing for constitutional continuity. After the ANC won 62 % of the votes in the April 1994 election, Mandela was sworn in as the first president of a democratic South Africa on 10 May 1994.

In the process of negotiation the NP, representing the white minority, had to abandon its ideas for the protection of group rights. Its hope now was that the protection of individual rights and the provisions for nine provinces, instead of the existing four, might provide a measure of protection for minorities. The Bantustans were incorporated back into South Africa. Though De Klerk told his supporters that he had aimed for, and achieved, a sharing of power; in fact that was only on a temporary basis, with one of the compromises reluctantly accepted by the ANC being a Government of National Unity (GNU) for five years. De Klerk also suggested that what was happening was the extension of democracy, from one for whites, coloureds and Indians, to all South Africans, but that too was highly misleading, for the reality was that there was a transition to a dramatically different political and constitutional order, one based on liberal democratic principles. The whole process gained legitimacy by the fact that

the final constitution was drawn up by a democratically-elected body, which received over two million submissions from members of the public during its drafting.

THE LEGAL AND POLITICAL NATURE OF THE NEW SYSTEM

Besides adopting the idea of the separation of powers, with an independent judiciary at the heart of the new system, both the interim and final constitutions included a justiciable bill of fundamental rights providing, for the first time in the country's history, that all were equal in law, and including safeguards for individual liberty and checks and balances on the abuse of executive power. The final constitution, unlike the interim one, not only enumerated civil and political rights, but also included a set of social and economic rights, such as rights to housing, education, food and water, and stated that the state should, within available resources, work for the progressive realisation of these rights. The Bill of Rights could only be amended by a vote of two-thirds of the National Assembly. New institutions were set up in chapter 9 of the constitution to help monitor the way the constitution was to operate. Of fundamental importance, in the new constitutional order, Parliament was now no longer supreme. Instead the constitution itself was the highest law, and a Constitutional Court of eleven justices was established to adjudicate on whether the legislature was complying with the constitution. The first draft of the final constitution was not accepted by the Constitutional Court and it had to be revised by the Constitutional Assembly before Mandela signed it into law in December 1996. It took effect in February 1997.

With the NP winning 20 % of the vote in the 1994 election, De Klerk became one of the new Deputy Presidents but soon found that he and his party had little power in the GNU, and that the ANC was effectively in control. In 1996 De Klerk took the NP out of the GNU, and not long after the NP disappeared from the political scene. Under Mandela the other Deputy President, Thabo Mbeki, was responsible for much of the day-to-day running of the country, and in 1999 Mbeki succeeded Mandela as President of the Republic, for Mandela had made it clear from the time he was elected that he would only serve one five-year term. The ANC, which still projects itself as the party of the liberation movement that brought freedom to South Africa, remains in power to this day.

LESSONS LEARNT

- South Africa was fortunate to have two great leaders steer the transformation process. De Klerk showed great courage

in taking the decisive steps to make the transformation possible, knowing many of his own supporters and many in the security forces were not in favour of it. He was able to hold the NP together as it underwent a sea-change in policy. Mandela emerged from jail a man of peace who skilfully projected himself as a statesman of integrity and one who championed reconciliation. As the founding commander of MK and because of his own personal sacrifices, he was able to take the majority of his supporters with him as he engaged in compromises with the apartheid rulers. A remarkable group of other leaders also played important roles in the process. A personal friendship that developed between the two chief negotiators, Cyril Ramaphosa for the ANC and Roelf Meyer for the NP, was important in ensuring that the negotiations finally succeeded.

- The two major players, the NP and the ANC, both recognised that there had to be compromises. The transformation began in a situation of stalemate, which made the conflict “ripe for resolution”: the NP government was under immense and increasing internal and international pressure, while the ANC did not possess the means to overthrow the government and come to power. So both accepted that they could not get what they ideally wanted: in the case of the NP, the continuation of white power; in that of the ANC, a transition to unfettered majority rule. The two major parties also had to try to bring other lesser players on board, to achieve as much legitimacy for the new system as possible. Early in the process they agreed that it should be “home-grown” and not initiated or overseen by any international body, though the mission the UN sent to South Africa in 1992 did help bring the parties together again after the negotiation process had broken down.
- Every such transformation is unique and this one had special characteristics deriving from its particular historical context. The transformation was made possible by the fact that increasing internal pressures on apartheid happened to coincide with the winding down, and then the end, of the Cold War. The fear by Western countries that the ANC might come to power under the influence of the SACP and that South Africa might become a socialist state dissipated, and in the new post-Cold War climate the ANC, which had always been a broad church ideologically, was quick to buy into the so-called Washington Consensus and neo-liberal economics.
- Though the political scene was transformed by the mid-1990s, the economic order remained very similar. This, and the elite nature of the transition, helps to explain why, twenty-five years later, South Africa, though now a very different country, is in some ways at least as unequal a country as it was before the end of apartheid.

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DISMANTLING OF THE STATE SECURITY APPARATUS

GUY LAMB

INTRODUCTION

In 1948 the National Party became the ruling party in South Africa. Historians generally regard this political development as the official commencement of the apartheid period, which was to herald the implementation of even more far-reaching racially discriminatory policies and legislation aimed at the comprehensive disenfranchisement and regulation of South Africa's black population. Throughout the apartheid period (1948–1993), opposition and violent resistance to government, principally within black communities, was typically met with an aggressive response from the security forces, especially the South African Police (SAP). From the mid-1980s the South African Defence Force (SADF) was deployed internally in response to an escalation in unrest and violent protests, and regularly used lethal force in this regard.

From the 1960s dynamics within a number of states in the Southern African region became increasingly threatening towards the South African government, particularly in Rhodesia (now Zimbabwe) and South West Africa (SWA) (now Namibia), which was occupied by South Africa at the time. In both territories liberation movements had initiated armed insurgency against the white minority governments, with these liberation movements being sympathetic to the plight of the African National Congress (ANC) and the Pan Africanist Congress (PAC) in South Africa. Southern Africa became an even more unwelcoming place for the apartheid government from the mid 1970s with Angola and Mozambique acquiring independence and subsequently being led by pro-communist governments. In response, the SADF became involved in various regional armed conflicts, especially in Namibia and Angola.

Such responses by the apartheid government were informed by a security-centred form of statecraft widely referred to as “Total Strategy”. This strategy was based on an ideology that a “total [communist] onslaught” was directed against the apartheid state from both inside and outside of the country. Total Strategy entailed the de facto centralisation of high-level decision-making on domestic and foreign policy within the State Security Council (SSC), which was dominated by the security services, particularly the military. A key foreign policy strategy was to use the security forces to destabilise states in Southern Africa that were perceived to be hostile towards the South African government and/or harboured ANC and PAC insurgents.¹

POLICE WORK UNDER APARTHEID

A central feature of apartheid was the methodical criminalisation of the movement of black people who were required to reside in specific (principally rural) areas and could only be present in urban and “Europeans (whites) only” areas if they had an official permit (passbook). SAP members were active in upholding such legislated racial segregation and arrested those black people who

failed to produce such a permit on demand. In fact, considerably more time was taken up with the enforcement of “petty” apartheid criminal codes than was devoted to the prevention and combating of more serious forms of crime.² Police also harassed and imprisoned numerous leaders of anti-government organisations. The SAP also became intricately involved in the forced removals of black populations from land that had been designated for exclusive use by whites, or from areas that had been earmarked to be buffer zones between white and black residential areas.³

Paradoxically, on average, close to half of all the SAP members were black, the majority of which occupied lower ranks of the policing organisation. This was largely due to cost considerations, as black police personnel were paid lower wages than whites. Black South Africans enrolled in the SAP largely due to limited stable employment opportunities, and the relatively better salaries offered by the SAP compared to other government institutions.⁴

There was a distinct difference with respect to the manner in which the SAP policed “ordinary” crime in white residential areas as compared to black townships, with patrolling and responses to calls for assistance being significantly more subdued in the latter. The SAP, which displayed distinct othering towards black populations, surmised that a minimalist approach to policing “ordinary” crime in black townships was appropriate as the SAP's enforcement of petty apartheid laws would mostly keep crime contained within townships.⁵ When necessary, the austere and indirect policing in townships was supplemented with mass crackdowns and curfews by both the police and the military in an attempt to clear-out the more deviant and undesirable elements from these communities through sudden and concentrated enforcements of laws and the mass arrests of suspects.⁶

From the 1980s the SAP also made use of “special constables” who were inexperienced, poorly paid black recruits often drawn from communities with strong support for loyalist vigilante groups, such as Inkatha. They were enrolled in a six-week crash course in basic policing and were then armed with shotguns, batons and *sjamboks* (a type of whip). These special constables were largely unsupervised and often operated with impunity.

1 Gavin Cawthra, *Brutal Force: The Apartheid War Machine*. London: International Defence & Aid Fund for Southern Africa, 1986; Rob Davies, and Dan O'Meara, “Total Strategy in Southern Africa: An Analysis of South African Regional Policy Since 1978”, *Journal of Southern African Studies*, 1985, (11), 2, 183–211; Kenneth W. Grundy, *The Militarization of South African Politics*, Oxford: Oxford University Press, 1988.

2 Andrew Prior, “The South African Police and the Counter-Revolution of 1985–1987”, *Acta Juridica*, 1989, 189–205.

3 John D. Brewer, *Black and Blue. Policing in South Africa*, Oxford: Clarendon Press, 1994.

4 Andrew Prior, *op cit*, 1989.

5 Gavin Cawthra, *Policing in South Africa. The SAP and the Transformation From Apartheid*. London: Zed Books, 1993.

6 John Brewer, *op cit*, 1994; Clive Glaser, “Whistles and Sjamboks: Crime and Policing in Soweto, 1960–1976”, *South African Historical Journal*, 2005 (52), 1, 119–139.

They were also notorious for their brutality, ineptitude, partiality and for abusing their mandate and service firearms to settle personal disputes.⁷

A further SAP strategy in relation to policing black communities was to provide financial and material support to loyalist groups that were predisposed to undermining or attacking organisations within their communities that were opposed to government. This in effect was a form of indirect policing, in which partisan groups were deputised to undertake aspects of geo-racial boundary enforcement. In Natal, for example, during the 1980s the SAP reportedly escorted and permitted Inkatha *impis* (armed vigilante groups) to perpetrate violent acts against communities aligned to the United Democratic Front (UDF)⁸ and the Congress of South African Trade Unions (COSATU). In addition, the SAP even thwarted efforts to prosecute Inkatha members, particularly warlords, who had allegedly been responsible for multiple acts of violence.⁹

SAP typically policed protests in townships at an arm's-length with an arsenal of military-style vehicles and incapacitants (such as tear gas). If required, SAP members would engage in a baton charge and use *sjamboks* on protestors. Lethal force was applied (including live ammunition) in the occasions where protestors breached the SAP notion of a buffer zone, or if the crowd did not adhere to instructions from the police.¹⁰ Such policing tactics often resulted in massacre of protestors, as was the case in Sharpeville (in 1960) and Soweto (in 1976).

Following the 1976 Soweto massacre the SAP became increasingly militarised (Brewer, 1994). Close strategic and operational ties were forged with the SADF, and the operational elements of the SAP were frequently teamed-up with SADF units to patrol high priority border areas, as well as subdue and contain unrest and violent protest action in black townships. In addition, the police were granted extensive search-and-seizure powers. Such developments were also informed by an escalation in acts of sabotage by the ANC's armed wing, Umkhonto we Sizwe (MK). In 1981, for example, there were reportedly more than 90 sabotage acts orchestrated by MK against police stations, railway lines, electricity stations, and military facilities. This was close to a nine-fold annual increase in attacks compared to the period 1977–1980.¹¹

From the mid 1980s elements within the SAP and the SANDF pursued clandestine divide-and-rule strategies in relation to a number of black communities that were perceived to be strong supporters for the ANC, UDF and COSATU. This entailed the formation and support of vigilante/gangster groups (which included the supply of firearms and ammunition) that then sought to unsettle ANC/UDF/COSATU mobilisation efforts in targeted communities. These groups also terrorised and attacked those individuals and communities that were supportive of the ANC/UDF/COSATU.¹² Furthermore, the Truth and Reconciliation Commission (TRC) implicated SAP members in the clandestine support of and/or complicity in attacks by Inkatha-affiliated hostel dwellers against ANC-aligned communities, which resulted in mass killings in the early 1990s. Massacres were perpetrated in the Transvaal province in areas such as in Sebokeng (1990), Swanieville (1991) and Boipatong (1992). Some SAP personnel even planned and directly perpetuated mass killings, as was the case with the 1988 Trust Feed Massacre in the Natal Midlands where UDF activists were assassinated in a SAP orchestrated hit.¹³

By the mid-1980s the SAP was struggling to contain this widespread violence and the destruction of state property in many townships. For the period from September 1984 to May 1990 the SAP reported that they had responded to in excess of 51,000

unrest incidents in which 4,529 people had died and 12,449 had been injured.¹⁴ Various states of emergency were declared (which mostly remained in place until 1990), which allowed the police to arrest and detain (without standing trial) suspected agitators. Between June 1986 and June 1987 the police detained an estimated 29,000 people.¹⁵

THE SOUTH AFRICAN DEFENCE FORCE

Between the early-1970s and the early-1990s, the SADF enjoyed a privileged relationship with the Presidency, both in terms of budget and influence on decision-making. It was unaccountable to Parliament, and its military operations were undertaken in the absence of public scrutiny. It was comprised a permanent force but derived the bulk of its manpower from the compulsory conscription of white men. In the 1980s, it was estimated that, in times of need, the SADF could muster between 400,000 and 500,000 personnel.¹⁶

The SADF was involved in a variety of military activities during the apartheid period, which included: frequent hot pursuit operations into Angola; covert cross-border attacks; material and training support of anti-Communist rebel groups such as the *União Nacional para a Independência Total de Angola* (UNITA) (in Angola) and the *Resistência Nacional de Moçambique* (RENAMO) (in Mozambique); counter-insurgency strategies; destruction of strategic targets in neighbouring countries; and large-scale conventional military campaigns in Angola. The SADF's principal enemies were the ANC; the South West African Peoples' Organisation (SWAPO), the main Namibian liberation movement; and the *Movimento Popular de Libertação de Angola* (MPLA) government in Angola along with its Cuban allies.

The South African government and the SADF perceived their interventions in Angola and other military operations throughout Southern Africa as necessary wars that were part of the West's

7 John Brewer, *op cit*, 1994; Matthew Krentridge, *An Unofficial War: Inside the Conflict in Pietermaritzburg*, Claremont: David Philip, 1990.

8 The UDF was an anti-apartheid movement that drew together hundreds of civil society organisations and religious organisations from across South Africa. It was closely aligned to the ANC.

9 Anthea Jeffery, *The Natal Story: Sixteen Years of Conflict*, Johannesburg: South African Institute of Race Relations, 1997.

10 Janine Rauch and David Storey, *The Policing of Public Gatherings and Demonstrations in South Africa, 1960–1994*. Braamfontein: Centre for the Study of Violence and Reconciliation

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resistance to a perceived Soviet global offensive. The SADF's first major invasion of Angola was through Operation Savannah (1975), which sought to prevent the MPLA from securing power at independence in November 1975. Operation Savannah was unsuccessful and the SADF withdrew in March 1976. The South African military continued to conduct clandestine and overt operations into Angola until the late-1980s. The aim of these operations was to prevent the MPLA government from permitting SWAPO to operate in southern Angola and to install UNITA as the *de facto* government of southern Angola.¹⁷

By the late-1980s, none of the parties involved in the Angolan war were in a position to secure a resounding victory. Furthermore, the SADF military campaign was placing a considerable burden on the South African economy. This resulted in considerable progress towards the conclusion of a peace agreement. The signing of the New York Accords in December 1988 resulted in the SADF withdrawal from Angola and Namibia, but also brought about the implementation of United Nations Resolution 435, which paved the way for Namibia's independence (in March 1990).

From the mid-1980s SADF soldiers were increasingly sent into black townships in an attempt to quell the intensification of violent protests against apartheid rule. Initially, soldiers were deployed to support the work of the police, but during the states of emergency SADF personnel were granted police powers (including the power of arrest, and search-and-seizure) and were often deployed separately from the police. For example, in 1985, more than 35,000 soldiers were dispatched to unrest hot spots. During this period there were numerous reports of SADF members being responsible for human rights abuses.¹⁸

INITIAL POLICE REFORMS

In 1988 the De Witt Commission was established to draw up proposals for the restructuring of the police, but the key recommendations were only effectively initiated during the early 1990s. In this regard, the SAP was reconfigured into five divisions, namely: Crime Combatting and Investigation (CCI), Visible Policing, Internal Stability, Human Resource Management and Support Services.¹⁹

The restructuring process subsequently became framed by the National Peace Accord (NPA), which was signed by government and the principal political groupings in 1991 (including the ANC). This document had a major police component, including a Code of Conduct for SAP members, specifically calling for effective, non-partisan, racially inclusive and more legitimate, community-focused and accountable policing. In addition, SAP members were obliged to "disarm those persons illegally bearing dangerous weapons in any gathering or procession".²⁰ Some analysts have argued that the NPA ultimately laid the foundation for democratic policing and community-oriented policing in the post-apartheid period.²¹

POST-APARTHEID PERIOD REFORMS

THE CREATION OF THE SOUTH AFRICAN POLICE SERVICE (SAPS)

South Africa's Interim Constitution (1993), which was negotiated during the political transition in the early 1990s, required the government to create the South African Police Services (SAPS) by

means of an act of Parliament. Such a police organisation was subsequently established out of the integration of various apartheid-era police bodies, including the Bantustan police forces, as well as the inclusion of some individuals from the armed wings of the ANC and the PAC into the existing SAP structures.²²

South Africa's final Constitution (1996) reframed the police's "internal security" obligation as follows: "maintain public order" and "protect and secure the inhabitants of the Republic and their property".²³ The subsequent SAPS Act (Act no. 68 of 1995) sought to re-engineer the police, and how they related to government structures and how they acted within society. The SAPS were thus required to: "ensure the safety and security" and "uphold and safeguard" the fundamental Constitutional rights of "all persons" in South Africa; "reflect respect for victims of crime and an understanding of their needs"; cooperate with "the communities it serves" to reduce crime; and submit to civilian oversight.²⁴

In essence, the architects of the Constitution and the SAPS Act had envisaged a new police for South Africa that would disregard the internal geo-racial apartheid policing boundaries and police all people with professionalism, compassion and respect, particularly those population groups that had previously been treated with suspicion and fear. Flowing from the new political leaders from the ANC and their civilian policing advisors set about drafting the National Crime Prevention Strategy (NCPS). The strategy was an attempt to "reorganise government" in order to reduce and prevent crime, but emphasised the need for the SAPS to be more efficient and effective.²⁵ This approach was informed by development-centred crime reduction efforts in other countries. The NCPS was an idealistic attempt to fundamentally address the various social and economic determinants of crime and violence in South Africa by means of an extensive, integrated, multi-layered, intergovernmental and public-private partnership enterprise. Many of the principles of the NCPS strategy were also re-emphasised in the 1998 White Paper on Safety and Security.

LIMITED SAPS REFORMS

The SAPS was fashioned amidst considerable political and socio-economic volatility. Intense political violence persisted in many peri-urban and rural areas in KwaZulu-Natal after the 1994 general elections. In addition, criminal violence escalated in most policing areas in South Africa throughout the remainder

17 Annette Seegers, *The Military in the Making of Modern South Africa*. London: IB Tauris, 1996.

18 Laurie Nathan, "Troops in the Townships, 1984–1987", in Jacklyn Cock and Laurie Nathan, (eds.), *War and Society: The Militarisation of South Africa*, Cape Town and Johannesburg: David Philip, 67–78.

19 Janine Rauch, *Deconstructing the South African Police*. Paper presented at the Annual Conference of the Association for Sociology in Southern Africa, Cape Town, 1991.

20 National Peace Accord, 1991, retrieved from <http://www.anc.org.za/show.php?id=3967>

21 (Phiroshaw Camay and Anne J. Gordon, *The National Peace Accord and its Structures*. South Africa Civil Society and Governance Case Study No. 1, 2002.

22 Mark Shaw, *Crime and Policing in Post-Apartheid South Africa. Transforming Under Fire*, London: Hurst & Company, 2001.

23 Republic of South Africa, *Constitution of the Republic of South Africa (Act No. 108 of 1996)*

24 Republic of South Africa, *South African Police Service Act No. 68 of 1995*.

25 Department of Safety and Security, *National Crime Prevention Strategy*, Pretoria: Department of Safety and Security, 1996.

of the 1990s, with high concentrations of such violence being experienced in Gauteng, KwaZulu-Natal and the Western Cape. Cabinet consequently impressed upon the SAPS the necessity to control and combat crime within South Africa as a matter of priority. In addition, the SAPS generally lacked popular legitimacy, particularly in townships.²⁶

During the latter part of the 1990s the ethos and orientation of the SAPS had remained relatively unchanged from the apartheid era (Rauch, 2004). Consequently, the SAPS responded to the radical policy shift that was recommended within the NCPS in a relatively superficial manner.²⁷ The police leadership narrowly interpreted the notion of crime prevention to conform to its tried-and-tested militarised approaches. Within a short space of time the NCPS had become marginalised, and was subsequently supplanted by the SAPS' own National Crime Combatting Strategy (NCCS) (in 2000), in which serious and violent crime was to be eliminated through aggressive policing, and by apprehending and imprisoning criminals.²⁸

The SAPS, however, did embrace some policing approaches that were in-line with more progressive thinking on crime prevention. A key example was that of community-oriented policing. It was seen by the new generation of South African policy makers in the 1990s to be a potential miracle treatment that would instil democratic policing values throughout SAPS, as well as generate legitimacy and grassroots accountability for the police (African National Congress, 1993; Pelser, 1999). In this regard, the SAPS Act (No. 68 of 1995) has required the police to establish Community Policing Forums (CPFs) in all policing areas. CPFs were envisaged to be committees of community members that would be mandated to: Promote communication and cooperation between communities and SAPS; engage in joint problem-solving between civilians and the police; facilitate transparency and accountability of the police; and improve the delivery of police services. Nonetheless, the SAPS modified the notion of community-oriented policing to suit the dominant policing ethos, namely as a means to mobilise and co-opt civilians as auxiliary resources for the business of state policing.²⁹

The SAPS even developed their own brand of community-oriented policing in 2001, which has been referred to as Sector Policing, with the National SAPS Commissioner issuing a Final Draft National Instruction on Sector Policing in 2003. It was a hybrid model that fused together elements of both community policing and problem-oriented policing, and was influenced by the limited British and North American experience in this area.³⁰ The SAPS version was envisioned to be a "practical manifestation" of community policing, that divided policing precincts "into smaller manageable parts", which would be actively patrolled by the same cohort of police in order to: deliver more community-specific, partnership policing; increase response times; and strengthen CPFs.³¹

Sector Policing was to be phased in over the next decade, and by March 2012 it had reportedly been implemented in 1,056 police station areas.³² However, by this point in time, the problem-solving aspects had been de-emphasised with sector policing having been re-interpreted as an "operational" form of visible policing.³³ Since 2000 there have been some studies of Sector Policing that has indicated that there had been some successes in building legitimacy and improving service delivery,³⁴ but other studies have indicated that the effectiveness of sector policing was undermined by scant community involvement and inadequate resources.³⁵

PUBLIC ORDER POLICING IN THE NEW SOUTH AFRICA

Efforts were also made to reform the SAPS approach to the policing of public disorder in an attempt to align this form of policing with the principals of policing in a multiracial democracy. In this regard the SAPS Public Order Policing Unit was established in 1995, which was the merger of the personnel from the former Riot Units and Internal Stability Units from the SAP and the various Bantustan police forces. It was envisaged that the Public Order Policing Unit would pursue a "more soft approach than previous historical methods" to the policing of gatherings, marches and protests, which included the showing of restraint and using force as a last resort.³⁶ Public Order Policing personnel were "re-selected" and underwent training based on international standards of crowd management by Belgian police instructors, which included negotiation skills.³⁷

The 1997 SAPS strategy on the policing of gatherings, protests and crowds called for the establishment of uniform procedures in this regard that were: aligned to the Constitution; community orientated; and efficient and effective. Public Order Policing units were also required to devote a significant amount of their time to supporting crime prevention and crime combatting operations. This strategy was encapsulated within SAPS Standing Order No. 262 (2002), which outlined how the police should act in circumstances where force was required to control collective disorder.³⁸

26 Ibid.

27 The SAP had experimented with the notion of crime prevention in the 1980s, but was narrowly interpreted as a community liaison function and appeared to be part of a "winning-hearts-and-minds" counterinsurgency strategy.

28 Guy Lamb, "Police Militarisation and the 'War on Crime' in South Africa", *Journal of Southern African Studies*, 2018, (44), 5, 933-949.

29 Monique Marks, Clifford Shearing and Jennifer Wood, "Who Should the Police Be? Finding a New Narrative for Community Policing in South Africa", *Police Practice and Research*, 2009, (10), 2, 145-155.

30 Johan Burger, J, *Submission to the Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community in Khayelitsha*, 5 May 2014; Janine Rauch and Bill Dixon, B, "Sector Policing. Origins And Prospects", *Institute for Security Studies Monograph*, 97, 2004.

31 (South African Police Service, 2003, 2013) South African Police Service, *Annual Report of the National Commissioner of the South African Police Service 1 April 2002 to 31 March 2003*, Pretoria: South African Police Service, 2003; South African Police Service, *National Instruction 3 of 2013: Sector Policing*, 2013.

32 (Government Communication and Information System, *South Africa Yearbook 2012/13*, 2013.

33 Johan Burger, 2014, *op cit*.

34 Jonny Steinberg, "Sector Policing on the West Rand. Three Case Studies", *Institute for Security Studies Monograph*, 2004, 110.

35 Dumisani S. Buthelezi, *An Analysis of the Implementation of Sector Policing in Soweto* (Magister Technologiae in Policing), University of South Africa, Pretoria, 2014; Moses Montesh, "Poor Infrastructure as an Inhibiting Factor in the Implementation of Sector Policing at Calcutta Police Station in the Bushbuckridge Local Municipality", *Acta Criminologica*, 2007, (20), 3, 32-45.

36 South African Police Service, *Annual Report of the South African Police Service 1 April 1996 - 31 March 1997*, Pretoria: South African Police Service, 1997, 50.

37 Sean Tait, and Monique Marks, "You Strike a Gathering, You Strike a Rock: Current Debates in the Policing of Public Order in South Africa", *South African Crime Quarterly*, 2011, 38, 15-22; Bilkis Omar, "Crowd Control. Can Our Public Order Police Still Deliver? SA Crime Quarterly", 2006, 15, 7-12.

38 Bilkis Omar, 2006, *op cit*; Ministry of Police, *Policy and Guidelines: Policing of Public Protests, Gatherings and Major Events*, 2013.

During the 2000s, the public order component was rebranded, reoriented and its members re-trained on two occasions. In 2001, following a reported decrease in incidents of public violence, these units were renamed Area Crime Combating Units (ACCUs). Informed by the principles of Sector Policing the ACCUs were regionalised and were assigned an adjusted mandate, namely, to focus on serious and violence crimes. Five years later the ACCUs were further rationalised into Crime Combatting Units (CCUs), which were heavily armed, sported military-style uniforms, and made use of military organisational terms such as “company” and “platoon”.³⁹ These developments have had serious implications for the nature of public order policing in South Africa in the post-apartheid period with SAPS members being regularly implicated in the excessive use of force. A prime example was the 2012 Marikana massacre in which 34 striking miners were fatally shot and 78 were wounded by a large contingent of well-armed police personnel during an unprotected strike. Evidence uncovered by journalists has suggested that some of the deceased had possibly been executed by the police.⁴⁰

DEFENCE TRANSFORMATION IN SOUTH AFRICA

During the 1990s the South African military establishment underwent a large-scale transformation process, not merely in terms of its personnel, but also with respect to its relationship with government, as well as its organisational culture, role and posture. The military was brought under civilian control, as Parliament was given the authority to approve the defence budget and decisions taken by the President to deploy the military. The Parliamentary Joint Standing Committee on Defence was granted powers of investigation and recommendation, and the personnel, logistics and financial functions of the military are closely regulated and subject to independent audit.

A new military structure, the South African National Defence Force (SANDF) was established that is comprised of an army, air force, navy, and health services. Its primary objective is the defence and protection of South Africa, its territorial integrity and its people. Within South Africa, the SANDF has undertaken the following activities: patrolled the borders on a regular basis; supported the SAPS in crime combatting operations; provided assistance to victims of natural disasters, such as floods and fires; provided search and rescue support at sea and in mountainous regions; and patrolled the Kruger National Park to combat wildlife poaching. In addition, SANDF personnel have assisted the Independent Electoral Commission with logistics for voter registration as well as provided support during national and provincial elections. The SANDF has also increasingly become involved in United Nations (UN) and African Union peace support operations in Africa. In August 2019, for example, the SANDF had contributed 1,168 personnel to UN missions.

MILITARY NEGOTIATIONS AND THE CREATION OF THE SANDF

In the early-1990s, parties responsible for negotiating South Africa's future were faced with the problem of how to deal with a variety of armed forces, namely the armed wings of the ANC and PAC (*Umkhonto we Sizwe* – MK and the Azanian People's Liberation Army – APLA), the former homeland armed forces and the SADF, all of which had the potential to destabilise

TABLE 1: CERTIFIED PERSONNEL REGISTER DATA

Armed Force	Number
Statutory forces:	
Former SADF (excluding part-time forces, but including civilians)	90,000
Former TBVC (homeland) defence forces	11,039
Subtotal	101,039
Non-statutory forces:	
MK	28,888
APLA	6,000
Subtotal	34,888
TOTAL	135,927

Source: Motumi and McKenzie (1998)

South Africa. A two-fold strategy was eventually agreed upon. Firstly, a new representative national armed force would be created (the SANDF), which would consist of personnel from all the above-mentioned armed forces. Secondly, thousands of combatants would be demobilised and reintegrated into civilian life.

Between 1993 and 1994, all South African statutory (conventional military formations) and non-statutory (armed wings of liberation movements) forces were required to submit a list of their personnel to a centralised list called the Certified Personnel Register (CPR), which was administered by the South African Department of Defence (DOD). This list was to form the basis of the military integration, as well as the demobilisation and reintegration of targeted ex-combatants. However, MK and APLA experienced challenges in compiling their relevant lists as they had not kept detailed records of their members; many ex-combatants had used pseudonyms during the armed struggle; and MK and APLA experienced difficulties in determining those categories of members that could be defined as “combatants”.⁴¹

The content of the CPR was controversial as thousands of ANC and PAC members who had not been included on the list claimed that they had served in MK or APLA. Consequently, these individuals were not entitled to any financial payments or other benefits, and in effect had to self-demobilize. The final numerical breakdown of the CPR by type of armed force at that time was as follows: *See Table 1*

Following the completion of the CPR, integration of the former combatants into the SANDF was initiated. It consisted of four stages:

- Ex-combatants were regionally mustered and then assembled at specified military bases.
- Ex-combatants then appeared before the placement board that consisted of different armed forces and the British Military

39 Bilkis Omar, “SAPS Costly Restructuring. A Review of Public Order Policing Capacity”, *Institute for Security Studies Monograph*, 2007, 138.

40 Greg Marinovich, “The Murder Fields of Marikana. The Cold Murder Fields of Marikana”, *Daily Maverick*, 8 September 2012

41 Tsepe Motumi, and Penny McKenzie, “After the War: Demobilisation in South Africa”, in Jacklyn Cock and Penny McKenzie, (eds.), *From Defence to Development. Redirecting Military Resources in South Africa*, Cape Town: David Philip, 1998, 181–203.

Assistance Training Team (BMATT). Those without formal military training or sufficient military qualifications did not undergo integration and were released from the military.

- If required, ex-combatants were provided with bridging training and orientation.
- Ex-combatants were placed into different arms of service.⁴²

The official process of integrating personnel into the SANDF began in April 1994. During these negotiations it was decided that the SANDF would include the following numerical breakdown of armed forces: MK-17,000, APLA-6,000, Homeland militaries-10,000 and SADF-85,000. The integration of MK and APLA was however characterised by dissatisfaction over ranks, conditions of service and salaries. Most MK and APLA soldiers received lower salaries and ranks compared to their white SADF counterparts. In addition, former non-statutory soldiers were not initially issued with uniforms, had to endure substandard living conditions, and were not provided with pensions as had been previously promised.⁴³

DEMobilIZATION OF IDENTIFIED EX-COMBATANTS

The official demobilisation process was initiated in April 1995, the aim of which was the voluntary release of ex-combatants (principally from MK and APLA) who were members of the SANDF, but either did not wish to, or were unable (due to physical disability) to serve in the full-time force. It involved the provision of gratuities, which varied according to the number of years of military service, from a minimum of R 12,734 to a maximum of R 40,657. Soldiers undergoing demobilization were also encouraged to participate in two weeks of voluntary counselling and eighteen months of vocational training through the DOD's Service Corps (SC).⁴⁴ It was anticipated that the SC would train close to 22,000 personnel between 1995 and 2001. However, the SC was plagued by various problems, with the primary shortcomings being:

- It was established without effective planning and training programmes were designed without an adequate analysis of existing skills among demobilised soldiers, as well as their career aspirations.
- No systematic labour market analysis was undertaken, which resulted in many trainees acquiring skills with which they could not secure jobs in their place of residence.
- Tensions existed between the SC Head Office, which was administered predominantly by former MK soldiers, and regional offices, which were run by former SADF and TVBC soldiers.
- The maintenance of a military culture within the SC undermined the culture of learning. There were a number of official inquiries into the performance of the SC, all of which found that the SC to have significantly under-performed and to have been ineffective in fulfilling its mandate.⁴⁵

In December 1996, the South African Parliament passed the Demobilisation Act, which extended demobilisation to SANDF members who could not be integrated because of their age, level of education, health, or individuals who chose not to continue in the employment of the military because of dissatisfaction with their rank after placement in the SANDF. It involved the provision of gratuities, which varied according to the number of years of military services. (DOD, 1998). Also in 1996 the Special Pension Act No. 69 of 1996 (which specifically targeted MK and APLA military veterans) was enacted to provide a modest pension to those former combatants were 35 years or

older on the commencement date of the Act, with monthly payments ranging from R 500 to R 5000 depending on the age of the beneficiary.

SANDF POLICY AND INSTITUTIONAL REFORM

DEFENCE POLICY

The Interim Constitution which was enacted in 1993 (which was reworked and amended in 1996), includes a Bill of Rights, stipulates that government should be transparent and accountable to the people of South Africa, and specifies that the South African armed forces should be non-partisan, subject to the control and oversight of an elected civilian authority; and required to perform its functions in accordance with the law. This provided a major impetus for the overhauling of South Africa's defence policy in the post-apartheid period.

The process of re-writing defence policy was characterised by a struggle over the control of drafting process between the Ministry of Defence and the DOD. In 1995, the DOD, presented a draft policy document to the Minister of Defence, Joe Modise, which recommended a series technical reforms. However, this plan did not adequately address organisational culture, as well as race and gender representivity. Modise rejected this document and established a more consultative process involving Parliament, political parties, interest groups. A White Paper on Defence was subsequently drafted, and then ratified by Parliament in 1996.⁴⁶

The White Paper provided the broad policy framework and the principles of defence in a democratic South Africa. The key principles were as follows: security shall be pursued by addressing the social, economic, political and cultural rights and needs of South Africans; the SANDF shall have a defensive posture and orientation, and shall pursue peaceful relations with other states; the SANDF will be a balanced, modern, affordable and technologically advanced military force, capable of executing its tasks effectively and efficiently; the SANDF shall be subordinate and fully accountable to parliament; the SANDF shall develop a non-racial, non-sexist non-discriminatory institutional culture; and the composition of the SANDF shall broadly reflect the composition of South Africa, and as a result affirmative action and equal opportunity programmes shall be introduced.⁴⁷

However, the Defence White Paper was vague in certain sections. No targets, timelines and implementation strategies were presented, and it did not address the critical issues of the SANDF's force design and budget.⁴⁸ Hence it became essential to initiate a more technical follow-on process that would

42 Mafole Mokalobe, *Demobilisation, Reintegration, Rationalisation and Peacebuilding in South Africa*, Unpublished Master of Social Science Degree, University of Cape Town: Department of Political Studies, 2001

43 Creative Associates International. *Tool Category C: Military Measures 7, Integration/Restructuring of Military Forces*, ND.

44 Tsepe Motumi, and Penny Mckenzie, 1998, *op cit*.

45 Mafole Mokalobe, 2001, *op cit*.

46 Laurie Nathan, "The 1996 Defence White Paper: An Agenda for Demilitarisation?" in Jacklyn Cock and Penny McKenzie, (eds.), *From Defence to Development. Redirecting Military Resources in South Africa*, (Cape Town: David Philip, 41-59, 1998.

47 Laurie Nathan, 1998, *op cit*.

48 Gavin Cawthra, "From 'Total Strategy' to 'Human Security': the Making of South Africa's Defence Policy, 1990-1999", *Journal of Peace, Conflict and Military Studies*, 2000, 1, 51-67.

recommend, in detail, the manner in which the SANDF would be transformed. This process became known as the Defence Review, which was a transparent and consultative process, with the Defence Secretariat making an effort to ensure public participation. These developments resulted in the formulation of a substantial document that was approved by Parliament in April 1998. This document included sections on defence posture; roles and functions; force design; regional and international security co-operation; organisation and structure; human resources (particularly strategies to bring about race and gender representivity); land and the environment; as well as defence acquisition management.

INSTITUTIONAL REFORM

Institutions that were geared towards effecting the necessary democratic changes with respect to the military establishment were either strengthened or introduced in post-1994 South Africa. The key organisations were: The Parliamentary Portfolio Committee on Defence and Military Veterans; the Defence Secretariat; the Chief Directorate Equal Opportunities and Affirmative Action (DOD); and the Military Ombudsman.

The South African multi-party Parliamentary Portfolio Committee on Defence and Military Veterans has been the key champion in terms of redrafting defence policy and legislation, as well as an advocate for transformation within the SANDF, and has, since the mid-1990s, this Committee has frequently held the DOD to account in terms of fulfilling its transformation objectives. The Secretary for Defence manages the Defence Secretariat and is the accounting officer of the DOD. He is the principle advisor to the Minister on defence policy, as well as on matters that may be investigated by the Parliamentary Portfolio Committee. The Secretary is responsible for monitoring the Chief of the SANDF's compliance with directives issued by the President or the Minister of Defence.

The Equal Opportunities and Affirmative Action Chief Directorate was established within the DOD, and has advised the Secretary for Defence on equal opportunities and affirmative action policy and plans (and the implementation thereof).

A Military Ombudsman was established in the Office of the Public Protector and reports to Parliament. According to the Defence White Paper, the Military Ombudsman is responsible for monitoring adherence to democratic civil-military relations and investigating complaints against the SANDF by military personnel and members of the public (Republic of South Africa, 1996). As shown in the various annual reports compiled by the Military Ombudsman, over the years, the Military Ombudsman has predominantly dealt with cases related to the conditions of service of serving or former SANDF members. Only a small minority of complaints have been related to complaints against SANDF personnel by members of the public. Of concern was a report by the Ombudsman in 2000 to the Parliamentary Portfolio Committee on Defence that verbal abuse of rank-and-file soldiers was widespread.⁴⁹

One of the major challenges that confronted the SANDF in the 1990s was to transform its race and gender profile. Hence targeted policies and programmes were required. The DOD has sought to implement measures to ensure that the DOD is broadly representative of the South African population, but at the same time ensures that the mission readiness of the SANDF is guaranteed. The key features of this policy are:

- To assist designated groups (particularly Africans and women) to develop their skills and potential, especially in leadership positions;
- To create an environment which values diversity and fosters mutual respect and dignity among all DOD personnel;
- To acknowledge and entrench the right of women to have the opportunity to serve in all ranks and positions, including combat roles;
- To subscribe to the principle of affirmative action as a measure to obtain equal opportunity in the DOD; fast-track identified military members and civilian employees, specifically personnel of the designated groups, who are suitably qualified in order to prepare them for leadership roles; and
- To develop special programmes to suit the specific needs of designated individuals/groups in developing their full potential to empower them to execute their tasks more efficiently.

Special education and training programmes were introduced in the SANDF to standardise procedures following the integration of statutory and non-statutory forces; to facilitate the above-mentioned affirmative action and equal opportunity programme; and upgrade the skills of African personnel and women soldiers. A civic education programme on "Defence in a Democracy" was planned, with the objective of instilling respect amongst military personnel for core democratic values such as respect for human rights, the rule of law, international law, non-partisanship, non-discrimination and civil supremacy over the armed forces.⁵⁰ However, such a programme is yet to materialise.

SANDF: FORCE RESTRUCTURING AND DOWNSIZING

In 1996 the total personnel strength stood at 101,000. However, in terms of the 1998 Defence Review, the ideal personnel strength was set 70,000, and hence a downsizing process was required, which the DOD referred to as "separation". The downsizing of personnel was largely achieved by means of natural attrition (e.g. resignations, retirements, transfers, selective non-renewal of contracts, discharges and death) and voluntary severance packages.⁵¹ The DOD also sought to achieve greater racial and gender representivity within its ranks. The table below provides details on progress that has been made in this regard between 1994 and 2001, where the percentage of African person increased from 37.5 % to 71 % (which is more representative of overall demographics in South Africa). There was also an improvement in terms of the DOD's gender representation during this period as there was a eight per cent increase in the overall number of women employed by the DOD between 1994 and 2011. *See Table 2*

In the late-1990s and early-2000s there were a number of incidents of alleged racial discrimination by white soldiers against their black counterparts. These incidents took the form of unfair punishment, assaults, slurs, discrimination and unfair dismissals. Shooting incidents between members of the SANDF, which were allegedly racially motivated, have also taken place. The most widely publicised incident was in 1999 when a black soldier shot

49 Military Ombudsman, *Report on the State of Military Ombudsman to the Joint Standing Committee on Defence*, 31 October 2000.

50 Laurie Nathan, 1998, *op cit*.

51 Philip Frankel, *Soldiers in a Storm: The Armed Forces in South Africa's Democratic Transition*, Boulder: Westview Press, 2000.

TABLE 2: RACIAL AND GENDER TRANSFORMATION IN THE SANDF

	1994	1996	2011
SANDF personnel (race) %			
African	37.5	54.1	71
Coloured	15.7	11.9	13
Indian	1	0.9	1
White	45.7	33.1	15
SANDF personnel (gender) %			
Male	80.2	82.3	72
Female	19.8	17.7	28

Source: Department of Defence (2011)

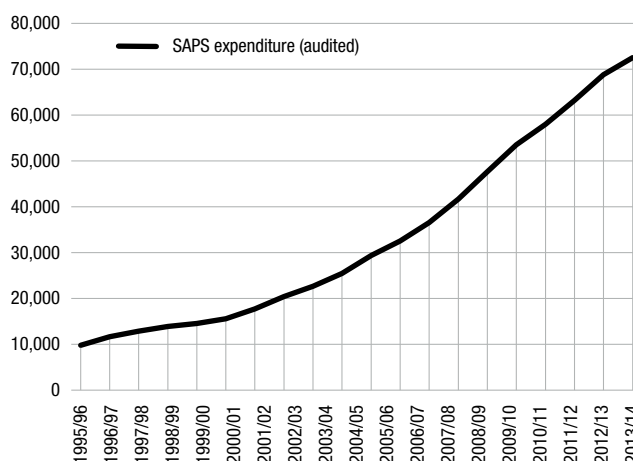
and killed six white colleagues and a white civilian at Tempe military base (Bloemfontein). Other allegedly racially motivated shootings have taken place at the Phalaborwa 7 SA Infantry Battalion, Simon's Town naval base and during the South African peace support operation in Burundi. Following the Tempe shooting, a Ministerial Inquiry was established to determine the causes of the Tempe shooting. According to the final report, the skewed racial representation at the SANDF's management at operational levels fuelled racial tension and contributed to overt racist incidents between white and black members of the SANDF.⁵²

REINTEGRATION OF EX-COMBATANTS INTO CIVILIAN LIFE

Studies on the reintegration of ex-combatants into civilian life indicated that ex-combatants encountered a number of challenges in this regard. Liebenberg and Roefs (2001) undertook a questionnaire-based study of a sample of 307 ex-combatants (of which 66 % of their sample stated that they were from MK or APLA). They found that 37 % of respondents to be unemployed.⁵³ Gear (2002) undertook a qualitative study that was based on interviews and focus group discussions. Gear concluded that many ex-combatants were experiencing major difficulties integrating into civilian life, and perceived themselves to have been "wished away".⁵⁴ The Centre for Conflict Resolution (2003) surveyed a nationally representative sample of 410 MK and APLA ex-combatants and found that 66 % per cent of respondents were unemployed, with most either being dependent on family members to provide them with money, food and shelter, or engaged in *ad hoc* informal sector activities. Approximately a third of the respondents indicated that they suffered from psychological problems.⁵⁵

LESSONS LEARNT

The South African case indicates that considerable democratic reforms in relation to the security apparatus are possible in post-conflict environments. A key aspect of this was an all-inclusive negotiation process that led to the drafting of a new national Constitution. This Constitution necessitated substantial legislative, institutional and policy reforms in terms of both the police and military. A further element of success was the systematic

CHART 1: SAPS EXPENDITURE (AUDITED AMOUNTS IN SOUTH AFRICAN RANDS)

Source: (National Treasury, various years)

integration of individuals from the previously conflicting groups into new security entities.

A key contributing factor to defence transformation in South Africa is that the country has not faced a significant military threat since 1994. Hence, the DOD and the Parliamentary Portfolio Committee on Defence were able to focus on and consolidate defence and security reforms, including effective civilian oversight of the military. However, transformation efforts have been constrained by declining budget allocations for the military over the past two decades, which in turn has had negative consequence for the SANDF's combat readiness as identified in the 2015 Defence Review.

Leadership also played a constructive role in defence reform. The Defence White Paper (1996) and the Defence Review (1998) would not have materialised if it had not been for the commitment of the relevant Cabinet Ministers and Chairpersons of the Parliamentary Defence Portfolio Committee; the diligence of senior members of the Defence Secretariat; and the willingness of the Chief of the SANDF and senior officers to make compromises and actively engage in the policy reform process. In addition, other constructive developments, such as changes to the role and functions of the SANDF, as well as movements towards greater racial equality in the SANDF, would not have been achieved without the necessary leadership.

The South African police did undergo a noticeable transformation process both in terms of democratic oversight and policing orientation. This was also facilitated by progressive leadership, both in terms of the relevant parliamentary committees and senior SAPS officers, combined with the requirement that the SAPS had to regularly engage with community organisations, such as CPFs, in its day-to-day policing activities.

52 Ministerial Committee of Inquiry, *An Analysis of Progress with Transformation in the Defence Force*, Bloemfontein: Ministerial Committee of Inquiry), 2001

53 Ian Liebenberg and Marlene Roefs, "Demobilisation and its Aftermath: Economic Reinsertion of South Africa's Demobilised Military Personnel." *Institute for Security Studies Monograph Series*, 2001, No. 61.

54 Sasha Gear, "Wishing us Away: Challenges Facing Ex-Combatants in the New South Africa", *Violence and Transition Series*, (8), 2002

55 Centre for Conflict Resolution, "Reintegration into Civilian Life: the Case of Former MK and APLA Combatants", *Track Two*, 2003, (12), 2.

However, some elements of apartheid policing remained, especially militarised policing. A key lesson is that policing reforms are especially difficult in contexts characterised by: consistently high levels of crime; low levels of public trust in the police; and a dominant view amongst government decision-makers that forceful approaches to police work is an effective means of reducing crime levels. This approach has resulted in a considerable expansion in the size of the police, as well as in terms of the police budget.

The SAPS, which encompasses close to 50 % of all funded government posts, has consistently received one of the largest allocations of total government spending compared to other departments. This financial allotment has increased considerably every year since 1995/96 (see Chart 1. below). In the 2014/15 financial year SAPS spent R 72.5 billion, which was in excess of 11 % of government spending for that year. For 2015/16 SAPS was allocated R 76.4 billion, which was more than the combined financial resources that had been apportioned to: Health; Basic Education; Trade and Industry; Economic Development; Agriculture, Forestry and Fisheries; Sport and Recreation; and Women.⁵⁶ Sound international research has shown that significant government investment in education, health, and employment creation is likely to result in meaningful long-term violence prevention outcomes. See *Chart 1*

CONCLUSION

During the apartheid period the security apparatus within South Africa was well-resourced and politically influential. The police and military were central to ensuring the perpetuation of a repressive government that sought to protect the interests and privileges of a minority group at the expense of the majority. A negotiated settlement was concluded between the main political groupings following decades of armed conflict that spanned numerous other countries in Southern Africa. A key focal issue during the negotiations was the reform of the both the police and military with aim of ensuring that these institutions would support and protect democratic governance in a “new” South Africa.

Since the elections in 1994 South Africa's security institutions have undergone considerable changes in terms of institutional arrangements, policy and posture. This has been influenced by the absence of a significant military threats to South Africa but has also due to the fact that the ANC, as the ruling party has had a substantial political majority. Such a state of affairs has enabled the South African government to initiate and consolidate reforms within both the police and the military.

56 National Treasury, 2015, *Estimates of National Expenditure 2015*, Pretoria: National Treasury.

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REGIME ARCHIVES

GERALDINE FRIESLAAR, NOBUKHOSI ZULU

INTRODUCTION

25 years after the new democratic dispensation was ushered in, reality has set in with the sobering cognizance that there are limits to the South African “miracle” and its liberation. Burdened with the legacies brought about by the oppressive, discriminatory and violent acts of colonialism, apartheid and resistance, the transformation discourse became a dream deferred. As the effects of these legacies continue to reverberate in post-apartheid South Africa with an increasing socio-economic divide driven by a cocktail of race and class polarisation, an incongruent ruling party and the resultant, often violent forms of protest action, there has been a return to a focus on basic human rights such as land, housing, employment, education and health care.

Never quite central in public debates and collective memory, archives in post-apartheid South Africa are “far from standing as enduring monuments to the past, instead [archives] appear somewhat fragile, eternally subject to the judgement of the society in which they exist. Neither atemporal nor absolute, the meaning they convey may be manipulated, misinterpreted, or suppressed ... [T]he archives of the past are also the mutable creations of the present.”¹ It is precisely for this reason, and in recognizing the impact left behind by colonial and apartheid legacies, one can begin to understand the limitations and challenges that faces the state archival system within the post-apartheid setting.

Historically speaking, South Africa is perhaps best known for its policy of *apartheid* (which translated from the Afrikaans language means apartness). *Apartheid* was informed by separate development of the different racial groups in the country and was the dominant ideology supported by the National Party (NP) which was formally institutionalized in 1948, although the roots of segregationist policies stretch back to the arrival of colonialism, long before the Afrikaner Nationalist Party assumed power. Though the system of apartheid drew on the discriminatory structures inherited from colonialism, the apartheid regime enacted legislation that legitimized, formalized and even normalized segregation, oppression and racial discrimination. The apartheid laws that came into force from 1948 onwards, destroyed, traumatised and displaced individuals, families and communities through forced removals and control over movement, housing, education and employment.

As apartheid reached into almost every aspect of people’s lives through entrenching white minority rule and discriminatory practices that sought to categorize, catalogue and classify its subjects by the use of oppressive, discriminatory and often violent acts of dehumanization and dispossession in the broadest sense, the apartheid regime produced a vast archive of its own activities of repression, control and discrimination.² While the apartheid regime might have been ardent record keepers, access to the records of the state archive were tightly controlled and shrouded in a culture of secrecy which has prevailed well into the present.

APARTHEID’S ARCHIVE

Although traces of archiving in the form of carvings, rock paintings, body scarification and collective stories that were passed from one generation to the next can be found throughout South Africa today, and predates the arrival of European colonialism, it has habitually been ignored.³ The arrival of European colonialism signaled the beginning of formal repositories to manage the resources and administrative challenges of the respective Dutch and British projects of empire building. The most important reason for the development of formal repositories during colonial times was the centrality of the archive in the formation and creation of the nation. Colonial archives were as much products of state machinery as technologies that bolstered the production of those states themselves, as argued by Ann Laura Stoler in her insightful study on nineteenth century Dutch colonial archives.⁴ Taking her argument further, Stoler contended that “[c]olonial archives were both sites of the imaginary and institutions that fashioned histories as they concealed, revealed, and reproduced the power of the state.”⁵

Following these modest pre-national, administrative colonial beginnings, the archival holdings underwent a major development in 1910 with the establishment of the Union of South Africa. The national archives service under the auspices of the Department of the Interior, legislatively came into being in 1922 and was later configured as part of the project of building an Afrikaner nation. The custodial mandate of the newly established State Archives Service (SAS) included the archival records of national and provincial government offices, which was further expanded in 1962 to encompass the archival records of local government offices as well as the records of the former self-governing homelands.

1 Judith M. Panitch, “Liberty, Equality, Posterity? Some Archival Lessons from the Case of the French Revolution”, in *The American Archivist*, 1996, Vol. 59, No. 1, 47.

2 Verne Harris, *Exploring Archives: An Introduction to Archival Ideas and Practice in South Africa*, Pretoria: National Archives of South Africa, 2000, 8.

3 One reason for early traces of archiving being overlooked is that the written record has always enjoyed more privilege at the expense of other modes of communication and recordkeeping such as the oral, visual and other sensory forms. For a discussion on the connections between orality and literacy see Isabel Hofmeyr, “We spend our years as a tale that is told”: *Oral Historical Narrative in a South African Chieftdom*, Johannesburg: Witwatersrand University Press, 1994. Also see Alessandro Portelli, What makes oral history different, in Robert Perks and Alistair Thomson (eds.), *The Oral History Reader*, London: Routledge, 1998 for his argument about the use and function of oral sources in creating meaning, content and form. For a discussion on how visuality has been subordinated to textuality, see Patricia Hayes, Jeremy Silvester and Wolfram Hartmann, Photography, history and memory, in Wolfram Hartmann, Jeremy Silvester and Patricia Hayes (eds.), *The Colonising Camera: Photographs in the making of Namibian History*, Athens: Ohio University Press, 1998, 2.

4 Ann L. Stoler, “Colonial Archives and the Arts of Governance”, in *Archival Science*, 2002, Vol. 2, 98.

5 Ibid., 97; Also read Richard H. Brown and Beth Davis-Brown, “The Making of Memory: The Politics of Archives, Libraries and Museums in the Construction of National Consciousness”, in *History of the Human Sciences*, 1998, Vol. 11, No. 4, 17–32.

Further to its mandate, SAS was also empowered to augment its public archival record holdings with private records. With the institutionalization of apartheid in 1948, and especially after the implementation of the Archives Act in 1962, the SAS was transformed into a formidable system with wide-ranging regulatory powers and “an extraordinary capacity to secure the support of most white South Africans as well as the acquiescence or collaboration of significant sections of the black population.”⁶ In a similar vein as colonialism, the apartheid state also sought to control social memory and the production of knowledge, as well as who had access to knowledge. Focused on legitimizing apartheid rule and building support for their ideology, the apartheid state gave attention to constructing state-funded memory institutions such as archives, museums, libraries and monuments through which they collected and constructed official narratives focused on entrenching a dominant ideology of white minority rule. In particular, apartheid was very successful in reaching into almost every aspect of the lives of the people which it governed by having control over the “racial classification, employment, movement, association, purchase of property, recreation and so on, all were documented by thousands of government offices.”⁷

Apart from the public records generated by the apartheid state, the apartheid archival system also encompassed records of the security police and intelligence services that documented their surveillance activities on especially those in opposition to apartheid. While these records constituted a significant part of the SAS, large quantities of records that documented the struggle against apartheid were confiscated during raids from individuals and organizations opposed to apartheid, as opponents to apartheid also started keeping their own account of the struggle against apartheid. Often forced by the long reach of the apartheid system into informal spaces, liberation movements, solidarity organizations and activists generated a vast record of their activism and resistance work that documented the underground activities and exile experiences of those opposed to apartheid.⁸ This material, considered to be subversive by the apartheid state, would constitute the shadow archives of the liberation struggle and would later be deployed as the antithesis or counter archives to the state archives. These archives would remain in the shadows until apartheid was legislatively dismantled in the early 1990s.

The rigidity of the apartheid bureaucratic structures molded the state archives into an apparatus in the service of the apartheid system as access to the state archives and employment opportunities within the state archives mirrored the enforced apartheid era legislation. The adoption of an apartheid bureaucratic culture, contributed to a skewed representation of historical memory in South Africa as the approach of the state archives to archival practices was informed by an ideology that sought to racially exclude, omit and elide the struggles and experiences of colonialism, segregation and apartheid’s marginalized and oppressed.⁹ It is also significant that in examples where documentation of black experiences or other marginalized voices took place, scant as it may be, this was subject to the subjectivities of white archival professionals.

This situation of apartheid fashioned gaps within historical memory and state imposed public amnesia through censure and restricted access prevailed until the end of apartheid. Through a sustained campaign of resistance punctuated with protests, mass mobilization, sanctions and international solidarity which culminated during the 1980s to fever pitch as

the apartheid state clamped down on its opponents, the National Party realized the need to engage with its opponents as the apartheid system would not be able to sustain the mounting pressure for reform calls. On 2 February 1990, then President F.W. de Klerk made an announcement in which he lifted the ban on political and solidarity organizations such as the Communist Party of South Africa (CPSA), African National Congress (ANC) and the Pan Africanist Congress (PAC), along with other political organizations, as well as the International Defence and Aid Fund (IDAF), an international solidarity organization, and also announced that political exiles would be allowed to return and that all political prisoners would be released from prison. After centuries of colonial oppression and four decades of experiencing the brutal force of apartheid, the revolution did not happen. Instead, apartheid was dismantled through a negotiated settlement between the liberation movement and the apartheid regime.¹⁰

The struggle for liberation in South Africa was a long and bitter battle in more ways than one. It is a fragmented story marked by violence, pain, loss and suffering but equally, it is a story about memory erasure, silencing of oppositional voices, exclusion and marginalization. The remnants that remained bear testimony to a tumultuous, divisive and painful past, some of which the apartheid regime managed to destroy in the last few feverish moments of apartheid in the early 1990s, just as the country was casting off the shackles of apartheid and emerging as a fledgling democracy.

The archive as a site of struggle, contestation and ambiguity, in particular the archives of the apartheid era, and after being shrouded in an imposed state of public amnesia for more than two decades following the democratic transition, has recently become prominent again in public discourse through a renewed call for justice for victims of apartheid era atrocities as the process started by the Truth and Reconciliation Commission (TRC) remains unfinished.¹¹ This prominence, however momentary it may be, has underlined the importance of the records of the state archives to assist in piecing together fragments of history, which is crucial in the process of the reopening of inquests, the prosecution of human rights abuses committed during apartheid and for families to find closure. Problematically, it has also brought into sharp focus the indeterminate and opaque nature of the apartheid era archives in the way it seemingly, resiliently and

6 Verne Harris, *Exploring Archives: An introduction to archival ideas and practice in South Africa*, Pretoria: National Archives of South Africa, 2000, 7.

7 Ibid., 8.

8 For an account of some of the struggle material was generated through the activities of the liberation movements and the support work of solidarity organizations such as the International Defence and Aid Fund see Geraldine Frieslaar, “(Re)collections in the archive: making and remaking the International Defence and Aid Fund (IDAF) archival collection”, Unpublished Ph.D Dissertation, UWC, 2015.

9 Verne Harris, “The Archival Sliver: Power, Memory and Archives in South Africa”, in *Archival Science*, 2002, Vol. 2, 73.

10 For a trajectory of the negotiated settlement see Steven Friedman and Doreen Atkinson, *The Small Miracle: South Africa's Negotiated Settlement*, Randburg: Ravan Press, 1994; Willie Esterhuysen, *Endgame: Secret Talks and the End of Apartheid*, Cape Town: Tafelberg Publishers, 2012.

11 In the Final Report of the TRC, one of the recommendations was that at least 300 cases should be investigated and prosecuted, however only two cases have been prosecuted in the past 15 years. Several family members of victims of human rights violations during apartheid has consistently called for justice and accountability but also equally, to provide them with the right to know in respect of what happened to their family members.

stubbornly remains in the long shadow of the apartheid regime's culture of secrecy as it refuses to be fully laid bare in the present.

THE DESTRUCTION OF RECORDS

The apartheid regime was built on secrecy and lack of transparency and as the pillars of apartheid's architecture started crumbling during the early 1990s, those in opposition to apartheid feared that the regime might just be tempted to destroy public records revealing apartheid secrets and culpability in human rights violations as evidence suggested that the regime routinely destroyed public records during apartheid.¹² Engineered by the apartheid state, and designed in part to withhold perceived sensitive information from the future government under the cloak of the very vague and dubious *Protection of Information Act* (PIA) of 1982, the state undertook a comprehensive sanitization exercise on its archival resources. While this operation involved various departmental structures within the regime, the focus of this large scale destruction of public records, were the records of the security and intelligence arms of the state in particular.¹³ According to the findings of an investigation that was launched by the Truth and Reconciliation Commission (TRC) into the destruction of public records, huge volumes of public records were destroyed between 1990 and 1994 in an attempt to sanitize the official record and keep the secrets of the apartheid state buried.¹⁴

Equally disconcerting, especially when viewed against a background of deliberate practices of memory erasure, the silencing and marginalization of oppositional voices during apartheid through exile, banning, detentions, torture, imprisonment, enforced disappearances and deaths, was the destruction of records that went beyond the repressive activities of the state and included the records of those that were opposed to apartheid. As revealed by the TRC investigation into the destruction of apartheid era records, records encompassing material that were confiscated during raids, collected as evidence against individuals or organizations considered to be enemies of the state, were not spared from being destroyed. Sometimes these records were part of the collateral destruction caused by bombings and other violent acts against those opposed to apartheid, but unfortunately, most of these surviving non-public records that made it into the twilight of apartheid were subsequently also destroyed during the early 1990s in the hope of whitewashing the historical record.

Apart from the widespread destruction of public records whether through intentional destruction or through the confiscation of private records which eventually led to their destruction, it remains to be told how many private records were obliterated from social memory within the rigid conditions of apartheid for fear of imprisonment, torture, harassment and even death. Hindered by a lack of resources, coupled with the state confiscation of material considered to be revolutionary and the possibility that individuals and organizations opposed to apartheid might have destroyed some of their own records in order to combat infiltration and prosecution by the apartheid state, this has resulted in an even more fragmented record of historical memory by the end of apartheid. As Verne Harris, a former archivist at SAS commented in his detailed account of the destruction of public records by the South African state between 1990 to 1994, that "this was a struggle of remembering against forgetting, of oppositional memory fighting a life-and-death struggle against a systematic forgetting engineered by the state".¹⁵

TRANSITION TO DEMOCRACY

With the negotiated transition from apartheid to democracy, the new South African state was shaped around the notion of a unified rainbow nation focused on fostering transformation, reconciliation and nation building as the central tenets of building a democracy. Although the negotiated settlement facilitated a Government of National Unity after the sweeping victory of the ANC in the 1994 general elections, the new democracy tentatively emerged in the post-apartheid setting burdened by the deeply entrenched psychological scars and documentary inheritances left behind by apartheid and colonialism. These sometimes deeply etched traces have left an indelible imprint on South African society as they continue to operate in very pervasive and often subversive ways.

Having inherited the documentary traces of apartheid and colonialism, with which the new South African government had to contend with, the early 1990s, in particular, also saw a proliferation of new archival and memory projects focused on the collection of memories of the hidden, marginalized, exiled and the suppressed archive. Some of them included, the South African History Archive (SAHA), the Mayibuye Centre for History and Culture which was later absorbed into the Robben Island Museum, the District Six Museum, the Gay and Lesbian Archives (established as a special project of SAHA but later became an independent project) and the National Heritage and Cultural Studies Centre (NAHECS) at the University of Fort Hare (UFH). Conceived as one of the ways in which to redress "apartheid-fashioned gaps in social memory",¹⁶ the creation of these counter archives and the augmentation of existing collecting institutions with anti-apartheid and liberation struggle material were about "bringing the hidden, the marginalized, the exiled, the 'other' archive, into the 'mainstream'".¹⁷ In addition, these institutions also played a key role in

12 Although it is not clear when a policy on record destruction was implemented, it certainly came into effect in 1978, when "all government departments received guidelines for the protection of classified information, signed by the Prime Minister and empowering department heads to authorize destruction outside the ambit of the Archives Act". See Verne Harris, "They Should Have Destroyed More: The Destruction of Public Records by the South African State in the Final Years of Apartheid, 1990-1994", in *Transformation*, 2000, Vol. 42, 4.

13 It is estimated that the National Intelligence Service headquarters destroyed 44 tons of paper-based and microfilm records in a 6-8 month period during 1993. See Verne Harris, "They Should Have Destroyed More: The Destruction of Public Records by the South African State in the Final Years of Apartheid, 1990-1994", in *Transformation*, 2000, Vol. 42, 7.

14 Verne Harris, "The Archival Sliver: Power, Memory and Archives in South Africa", in *Archival Science*, 2002, Vol. 2, 64; Also see Harris, *Exploring Archives*, 9.

15 Verne Harris, "They Should Have Destroyed More: The Destruction of Public Records by the South African State in the Final Years of Apartheid, 1990-1994", in *Transformation*, 2000, Vol. 42, 13.

16 Verne Harris, *Exploring Archives: An Introduction to Archival Ideas and Practice in South Africa*, Pretoria: National Archives of South Africa, 2000, 11.

17 Ibid. During the early 1990s a number of strategies were employed such as publications and exhibitions as a means of bringing the hidden, lost and exiled archive into the mainstream. Emblematic of this endeavour, was an exhibition curated by Gordon Metz, who at the time was the curator of visual collections at the Mayibuye Centre for History and Culture in 1994. The exhibition was entitled "Margins to Mainstream: Lost South African Photographers" and featured the "lost" work of Ernest Cole, Bob Gosani, Willie de Klerk, Ranjith Kally, Leon Levson and Eli Weinberg. For a further discussion on the "Margins to Mainstream" exhibition see Gary Minkley and Ciraj Rassool, "Photography with a difference: Leon Levson's camera studies and photographic exhibitions of native life in South Africa, 1947-1950", in *Kronos*, November 2005, Vol. 31, 186.

the transformation discourse that emerged alongside the political transformation that South Africa was undergoing both by leading discussions in heritage transformation and through their archival practices premised on activism and social justice.

Repatriated from exile, and consisting of the material of previously banned organizations as well as the records of various international solidarity organizations, and those of activists who fought in the struggle against apartheid, anti-apartheid struggle and liberation struggle related materials were unceremoniously thrust into a national process of heritage and archival transformation in the service of promoting the principles of democracy and reconciliation. Highly controversial because of its enduring contemporary significance and mired in continued secrecy as a consequence of the conditions in which they were constituted, these archives have been at the forefront of intense debates regarding issues of ownership, commodification, competition, marginalization, silencing and collective amnesia.

Constitutive of the “hidden, exiled or counter” archives of the struggle against apartheid, these archives were formally positioned in opposition to the state archives through the emergence of a transformation discourse during the early 1990s. A discourse on transformation, especially one that speaks to issues of memory, education and culture can be traced back to as far as the 1970s, with the emergence of resistance art and literature and the conceptualization of a people’s education during the 1980s as a means of countering apartheid. Crafting a prestigious position within a changing political landscape whose agenda, amongst other things, was concerned with the remembering, recuperating and the rewriting of history, the records of the liberation movements, solidarity organizations and records from anti-apartheid activists that documented different aspects of the liberation struggle, coalesced around a transformation discourse, informed by the assumption that archives in South Africa required a reimagining or a refiguring.¹⁸

Building upon these projects of memory construction and oppositional historiography which emerged from the 1970s, the transformation discourse of the 1990s was primarily informed by the need for reconciliation, redress and equality. Reflecting on this period, Verne Harris noted that the transformation discourse in archives was constructed “around a commitment to redressing inherited balances and rectifying the exclusions of the past.”¹⁹ According to Harris, the impetus of the construction of a transformation discourse around archives was to take the archives to the people.²⁰ However, as Harris thoughtfully observed, “[t]he nature of the transition to democracy meant that there would be no dramatic dismantling and reconstruction of the apartheid archival system. Rather, the new would be built out of the old through a process of transformation.”²¹

Emphasizing the tension and challenges this created for archives, Helena Pohlandt-McCormick argued:

Not surprisingly, the years since 1994 have seen South Africa emerge as a complex and conflicted nation, burdened still with the legacy of apartheid and resistance ... The destruction of historical archives and the concealment or exclusions of materials must be included in the repertoire of the state’s efforts to change what was known and remembered of South Africa’s past. Less visible, but no less dangerous, are complex patterns of behaviour (habits of secrecy, control, dissimulation, accountability or lack thereof) that have as much to do with apartheid bureaucracies as with resistance politics, most of all in the way

they replicate each other. A new culture of remembering and accountability brings new evidence and historical understanding into the open, but it also brings new challenges.²²

Although there was a fervent desire to redefine archives during the 1990s, this reimagining had to occur within the constraints posed by an inherited bureaucratic system built upon the injustices and inequality of apartheid as well as the confines of a reconciliation narrative as set out by the agenda of a new democracy in the making.

It is against this background that the *National Archives of South Africa Act* came into being in 1996, which usurped the SAS and established the National Archives in response to the shifting political changes and the need for transformation within the national archival system. As newly established and reconstituted archival and memory projects were positioning themselves in respect of assuming possession of the counter archives, the National Archives had to work harder to establish their credibility in respect of representation, access and active documenters. Central to transforming the national archival system were issues of representation within the public service that had been at the forefront since 1994, and which have seen changes brought about through the application of affirmative action policies in the recruitment of archivists in the National Archives. Parallel to the transformation of the national archival system, was the question of transparency and accountability and the degree to which public records should be made accessible to the public while also taking into account the interests of the state in safeguarding sensitive national issues.

In balancing the interest of the state with the responsibility of providing access of public records to the public, the *Promotion of Access to Information Act* (2000), also known as PAIA was passed which gives effect to the constitutional right of access to information held by public and private bodies as outlined in the South African Constitution.²³ However, as Veronique Riouful

18 In post-apartheid South Africa, the debate on the archive was made explicit with the publishing of *Refiguring the Archive*, which was the outcome of a project that focused on a series of thirteen seminars hosted in 1998 by the University of the Witwatersrand’s Graduate School for the Humanities and Social Sciences. Constituted around a visit by Jacques Derrida to South Africa, the *Refiguring the Archive* project was conceived as an idea to address and interrogate urgent questions posed to the archive that followed in the wake of the work of the Truth and Reconciliation Commission (TRC) and the transformation of institutions in South Africa after 1994. In their interrogation of the archive, the contributors to the volume *Refiguring the Archive* proposed a (re)figuring of the archive by investigating the ethnographies and histories of archives, the way in which institutions such as archives are implicated in creating a particular vision of society and, very significantly, to understand the conditions and processes of the record. See Carolyn Hamilton, Verne Harris, Michele Pickover, Graeme Reid, Razia Saleh, Jane Taylor (eds.), *Refiguring the Archive*, Cape Town: David Philip, 2002, 7–16.

19 Verne Harris, “Seeing (in) Blindness: South Africa, Archives and Passion for Justice”, in *Archifacts*, 2001, 5.

20 Harris, *Exploring Archives*, 5.

21 *Ibid.*, 10.

22 Helena Pohlandt-McCormick, In good hands: Researching the 1976 Soweto Uprising in the State Archives of South Africa, in Antoinette Burton (ed.), *Archive Stories: Facts, Fictions and the Writing of History*, Durham: Duke University Press, 2005, 319–320.

23 Section 32(1) of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution), provides that everyone has the right of access to records or/and information held by the state and any information held by another person and that is required for the exercise or protection of any rights.

and others have argued, the new democratic dispensation of 1994 brought its own conditions in which to reshape representations of South Africa as a country “promoting democratization, fostering reconciliation and national unity,”²⁴ through which South Africa was represented within the lens of as a reconciled and unified rainbow nation. Drawing on Riouful’s argument of the positive and universalist terms in which South Africa was recast in order “to fit the new political situation and to foster cohesion,”²⁵ it can be argued that in the project of recasting South Africa as a unified nation, it necessarily involved the silencing, forgetting or marginalization of certain voices and narratives. In his reflections on the relationship between the archive and the making of the nation state, Kwame Anthony Appiah made a similar argument in which he noted that, “[n]ational history is a question of what we choose to remember, not just in the sense of which facts we use for our public purposes, but equally in the sense that we choose which facts actually count as ours.”²⁶

DECLASSIFICATION AND OPENING UP OF THE ARCHIVES

The widespread destruction of records and the entrenchment of an apartheid culture built on secrecy within the national archival system, which was further shaped by the compromises reached as a result of the negotiated settlement between the apartheid regime and the liberation movements, impacted heavily on the work of transitional justice and truth recovery. Promulgated by the *Promotion of National Unity and Reconciliation, Act 34 of 1995*, the Truth and Reconciliation Commission (TRC), was established and tasked with the responsibility to investigate apartheid’s atrocities through public participation and transparency, granting amnesty to perpetrators, in line with full disclosure by amnesty applicants, providing victims with some form of reparation and making recommendations to the President in order to prevent any future recurrence of systematic violations of human rights. Though the South African TRC has been internationally recognized for its work in assisting the country to deal with issues of the past, the TRC has not been without its critics, especially when it is compounded by the structural inequalities inherited by the previous regime that continue to prevail in post-apartheid South Africa. The memory work that had begun with the TRC has been plagued by a persistent lack of political will, apartheid fatigue, and has been recently revealed, even political interference but all too often, there is the sense of rather leaving the skeletons in the closet where it cannot stir up trouble in the present.²⁷

Pointing to the decisive role that the archive plays in the formation and the subsequent safeguarding of the nation and the state, Jacques Derrida argued that, “[t]here is no political power without control of the archive, if not memory. Effective democratization can always be measured by this essential criterion: the participation in and access to the archive, its constitution, and its interpretation.”²⁸ But how successful has this been? One of the recommendations of the TRC was to protect and make readily accessible to all South Africans the “national asset” that is the records of the TRC archive. In line with this recommendation, the South African History Archive (SAHA), an independent activist archive based at Constitution Hill in Johannesburg, has demonstrated a longstanding interest in making the work and records of, and surrounding, the South African TRC more widely

available, often in the face of little state engagement in continuing the reconciliation agenda begun by the TRC.

One example of the work SAHA has undertaken in making the TRC archive, in its broadest sense, more readily accessible was the development of the SAHA/ SABC Truth Commission Special Report multimedia player and website, an interactive tool built around the 87-part Truth Commission Special Report television series.²⁹ Beyond this initiative, and since the inception of SAHA’s Freedom of Information Programme (FOIP) in 2001, SAHA have made over 2000 requests utilizing PAIA on behalf of individuals and communities, researchers, authors, academics, community based organisations, social movements, and other non-governmental organisations and coalitions in the public interest.

Despite, the necessity for transparency and accountability required within the democratic transition, transformation in respect of providing access to public records has been painfully slow as the new government inherited the apartheid regime’s “organizational culture of clandestine, unaccountable and covert activity.”³⁰ In SAHA’s experience of having submitted PAIA requests for access to TRC records, the state has repeatedly attempted to block access to the TRC archives, which, all too often, has resulted in unnecessarily lengthy, hostile and litigious engagements. SAHA has secured several favourable settlements, forcing government departments to hand over TRC records they had previously refused to disclose and, in some instances, had denied even existed. However, because of these last minute out-of-court settlements, no legal precedents have been set around access to the TRC archive, enabling government departments to continue using such blocking tactics. Furthermore, going to court is expensive and time-consuming and should not be the primary mechanism to gain access to TRC records. It is ironic to consider that, as stated in its preamble, PAIA had, in part, been enacted to counteract “the secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations” in the apartheid era.

To date the records of various pre- and post-1994 Government departments are neither kept at, nor do they fall under the oversight of the National Archive. In fact, as it currently stands the process of concealing of records as classified is of grave concern as it is not a transparent process and is antithetical to the principles of openness enshrined in PAIA. State organs can easily declare information in their archives to be protected on the basis of national security, and challenging such

24 Veronique Riouful, “Behind Telling: Post-apartheid Representations of Robben Island’s Past”, in *Kronos*, August 2000, Vol. 26, 22.

25 Ibid., 26.

26 Kwame Anthony Appiah, *Identity, Politics and the Archive*, in Xolela Mangcu (ed.), *Becoming Worthy Ancestors: Archive, Public Deliberation and Identity in South Africa*, Johannesburg: Wits University Press, 2011, 106.

27 Greg Nicolson, “NPA allowed manipulation of criminal justice system in TRC cases”, in *Daily Maverick*, 4 June 2019, <https://www.dailymaverick.co.za/article/2019-06-04-npa-allowed-manipulation-of-criminal-justice-system-in-trc-cases/>

28 Jacques Derrida, *Archive Fever: A Freudian Impression*, translated by E. Prenowitz, Chicago and London: University of Chicago Press, 1995, 4, note 1.

29 See <http://sabctr.saha.org.za>

30 Graeme Simpson, “A Brief Evaluation of South Africa’s Truth and Reconciliation Commission: Some lessons for societies in transition”, Paper written prior to the publication of the TRC’s Final Report, October 1998, <https://www.csvr.org.za/index.php/publications/1724-a-brief-evaluation-of-south-africas-truth-and-reconciliation-commission-some-lessons-for-societies-in-transition.html>

a classification is a difficult task. This is because the information required to prove that the records should be public record is the very information that has been declared as classified. The legislation in respect of state security is yet to be passed effectively. This applies particularly to the records of the former state security structures such as security police, intelligence, defence, and the former homelands. Therefore, identifying their locations and extent is essential. Many of these records have been classified and therefore they remain unknown and inaccessible to the public. Other factors contributing to the challenges of accessing the records of the state are the result of mismanagement in government archives, general poor resourcing of state archives, skills shortage and lack of professional commitment in the national, provincial and municipal archives.

In 2011, after much uproar, the proposed Protection of State Information Bill, commonly referred to as the Secrecy Bill, was placed on hold to allow for further consideration. The Bill was of great concern to archival work involving right to truth and access to information. The Bill failed to accurately convey how information was classified as “secretive”, as well as allowing blanket categorization of whole groups of information as classified without individually considering each record. The Bill also attempted to usurp the position of PAIA as the key legislation in respect of access to information. PAIA states that in relation to other legislation, it holds supremacy and is the primary mechanism through which an individual can attempt to access information.³¹ Although the Bill was shelved, it demonstrated the thinking of the government around the classification of documents and granting public access to sensitive documents.³²

For the records that are available in the archives, access is not automatic. Individuals are required under PAIA to make a request to gain access to the records. PAIA prescribes how the form should appear and the processes to be followed to access records that are held by the state or a private body. The condition of the national archival system is in a state of crisis and not conducive to promoting access to information. Despite the fact that the law mandates that records must be created and kept in a manner that promotes access to information, this has not been the case. The failure to keep archives in a fashion that is organised and easily accessible makes it difficult for organizations and individuals that make PAIA applications to access records in a suitable manner.

In order to access the records held in state archives, individuals and organisations have often been forced to use more creative ways than just merely submitting a PAIA request and trusting that the records will be released.³³ Whilst the provisions of PAIA are very clear about the responsibility of the state to respond to requests on time, allowing the archivists time to sift through large quantities of records and providing them with greater scope, has proved necessary in ensuring that records released. As a result of the resources that have incrementally shrunk over the years, requests are rarely responded to on time.³⁴ PAIA has specific provisions that dictate specific time frames that must be adhered to in the process of releasing information. Ideally records should be released as per the submitted PAIA requests, but in some instances the archives such as the South African Police Archives and the National Archives have opened up their doors and allowed researchers to go through their records on their own.³⁵

A limitation that exists in the use of PAIA is the requirement that the requested items must be specifically identified. Although PAIA is intended to be used by the general public in accessing

records, an individual requester might not know the exact location and description of the record. This reason could result in a finding that “the work involved in processing (the request) would substantially and unreasonably the resources of the public body”³⁶ and therefore the request can be denied by the information officer. With the complex manner in which the archives are in, there are instances where an ordinary individual would not know where in the archives records are held. It has been the experience of SAHA that a series of PAIA requests need to be sent before records are correctly identified and the PAIA request is responded to.³⁷ The process is long for the expert archivists, and is naturally more cumbersome for the ordinary citizens. PAIA does however have provisions under section 19 that instruct an information officer to offer assistance to individuals who make requests and require help in clarifying their requests.

In addition to negotiating and being flexible on legislative requirements, the most effective tool to gaining access to records that are held by state archives has been the use of litigation. The mechanism of PAIA is such that once an appeal to the minister in charge of the department from whom records are sought has made a decision to deny the request for records the only available option is through the courts. SAHA has extensive experience in using the courts to gain access to public records held in the State archives. The most significant of these cases is the Section 29 Hearings, which saw the records of the hearings that were held in camera during apartheid released as well as the records from the Department of Defence that revealed the depths of corruption pertaining to the arms deals during

31 PAIA, Section 5 provides “This Act applies to the exclusion of any provision of other legislation that- (a) prohibits or restricts the disclosure of a record of a public body or private body; and (b) is materially inconsistent with an object, or a specific provision, of this Act”.

32 Pierre De Vos, “Secrecy Bill Less About Media Freedom, More About National Security State”, in *Constitutionally Speaking*, 21. 1. 2012, <https://constitutionallyspeaking.co.za/secrecy-bill-less-about-media-freedom-more-about-national-security-state/>

33 In one example was the manner in which SAHA worked with the Department of Defence to access from their archives records that concerning the treatment of LGBTQ+ members of the military during apartheid. It came to light during the TRC hearings that the military during apartheid used torturous and inhumane treatments to “treat” homosexuality. For a more detailed discussion on how these records were eventually accessed see Laura Pollecut, *Unlocking South Africa’s Military Archives*, in Kate Allen, ed, *Paper Wars: Access to Information In South Africa*, Wits University Press, 2009, 122–142.

34 The South African History Archive has expert knowledge on using PAIA as a means to access information in archives. For a deeper analysis on the challenges that around the compliance to PAIA see Nobukhosi Zulu and Yewande Adeleke, “There’s many an obstacle in exercising our right of access to information”, in the *Daily Maverick*, 4. 10. 2018, <https://www.dailymaverick.co.za/article/2018-10-04-theres-many-an-obstacle-in-exercising-our-right-of-access-to-information/>

35 For a report on the experience of visiting the SAPS Archive and the condition of the archive see http://www.saha.org.za/news/2019/February/saps_archival_visit.htm

36 PAIA section 45 states that “The information officer of a public body may refuse a request for access to a record of the body if- (a) the request is manifestly frivolous or vexatious; or (b) the work involved in processing the request would substantially and unreasonably divert the resources of the public body”.

37 In the SAHA v. SARB matter, PAIA requests were first sent in 2014 but they were considered too broad, and the final request was eventually narrowed down after extensive consultation. That case is currently on appeal and on the papers, a definition of what constitutes a frivolous and vexatious application will hopefully be defined by the courts. See http://www.saha.org.za/news/2018/March/court_strikes_a_blow_against_transparency.htm

apartheid.³⁸ The process of litigation is a cumbersome one that requires extensive resources and takes many years for matters to be finalised. In the meantime, requested records are at risk of being mishandled and destroyed. Litigation is an unsustainable and unattainable for the greater majority of the population. So, whilst theoretically archives are meant to be accessible to the public, this not the reality.

DEALING WITH INDIVIDUAL RIGHTS AND PROTECTION OF INFORMATION

In 2013 the president signed into office the progressive and necessary *Protection of Personal Information Act* (POPIA) into law. The purpose of the law is to “... promote the protection of personal information processed by public and private bodies; to introduce information protection principles so as to establish minimum requirements for the processing of personal information.”³⁹ However, the drafters of POPIA failed to take into consideration the right manner in which this law would affect archives and access to archives.

POPIA places a heavy burden on archives in so far as it relates to the processing of materials that are received and processed by archives. POPIA specifies that information of a personal nature must be collected from the relevant affected individual, except for situations where that collection falls under a listed exception,⁴⁰ of which archives is not specifically listed. The difficulty with this section is that organisations dealing with archives receive records from donors who gather information about individuals. This means that for each collection, an archival organisation has to establish that the collection constitutes a legitimate interest to the archive. In theory, this involves testing each record individually for any personal information contained therein. Once an archive has established that a collection is legally acceptable, only then may it process the personal information. In order to store the information in the archival collection, the consent of the individual whose personal information it is, must be obtained, or the archive has to establish that it is pursuing a legitimate interest.

The resource-intensive nature of these requirements is likely to have a crippling effect on archival institutions in a sector that is already under-resourced and struggling to meet the demands of national heritage, serving another blow to the preservation of South Africa's heritage. A further concern is that the POPIA requires institutions in possession of personal information to take steps to ensure that the personal information is complete, accurate, not misleading and updated where necessary. It is the nature of archive that the records contained therein represent views, opinions or perceptions fixed in a particular moment. It is not appropriate to amend archival records because the information contained therein is later found to be inaccurate or incomplete. This creates an onerous burden on the archive and has the ability the greatly discourage public access to archival records.⁴¹ So, whilst the protection of personal information is an admirable goal, the unintended consequences for archives are regrettable.

LESSONS LEARNT

The *Archives Act* of 1996 held much promise, as was articulated by its optimistic and bold agenda, but this promise has not been realised as the initial energy and optimism around transformation

waned in the absence of adequate resources, funding and a lack of understanding of the work of archives. According to a recent report prepared by the UCT-based archive, heritage information and promotion agency, Archival Platform, “the optimism that marked the 1990s crumbled away as resources failed to materialise, backlogs in processing archives and records grew to unmanageable levels, training and opportunities for professional advancement became limited ...”⁴²

In 2019, the vision of archives in the future seems dismal and unsettling, at best, beset as archives were with epistemic and political uncertainties in the present. The crisis in which the national archival system found themselves in was already flagged as early as 2007 in “Archives at the Crossroads: Open Report to the Minister of Arts and Culture” following deliberations of the conference, “National System, Public Interest” that considered the dismal state of archives in South Africa. The “Open Report to the Minister of Arts and Culture” argued that the significance of archives is, for the most part, unacknowledged and concluded that the danger herein lies in the creation of an inadequate and strained archival system that is plagued by protracted under-funding and poor service delivery.⁴³ The stark reality is that after 25 years of transformation processes that were informed by the promissory note of democratic change, archives are still under siege from both within and from outside the archival realm. In their report, Archival Platform argued that “[m]uch good work was done systematically through the 1990s, but the hopes of that period have not been realised. Today the national archival system is in trouble. Good work is being done only in isolated pockets. There is no overarching policy framework for archives beyond that implicit in national and provincial legislation. The vision of the 1990s has evaporated. Chronic underfunding and a lack of resources is ubiquitous. The political will to change things is largely absent. The system, simply put is not delivering.”⁴⁴

Slightly predating this report of Archival Platform, Carolyn Hamilton attributed the crisis facing the national archival system to a combination of fractures, uncertainties, changes and ambiguities around archival inheritances of the colonial and apartheid periods. According to Hamilton, “[t]he neglect of the official archival institutions also speaks to contemporary epistemic and political uncertainties, ambiguities and contradictions surrounding the formal archival inheritance and the many forms of material

38 The records that were released were released from the DOD contributed extensively to a book that details the corruption of the apartheid government. See Hennie Van Vuuren, *Apartheid, Guns and Money*, Oxford University Press, 2017.

39 Description and title of POPI Act 4 of 2013.

40 The list of exclusions is found POPIA Section 6 and 7 and covers a broad range of exclusions such as those concerning to the function of a public body in the interest of national security and journalistic organisations pursuing a legitimate public interest.

41 Although POPIA was signed into law, the effect of the full provisions has been suspended and is awaiting that all provisions become enforceable. Once these provisions become active, it remains to be seen how archives in South Africa will adapt to the enforcement of the law.

42 “State of the Archives: An analysis of South Africa's national archival system, 2014”, prepared by Archival Platform, 2015, 32, http://www.archivalplatform.org/images/resources/State_of_the_Archive_FOR_WEB.pdf

43 “Archives at the Crossroads 2007: Open Report to the Minister of Arts and Culture” from the Archival Conference “National System, Public Interest”, April 2007.

44 Executive Summary, “State of the Archives: An analysis of South Africa's national archival system, 2014”, prepared by Archival Platform, 2015.

held in other custodial formations.”⁴⁵ Although Hamilton conceded that the crisis in the national archival system was much more complex than bad management and being under-resourced, her argument was mostly concerned with the way in which colonial and apartheid state archives were seemingly being relegated to the margins of history because they were tainted and dubious in nature, and therefore viewed with distrust.⁴⁶

RECOMMENDATIONS

Promoting a culture of openness and accountability is seen to be crucial for the health of a democratic society. PAIA provides a tool for civil society in the sense that it was enacted to foster a culture of transparency and accountability in public and private bodies to prevent, and counteract the secretive and unresponsive culture in public and private bodies that led to an abuse of power and human rights violations in the apartheid era, but it is piece of legislation that will unfortunately not achieve those objectives on its own. Additionally, there continues to be concerns about a work culture that allows important information not to be recorded at all, and ineffective record-keeping systems to identify and retrieve information that would be of use to government and the public. Added to this is the continuing delays in declassification of documents that appear to have been overclassified and which are then either not made available, or take months to process.

Framed against this background it is recommended that:

- The state needs to take appropriate measures to ensure the prevention of the sanitization of records in future through greater safeguarding of records through the provision of adequate resources to the national archival system both in terms of budgetary resources and legislative power;
- Greater integration between public and non-public archives, the safeguarding of records across both public and private archival institutions and promoting access thereof;
- Public archives should transform themselves into active documenters instead of passive antiquarians and foster an outreach programme in order to take archives to its citizens;
- The security establishment should assist in locating and retrieving documents removed without authorization by operatives of apartheid security structures;

- The National Archives should be given the necessary resources to process and make available to the public, as a means to fill many of the gaps in official memory resources and also to assist in the unfinished business of the TRC;
- The National Archives should be given the necessary resources to fill the gaps in official memory resources through the collection of non-public records and the promotion of oral history projects;
- There is an urgent need to revisit existing information security standards and directives that speak to classification and declassification of information, especially those that were put in place prior to the implementation of PAIA dates from the apartheid era. Certain government departments have consistently failed to ensure that their security standards and internal directives are in alignment with PAIA and the standards set therein;⁴⁷
- Although some sections of PAIA mandates the release of certain information after a specified time period, South Africa does not provide for automatic declassification of records after a specified time period, such as 20 years. It is high time that South Africa opened the archive;
- South Africa is behind many other nations that have come from repressive regimes in that, South Africa has failed to automatically (at least systematically) give access to all records of gross human rights violations. This arises from the so called “right to truth” which is recognised in international law and which is fundamental to challenging impunity.⁴⁸

45 Carolyn Hamilton, “Forged and continually refashioned in the crucible of ongoing social and political life: Archives and custodial practices as subjects of enquiry”, in *South African Historical Journal*, 2013, Vol. 65, No. 1, 21.

46 Hamilton, “Forged and continually refashioned in the crucible of ongoing social and political life”, 20.

47 The Department of Defense has at times informed the South Africa History Archive that all their records are classified. See http://www.saha.org.za/news/2006/December/saha_rejects_claim_intelligence_records_outside_ambit_of_paia.htm

48 Resolution 2005/66 of the United Nations Commission on Human Rights (UNCHR) which “recognizes the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights”. The right to truth is essential to ensuring that all human rights violations, including economic crimes, are not repeated.

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THE ABSENCE OF LUSTRATION IN THE PROCESS OF POLICE REFORM

DAVID BRUCE

INTRODUCTION

The South African Police (SAP), the main predecessor to the current South African Police Service (SAPS), was heavily implicated in human rights violations. Nevertheless during the period of transition to democracy (1990–1994) there was no process of lustration in order to remove personnel who had been implicated in human rights violations, or other crimes, from the police. Though police reform remained a priority in the period following the transition, there was also no process of lustration in this period.

Nevertheless, during the period of roughly 15 years after the transition to democracy the composition of the SAPS was to change profoundly. The reasons for the absence of lustration, and the factors that drove changes to the composition of the SAPS, are discussed in this paper.

POLICE ABUSES DURING THE APARTHEID PERIOD

When talking about the police in apartheid South Africa the focus often tends to be on what the Truth and Reconciliation of South Africa (TRC-SA) called “gross violations of human rights”. But apartheid was above all a system of institutionalised racial discrimination and white privilege based on the idea of white superiority. In line with this, the abuse that the South African Police (SAP) were probably associated with most frequently was casual violence towards black people, particularly those who were not deferential to white police in a manner seen to be consistent with their subordinate social status.

But serious human rights violations there certainly were. These violations were to become a major focus of public concern. This was above all when they were targeted against opponents of the apartheid government involved in resistance activities. These included members of the African National Congress (ANC), which was banned in South Africa from 1960 onwards, other liberation organisations, as well as others associated with the struggle for democracy. These political gross violations of human rights, related to the “conflicts of the past”¹ were the main motivation for the establishment of the TRC-SA in 1996.²

There was also a pattern of violations by the apartheid era police against alleged criminals. The TRC-SA did not address these but focused exclusively on the violations that were political in nature.

In its initial report (1998), the TRC-SA indicated that it had received information on 36 935 gross violations of human rights³ against 28 750 victims that took place during the 1960 to 1994 period. These included 5002 instances of torture against over 2 900 people.⁴ Of cases of torture, the majority involved beatings but over 2000 involved “deliberate methods of torture, such as being forced into painful postures, electric shocks, suffocation or mental torture”.⁵ Allegations of torture overwhelmingly

implicated the SAP, and above all the Security Branch of the SAP. The Security Branch were the division of the SAP responsible for state security. Above all it focused on groups involved in opposition to apartheid, the ANC above all. The TRC found that “torture was used systematically by the Security Branch, both as a means of obtaining information and of terrorising detainees and activists”.⁶

In addition to the 5002 instances of torture, the TRC also recorded over 16 000 instances of what it called “severe ill treatment”. Roughly half of these were beating or shooting.⁷ Of acts of severe ill-treatment for which a perpetrator was identified, roughly 7 300 were attributed to the SAP.⁸ A SAP unit known as Koevoet was also heavily implicated in acts of torture in Namibia (known as South West Africa until it became independent of South African control on 21st March 1990). Under the apartheid system certain rural areas had been designated as black tribal “homelands” and some of the police forces of these homelands, notably the KwaZulu Police, were also linked to cases of severe ill-treatment⁹ and torture.¹⁰

POLICE AND THE TRUTH COMMISSION

A major reason for the absence of any detailed attention to questions about lustration during the transition was probably that perpetrators of human rights violations were supposed to apply for amnesty to the South African Truth and Reconciliation (TRC-SA). The TRC-SA, established in 1996, was supposed to be the primary mechanism by means of which South Africa addressed the fact that many former members of the security forces, and of the armed wings of the liberation movements, had been implicated in human rights violations of one kind or another.

Despite the fact that the state security forces had been heavily implicated in gross human rights violation, few of their members

1 Promotion of National Unity and Reconciliation Act, No. 34 of 1995, <http://www.justice.gov.za/legislation/acts/1995-034.pdf>.

2 The liberation movements were not also associated with some gross human rights violations including not only killings, but also acts of torture, and some attention was given to these by the TRC-SA.

3 Gross violations of human rights are: killings, torture, severe ill treatment and abduction. Truth and Reconciliation Commission of South Africa (TRC-SA), Final Report, Vol. 3, Chapter 1, 3, <http://www.justice.gov.za/trc/report/>

4 TRC-SA, Final Report, Vol. 3, 7.

5 TRC-SA, Final Report, Vol. 3, 7. The statistics on torture and other violations in the TRC report are in fact based on analysis of 33 713 (91 %) of these 36 935 gross human rights violations (Ibid., Vol 3, pages 3–4).

6 TRC-SA, Final Report, Vol. 2, 187.

7 TRC-SA, Final Report, Vol. 3, 7.

8 TRC-SA, Final Report, Vol. 3, 10.

9 TRC-SA, Final Report, Vol. 3, 10.

10 TRC-SA, Final Report, Vol. 3, 1, E1C.1-1.

applied for amnesty from the TRC-SA. Of the 293 who did apply, 256 applied for offences that were committed while they were SAP members.¹¹ Of these, almost 90 % (229 out of 256) were Security Branch members at the time of the violation.¹² Out of 550 incidents¹³ for which members of state security forces applied for amnesty 81 % (446) were committed while the applicants were employed by the SAP Security Branch.¹⁴

The relatively large number of applications received from Security Branch members did not indicate that this group was more favourably orientated towards the TRC-SA than others. Security Branch personnel who applied for amnesty constituted a small fraction of people who had been members of the Security Branch.¹⁵ A high proportion of these applications were submitted by people who had been implicated in cases involving Eugene de Kock, a senior Security Branch commander. After his own involvement in a large number of serious human rights violations had been exposed, and while he was being prosecuted for his involvement in these violations, De Kock had submitted an amnesty application. The application implicated numerous Security Branch members. Many of those who did apply, therefore appear to have done so primarily to protect themselves after De Kock's amnesty application increased the risk that they would be prosecuted.

But the general response by most members of the Security Branch, and other members of the security forces, appears to have been one of resistance to, and rejection of legitimacy of the process. In addition they may have believed that there was little danger of prosecution.¹⁶ In this respect they would have been correct. De Kock himself was one of the very few police ever prosecuted for apartheid era violations.¹⁷ He was convicted in 1996 and remained in prison until 2015. Initially, in the face of surging levels of crime in South Africa, there was little sense that state investigative and prosecutorial resources could be committed to pursuing perpetrators of past human rights violations who had not received amnesty.¹⁸ In later years, for reasons that are not entirely clear, government actively sought to discourage prosecution of those implicated in violations committed during the apartheid era.¹⁹

ESTABLISHMENT OF THE SAPS

During the years immediately after the unbanning of the liberation organisations by the South African government in February 1990, the SAP started to integrate Security Branch members into its Detective Branch.²⁰ Some members were also transferred to other SAP components.²¹ In 1994, the year of South Africa's formal transition to democracy, police from the "homeland" police forces were merged with the SAP to form the South African Police Service (SAPS),²² the national police of the new democratic Republic of South Africa.

The only other personnel who were admitted to the SAPS were roughly 1000 former members of liberation movements. Of these, 100–200 were mainly transferred to the police intelligence component. The balance of roughly 800, most of them former members of the ANC's armed wing Umkhonto weSizwe, were appointed to a newly created Protection Services component, responsible for VIP protection.²³ This ensured that members of the newly elected government, many of whom were from the ANC, could be more confident of the loyalty of those who were charged with protecting them.

Therefore, with the above exceptions, the 140 848 men and women who were SAPS members in 1995 were all previously members of the 11 police forces of the apartheid system – the SAP and the ten homeland police forces. These included some members of the former Security Branch. One of the more well-known examples is that of Jeffery Benzien. Benzien, a former member of the Security Branch, was one of the police who applied for amnesty to the TRC-SA for various acts of torture and one killing. In June 1990 he was transferred out of the Security Branch and subsequently occupied a variety of positions. When he appeared before the amnesty committee of the TRC in June 1997, he was a member of the SAPS airwing.²⁴

SHIFTS IN THE COMPOSITION OF POLICE ORGANISATIONS IN THE EARLY AND MID 1990S

The process of reform, and negotiations between the government, the ANC and other political parties, began in February 1990. Early in this process the white National Party governments indicated that it wanted to remove the police from the "political playing field".²⁵ In August 1992 the Minister of Law and Order, Hernus Kriel announced that 18 white police generals, one third

11 Another two committed offences both as members of the SAP and later members of the South African Defence Force (SADF).

12 TRC-SA, Final Report, Vol. 6, part 3, 182.

13 Some incidents incorporated a number of different acts or offences. See TRC-SA, Final Report, Vol. 6, Section 3, 186, footnote 10.

14 TRC-SA, Final Report, Vol. 6, section 3, 186–7.

15 There were estimated to be 4000 Security Branch members in 1991. Janine Rauch, "Police Transformation and the South African TRC", Centre for the Study of Violence and Reconciliation, Research Report, 2004, 36, citing Cawthra, Gavin, *Policing South Africa*, London: Zed Books Ltd., 1993, 55, 58.

16 Ibid., 34–36.

17 The number of applicants in De Kock-related incidents accounts for 48 % of all Security Branch applications. See TRC-SA, Final Report, Vol. 6, section 3, 184.

18 Rauch, *Police Transformation and the South African TRC*, 36.

19 Greg Nicholson, "NPA blames Mbeki government for failure to prosecute TRC cases", in *Daily Maverick*, 6 February 2019, www.dailymaverick.co.za/article/2019-02-06-npa-blamesmbeki-government-for-failure-to-prosecute-trc-cases/

20 Janine Rauch, *Deconstructing the South African Police*, Paper presented to the Annual Conference of the Association for Sociology in Southern Africa, Centre for the Study of Violence and Reconciliation, 1991, <https://www.csvr.org.za/publications/1479-deconstructing-the-south-african-police>

21 Mark Shaw, *Crime and policing in post-apartheid South Africa – Transforming under fire*, Cape Town: David Philip Publishers, 2002, 27.

22 Section 236(7)(a) of the interim constitution (Act 200 of 1993) provided, inter alia, that "At the commencement of this Constitution the South African Police existing in terms of the Police Act, 1958 (Act No. 7 of 1958), and all other police forces established by law shall be deemed to constitute the South African Police Service ..."

23 Elrena van der Spuy, The integration of ANC and PAC cadres (non-statutory forces) into the South African Police Service, 1994–1996: Facets and fault lines, in Schwikkard, Pamela-Jane, Hooctor, Shannon Vaughn (eds.), *A Reasonable Man: Essays in honour of Jonathan Burchell*, Cape Town: Jutas, 2019.

24 Truth and Reconciliation Commission, Amnesty Hearing, Jeffery Benzien, 14 July 1997, http://www.justice.gov.za/trc/amntrans/capetown/capetown_benzien.htm; Another example is provided in: Shaw, *Crime and policing in post-apartheid South Africa*, 32.

25 Mark Shaw, Point of order: Policing the compromise, in Steven Friedman, Doreen Atkinson, *South African Review 7: The small miracle: South Africa's negotiated settlement*, Johannesburg: Ravan Press, 1994, 206.

of the general staff of 52 white officers, would be retired from the SAP.²⁶ There were some who believed that this was intended to weed out those likely to be resistant to reform. However, several generals who had played a central role in state repression against opponents of apartheid remained in the SAP.²⁷ A more important factor may have been the need to make space for black police to be appointed to what were then the exclusively white officer ranks of the SAP. Not long after this, in April 1993, Eugene de Kock and 83 SAP members attached to the Security Branch's Vlakplaas unit "took 'early retirement' and large severance payouts from the SAP."²⁸

A number of former SAP members, including former Security Branch members, also left the SAPS shortly after it was formed in 1994. Some of these may have left for political reasons or because they did not see a future for themselves in the SAPS. One reason for this would have been that, because of the emphasis on redressing racial imbalances in the SAPS (see further below) there would be few promotion prospects for white male police for some time to come.²⁹ Some members may therefore simply have resigned. Another option that some pursued, was to apply for a medical discharge with some reportedly applying for these for "stress."³⁰ Another factor, amongst more senior members, may have been "the scrutiny associated with the senior appointments process in the new SAPS in 1995 and thereafter."³¹ This may have been the reason behind the departure of General Johan Van Der Merwe, former commander of the Security Branch and overall head of the SAPS from 1990 onwards.³²

Whatever the number of members who left on their own initiative, this number is likely to have increased as systems were introduced to encourage members to leave. The agreement negotiated between political parties at the multi-party talks, as embodied in the "interim constitution" of 1993, made some provision for continuity for existing state employees, including members of the SAP and homeland police forces.³³ At the same time it provided that the public service should be "broadly representative of the South African community."³⁴ This implied that government would need to implement measures to improve the "representivity" of the SAPS, especially in its higher echelons.

In the words of George Fivaz, a former SAP officer, regarded as having clean hands, who was appointed as the first National Commissioner of the SAPS "In the interim constitution those people were protected. All the personnel had to be amalgamated into the new South African police service. There was no provision for retrenchment packages, or severance packages, or lay-off packages, or whatever the case may be. So you had to take those people into the new South African Police Service as a given, those were the material, you as the new Commissioner had to design processes to rationalise and to amalgamate and to transform."³⁵ A system of retirement and retrenchment was therefore put in place in order to create openings for "previously disadvantaged" South Africans, a category understood to include black South Africans, women and people with disabilities.³⁶

A generous system of "voluntary severance packages" was therefore introduced³⁷ with more than 5000 SAPS members benefitting from these between 1996 and 1998.³⁸ While these were targeted at white members it was not only whites who took advantage of them. In June 1997 a SAPS spokesperson reported that of 3087 SAPS members whose severance packages had been approved, 2396 were white (78 %) including 1794 men and 602 women.³⁹ Overall 621 (20 %) of those who were granted severance packages in that year were women. Though the intention

was to create openings for black personnel to be promoted to leadership positions, the fact that a number of those who applied for packages were from the "middle management" echelons also meant that significant skills were lost to the SAPS in the process.⁴⁰ The severance packages were essentially about creating space at senior level for senior black appointments. They had little to do with trying to remove those who had been involved in human rights abuses. It is believed that a significant number amongst those who left became involved in the private security industry.⁴¹ The industry had a tradition of recruiting former security sector personnel.⁴²

In understanding the approach taken to personnel issues during the transition to democracy, it is important to understand some of the key considerations and constraints, which the ANC was faced with. While the ANC and others who supported democratisation were concerned to ensure a genuine transfer of power and the establishment of a fully democratic South Africa, there were profound anxieties that the security forces would resist and obstruct the process of democratic transformation.⁴³ This anxiety was mainly focused on the military, but it was seen

26 Ibid., 207–208; "South Africa moves to restore credibility of police", in *UPI*, 27 August 1992, <https://www.upi.com/Archives/1992/08/27/South-Africa-moves-to-restore-credibility-of-police/8467714888000/>

27 Shaw, *Point of Order*, 207–209.

28 Rauch, *Police Transformation and the South African TRC*, 26.

29 Interview with Martin Schönteich, *Innovations for Successful Societies*, Princeton University, 31 January 2008, https://successfulsocieties.princeton.edu/sites/successfulsocieties/files/interviews/transcripts/3256/Martin_Schonteich.pdf; "26 Step 2000: Fivaz, George", *The Heart of Hope – The O'Malley Archives*, <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv00017/04lv00344/05lv01353/06lv01385.htm>

30 Rauch, *Police Transformation and the South African TRC*, 28.

31 Ibid., 37.

32 Ibid., 37; "Van der Merwe, General Johan", *The Heart of Hope – The O'Malley Archives*, <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv03445/04lv03519/05lv03675.htm>

33 Constitution of the Republic of South Africa, Act 200 of 1993, Section 236, inter alia 236(2) and 236(4).

34 Constitution of the Republic of South Africa, Act 200 of 1993, Section 212(1)(b).

35 "26 Step 2000: Fivaz, George", *The Heart of Hope – The O'Malley Archives*, <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv00017/04lv00344/05lv01353/06lv01385.htm>

36 Department of Public Service and Administration, *White Paper on the Transformation of the Public Service*, 15 November 1995.

37 "26 Step 2000: Fivaz, George", *The Heart of Hope – The O'Malley Archives*, <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv00017/04lv00344/05lv01353/06lv01385.htm>

38 Based on 1288 in 1996, 3087 in 1997 and 701 in 1998. See: Elizabeth Sidiropoulos et al, *South Africa Survey 1997/1998*, Johannesburg: South African Institute of Race Relations, 1998, 246; Herma Forgey et al, *South Africa Survey 1999/2000 – Millennium Edition*, Johannesburg: South African Institute of Race Relations, 1999, 371. It is not clear if these figures are comprehensive.

39 Sidiropoulos et al, *South Africa Survey 1997/98*, 246; The balance were 528 African men, 11 African women, 85 coloured men, six coloured women, 57 Indian men, and four Indian women (Ibid.).

40 Interview with Martin Schönteich, *Innovations for Successful Societies*, Princeton University, 31 January 2008, 13, https://successfulsocieties.princeton.edu/sites/successfulsocieties/files/interviews/transcripts/3256/Martin_Schonteich.pdf; Sidiropoulos et al, *South Africa Survey 1997/98*.

41 Piers Pigou, Whatsapp text and voice messages, 27 and 28 June 2019.

42 Jenny Irish, *Policing for profit: The future of South Africa's private security industry*, Institute for Security Studies, 1999, <https://issafrica.s3.amazonaws.com/site/uploads/Mono39.pdf>

43 Shaw, *Crime and policing in post-apartheid South Africa*, 29.

as important to secure support for the transition process from the apartheid security forces overall. On the basis of its status as the liberation movement that could best claim to represent black South Africans, the ANC was seen as the principal rival and “negotiating partner” of the white National Party. The ANC, including its leader Nelson Mandela, consistently sought to ensure that members of the security forces would remain subject to and loyal to the newly elected government. It therefore sought to avoid measures that might be interpreted to mean that their future in South Africa would not be secure.

There was another major limitation on the ability of the ANC to intervene on the policing terrain. In the 1960s the ANC, and the other major liberation movement, the Pan-Africanist Congress, both established guerrilla “armed wings”. These had been involved in military activities in South Africa which, in the case of the ANC’s armed wing Umkhonto we Sizwe, were based on the Vietnamese model of “people’s war”. The process of transition therefore included integration of 21 000 “non-statutory force” members into the newly established South African National Defence Force (SANDF), with a further 9 800 being demobilized.⁴⁴ However the ANC had no personnel with backgrounds in policing.

At one point consideration was given to integrating members of Self-Defence Units (SDUs) into the SAPS. These were irregular militias based in the black townships that were composed of young political activists and other marginalized young men.⁴⁵ Apart from performing a military function during the period of resistance to apartheid, in some instances they had also performed a policing type role. But SPU members were generally regarded as unsuitable for recruitment into the SAPS, and were clearly not candidates for management or leadership roles.⁴⁶ This meant that, other than the small number of ANC members with intelligence backgrounds, who had been integrated into the SAPS, there were no other personnel who were suitable to take up leadership positions other than the former members of the SAP and homeland police forces. This meant that the ANC was dependent on the existing policing system to constitute a policing service. It also meant that senior homeland police were some of the primary candidates for populating the senior ranks with black officers.

The process of democratisation and police reform in South Africa therefore took place in the wake of the conflict between the apartheid government and the liberation movements. The fact that this was partly military in character may be seen to have provided another reason for the lack of interest in questions of lustration. Any process of this kind, which involved scrutiny of past violations by members of the security forces, would have raised questions about the involvement in human rights violations by ANC members and other liberation movements. The TRC amnesty process, in terms of which those who had committed human rights violations related to the conflict could obtain amnesty for full disclosure of their involvement in this regard, was a far more palatable option for all political parties.

Rather than removing police who were implicated in human rights violations, the process of reform of the police in South Africa therefore focused on other measures. Central ideas included those of changing the police from being police “forces” to being a “police service”, that was responsible for serving all South Africans, and the concept of community policing, intended to build better relationships between police and communities. Other

measures were of a symbolic nature such as changing the rank system from military ranks to non-military ones,⁴⁷ changing the colour of police vehicles, and changing the names of police stations in some cases.⁴⁸ Measures also included revision of the basic training curriculum for new SAPS members, the development of a human rights training curriculum for current members of the service, and the introduction, in 1997, of a code of conduct for the police.⁴⁹

CHANGING THE PROFILE OF THE SAPS

As a result of resignations, deaths and other factors contributing to natural attrition, as well as the voluntary severance packages, there were significant shifts in the composition of the SAPS, and a decline in the overall number of SAPS members, during the late 1990s. The number of SAPS members reached its lowest point, at 120 549, in 2002. By 2003, the number of white personnel had declined from 50 097 in 1995 to 33 523, a reduction of 33 %. At this point the process of en masse recruitment (discussed below) had also begun. As a result, by 2003 the number of black members (including Africans, coloureds and Indians) had already increased by 8 % from the 90 751 that there were in 1995, to 98 049. After having constituted 36 % of SAPS members in 1995, whites now constituted 25 %.⁵⁰ If judged relative to the overall population of South African, whites, and particularly white men were still over-represented in the SAPS. But this would change in the nine years that followed.

Between 2002 and 2012 the SAPS recruited 123 606 new members. Due to natural attrition, the net gain was however in the region of 80 000 members with the SAPS reaching a total of 199 345 personnel in 2012. During this period the emphasis was not only on increasing SAPS numbers but also on changing the racial profile of the SAPS. For instance, during the years 2006

44 Department of Defence, Final integration report to the Portfolio Committee on Defence, 9 November 2004, <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2004/appendices/041109final.htm>

45 Monique Marks, *Young Warriors: Youth Politics, Identity and Violence in South Africa*, Johannesburg: Wits University Press, 2001.

46 See Shaw, *Crime and policing in post-apartheid South Africa* and van der Spuy, The integration of ANC and PAC cadres (non-statutory forces) into the South African Police Service, 1994–1996: Facets and fault lines, in Schwikkard, Pamela-Jane, Hoor, Shannon Vaughn (eds.), *A Reasonable Man: Essays in honour of Jonathan Burchell*. ANC provides no basis for constituting an alternative policing system (e.g. example of ANC marshals in SAR 222, and later debate about SPU members – on this also see Shaw 30 as well as van der Spuy).

47 This was reversed in 2009. See, for example, “The role of the South African Police Service at Marikana on 16 August 2012”, Submission by CASAC to the Marikana Commission of Inquiry, Council for the Advancement of the South African Constitution (CASAC), January 2013, page 13, paragraph 20b, <http://www.casac.org.za/wp-content/uploads/2015/02/Farlam-Submission-final-220113.pdf>

48 Janine Rauch, Police Reform and South Africa’s Transition, Centre for the Study of Violence and Reconciliation, Paper presented at the South African Institute for International Affairs conference, 2000, <http://www.csvr.org.za/docs/policing/policeformandsouth.pdf>

49 David Bruce, New Wine from an Old Cask? The South African Police Service and the Process of Transformation, Centre for the Study of Violence and Reconciliation, Paper presented at John Jay College of Criminal Justice, New York, 9 May 2002, <https://www.csvr.org.za/docs/policing/newwinefromold.pdf>

50 David Bruce, “New blood: Implications of en masse recruitment for the South African Police Service”, in *SA Crime Quarterly*, March 2013, No. 43, 18, <http://www.issafrica.org/uploads/SACQ43Bruce.pdf>

to 2012, 97,6 % of recruits were black.⁵¹ By 2012 the South African government had come close to achieving its goal of ensuring that the racial profile of the SAPS was aligned with that of the South African population. However, with the number of white SAPS members at 12 %, their numbers still exceeded white representation in the South African population which was then at 8.9 %.⁵² By 2012 women constituted 34 % of SAPS personnel.

In South Africa, police were therefore reconstituted, though this was largely for reasons other than those that are supposed to motivate lustration. There are no policy documents that show the motivation for the process of en masse recruitment. Therefore the motivation for this process is a matter of speculation. For some time the South African government had been under pressure to improve its responses to crime, and this may have been one factor. More important perhaps, is that in 2002 the Fédération Internationale de Football Association (FIFA) opened the bidding for the 2010 World Cup.⁵³ South Africa at the time had an international reputation for high levels of crime. In 2004 South Africa secured the bid for the 2010 World Cup. Reassuring FIFA, and potential visitors to South Africa, that their safety would be assured was a key government priority. Finally the process of en masse recruitment provided an opportunity to address racial imbalances in the SAPS that were a legacy of the apartheid. At the time the new democratic government was having little success in addressing high rates of unemployment. The creation of large numbers of new police jobs provided an opportunity for state investment in expanding the black middle class. By doing so, the ANC may have hoped to consolidate support for it to continue to govern South Africa.

CONSEQUENCES OF THE ABSENCE OF LUSTRATION

Processes of lustration are not the same as processes of accountability, such as requirements for the disclosure of past human rights violations in return for amnesty, or prosecutions. Lustration is instead primarily intended to serve as a means of purifying the security forces that are established during a transition to democracy. Their function is partly symbolic and may be intended as a means of trying to secure greater legitimacy for security agencies. They may also be intended to assist in and ensure that the security forces of the new regime do not reproduce the “bad habits” of the old.

It is not clear how many apartheid era police who had been involved in human rights violations remained in the SAPS after the transition. Many of those who left in the 1990s are likely to have been individuals who were implicated in these violations. Nevertheless the involvement of the SAP, and other apartheid era police forces, in human rights violations was extensive, and there is little question that the SAPS continued to employ many of those who were involved in these violations. These may not have been primarily members of the Security Branch. SAP units involved in ordinary “crime related” policing functions, including notably the Murder and Robbery Units, were also extensively involved in torture and other abuses including extra-judicial executions.⁵⁴

The latter issue was highlighted in a report on police violations of human rights published, in the immediate aftermath of the transition to democracy, in 1995. One issue highlighted in the report was the killing of people in suspicious circumstances in KwaZulu-Natal province, frequently involving Murder and

Robbery units.⁵⁵ The Murder and Robbery Units were later shut down, but many of their members continued to serve in new SAPS specialised units that were established in the post-apartheid era. It is therefore likely to be more than a coincidence that some of these new specialised units have been linked to allegations of human rights violations in the post-apartheid era. In the most highly publicised case of this kind, members of a branch of a unit in KwaZulu-Natal, the Durban Organised Crime unit, were accused of the extrajudicial killings of up to 45 people.⁵⁶ The case against members of the unit has been highly controversial. Allegations have been made that it was motivated by the desire to neutralise corruption investigations against prominent persons with high level political connections. There may be some truth to this. But there is also significant evidence that members of the unit were connected to many irregular killings.⁵⁷

Numerous police who had been involved in violations that were not of a political nature were absorbed into the SAPS. The amnesty process was focused on perpetrators of human rights violations connected to the political “conflicts of the past”, and was of no relevance to these individuals. Calls for the prosecution of those who did not receive amnesty have also only focused on those who were implicated in political violations. In order to deal comprehensively with the legacy of past human rights violations, any process that was implemented would have had to address the legacy of violations both against political opponents and suspected criminals. This highlights one of the major limitations of the process of reform, or transformation as it has often been called, of the police in South Africa.

CONCLUSION

The personnel profile of the SAPS therefore changed dramatically in the period after apartheid. However the reconstitution of the police was largely for reasons other than those that are supposed to motivate lustration. In practise, what was prioritised was changing the racial and gender profile of the police. This motivated for retaining black or female members of the former police forces. On the other hand, there was a strong focus on encouraging white male members of the police to leave, with this being encouraged through retrenchment packages. The position of white female SAPS members would have been more ambiguous. Official policy aimed to reduce the overall number of white SAPS members, but improve the representation of

51 Bruce, “New blood: Implications of en masse recruitment for the South African Police Service”, 19.

52 Ibid.

53 “2010 FIFA World Cup”: bidding process opens”, Fédération Internationale de Football Association, 23 October 2002, <https://www.fifa.com/about-fifa/who-we-are/news/2010-fifa-world-cuptm-bidding-process-opens-83657>

54 Breaking with the past? Reports of alleged human rights violations by South African Police, 1990–1995, The Trauma Centre for Victims of Violence and Torture, Independent Board of Inquiry, Johannesburg: Network of Independent Monitors, 1995, 171–206.

55 Ibid.

56 “Charges against Booysen and Cato Manor unit dropped”, in *The Citizen*, 17 July 2019, <https://citizen.co.za/news/south-africa/courts/2155817/charges-against-booysen-and-cato-manor-unit-dropped/>

57 “Former Sunday Times editor Ray Hartley’s blistering response to ‘death squad’ criticism”, in *News24*, 21 October 2018, <https://www.news24.com/SouthAfrica/News/read-former-sunday-times-editor-ray-hartleys-blistering-response-to-death-squad-criticism-20181021>

women, including at senior levels. Some white women members had police experience that recommended them for senior positions. This concern with racial and gender representation, not a concern about past human rights violations, had the most impact on the composition of the police in the period after apartheid.

In addition, it is clearly important that a mechanism was established for addressing involvement in apartheid-era politically motivated human rights violations. This was the amnesty committee of the TRC-SA. This may have encouraged those involved in police reform to give little attention to the continued presence in the security forces of those who had been involved in human rights violations. In the end the commitment made to prosecute those who were implicated in serious human rights violations and who had failed to apply for, or been denied, amnesty, was largely neglected.⁵⁸ Perpetrators may have remained in the SAPS, or chosen to leave, possibly in response to the incentives provided by severance packages.

However, the fact that some of them remained in the SAPS, and the generalised impunity that they had enjoyed, received little public attention. Coinciding with the transition to democracy, violent crime became a major pre-occupation in South Africa. With the criminal justice system overwhelmed by the task

of addressing crime, there was little public energy for, or interest in, re-directing the energies of criminal justice personnel to dealing with the abuses of the past.

Throughout this time the fact that abuses by police extended far beyond the political terrain received little attention. The question of dealing with perpetrators of past non-political violations was largely disregarded, whether in relation to discussions about amnesty, or prosecution. Torture and extra-judicial executions continue to be features of policing in post-apartheid South Africa, and in some cases this clearly reflects the legacy of practises from the apartheid era. However, it also reflects officially sanctioned processes of re-militarisation of policing, as well as on the ground adaptations by police to pressure to deliver results in fighting crime.

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58 Hugo van der Merwe, Prosecutions, pardons and amnesty: The trajectory of transitional accountability in South Africa, in Nicola Palmer, Phil Clarke and Danielle Granville et al (eds.), *Critical Perspectives in Transitional Justice*, Cambridge: Intersentia, 2012, 447.

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INVESTIGATION AND PROSECUTION OF CRIMES OF THE REGIME

NOBUKHOSI ZULU

INTRODUCTION

In 1948 the official policy of apartheid was introduced in South Africa by the minority white government. South Africa has been under colonial rule since the 17th century; however, apartheid was special and unique in that it codified the already existing oppressive laws, and the government went to great lengths to enforce the laws. As the power of apartheid rested primary on the oppression of the black majority, it was not long till already existing liberation forces such as the African National Congress (ANC), Pan African Congress of Azania (PAC), the South African Communist Party, and others, began to resist. The ANC, which originally espoused the principles of non-violence and peaceful resistance formed Umkhonto Wesizwe (MK), the militant wing of the party, after it was clear that the apartheid forces were not willing to change through peaceful means. The period of conflict intensified during the 1980s, as the struggle forces became more militant in their resistance, the apartheid government responded with more brutal violence. A prominent tactic of the apartheid government was enforced disappearances and unexplained deaths in police custody. The arm of the South African Police (SAPS) that was tasked with destroying the resistance was the Security Branch.¹ The operations of the Security Branch were shrouded in secrecy, with protection of the State.

At the end of apartheid, in 1994, a historic negotiated settlement was agreed upon by all political parties in the bid to avoid any further bloodshed and to foster in a democratic era. Part of this negotiated settlement included the establishment of the Truth and Reconciliation Commission (TRC).

THE TRUTH AND RECONCILIATION COMMISSION

The Promotion of National Unity and Reconciliation Act 34 of 1995 (TRC Act) established the TRC. Like other truth commissions, the TRC was established to deal with issues that transpired within a specified time period. The period of investigations began in March 1960 (the commencement of the Sharpeville massacre) and ended in May 1994 (the month in which Nelson Mandela was inaugurated as president). The task of the Commission was a bold one, to “facilitate, initiate and co-ordinate where necessary inquiries into the nature, cause and extent of human rights violations in South Africa”. It was believed that through open and public dialogues, the truth about the very secretive apartheid apparatus would come to light giving families closure and foster the beginning toward reconciliation. This was to be done through public hearings where both victims and perpetrators could appear before the Commission and have their truths heard.

The South African TRC was different from other traditional commissions in that it veered from the norm. Instead of granting blanket immunity for prosecutions, the amnesty

was conditional. The TRC consisted of different committees that were responsible for different areas. The pertinent commission in this case was the Commission on Amnesty. A key component of the TRC process was that individuals who were guilty of vile acts of gross human violations during apartheid could come before the Commission, fully disclose their actions and the Commission would make a decision on whether or not to grant amnesty. The Commission was open to individuals who simply wanted their criminal records cleared for things like printing ANC pamphlets, which were criminalised by the apartheid State.

Granting of amnesty was conditionally dependant on whether an individual had fully divulged their part in the apartheid system. The Committee was guided by certain criteria, which focused on the questions around the motive of the act, context and objective of the act, omission or offence and “whether the above was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, an agent or supporter”; the relationship between the act, offence or omission and the political objective pursued. A fundamental precondition for the granting of amnesty was that the “applicant made full disclosure of all relevant facts”.

A challenge that was faced with the amnesty proceedings is the complex political stance that the TRC took of holding both freedom fighters and apartheid defenders culpable of human rights violations, granting both sides the opportunity appear before the TRC as perpetrators and victims. In many ways, this act tainted the view the public had of the TRC and caused individuals to doubt the legitimacy of the TRC. Many people at the time, and even to date, feel that the granting of amnesty was in some way disrespectful to the families and survivors of the crimes and that it promoted impunity. The TRC was aware of these criticisms but also had to deal with the real issue of ensuring that the peaceful transition of power was secured and avoiding unnecessary loss of life. It thus noted, “prosecutions could endanger the peace process; hence the need for an accountable amnesty provision which did not encourage impunity”.² Not all amnesty applications were granted; the main reason being that the applicants had failed to disclose adequate information, so as to bring real resolution to the matters.

The TRC process was wrought with issues of legitimacy, with accusations on all sides raising concerns of bias and the unfair nature of the hearings. One of the reasons that allowed people to be willing to compromise was the promise that those individuals

1 Kevin O'Brien, “Counter-Intelligence for counter-revolutionary warfare: The South African police security branch 1979–1990”, in *Intelligence and National Security*, 2001, Vol. 16, 27–59

2 Truth and Reconciliation Commission of South Africa: Report, Vol. 6, Section 5, Chapter 1 at para 24

who failed to appear before the TRC and give adequate testimonies, or were denied amnesty would face the full extent of the law once the process was concluded, thus justice would be served eventually.

The final report of the TRC was delivered in 2003. In the last volume, the report clearly states that, “where amnesty has not been applied for, it is incumbent on the present state to have a bold prosecution policy in order to avoid any suggestion of impunity or of contravening its obligations in terms of international law”. At the end of the TRC, over 300 cases were handed over to the National Prosecution Authority (NPA) for further investigation and possible prosecutions. It was now up to the NPA under a democratic government to pursue justice and fulfil the strong recommendations made by the TRC.

IDENTIFYING THE PERPETRATORS OF APARTEID ERA CRIMES

A number of perpetrators of apartheid era crimes are well known. Their existence came to be known most through the testimonies of the victims and perpetrators of apartheid. During the TRC hearings, family members and survivors were able to tell their stories and identify specific state officials who were involved in their victimisation. Other state agents who turned state witness were also able to implicate their co-agents and partners in a number of crimes. Investigators, such as Frank Dutton, have been instrumental in going through available records and identifying cases that could lead to real prosecution. Unfortunately, with the government seemingly lackadaisical to continue with the work of the TRC, this work is largely funded by civil society organisations and individual family members who were not satisfied by the government’s intervention and are desperate for answers.

A well-known example of the State’s unwillingness to prosecute is that of Stephen Bantu Biko, the much-revered leader of the South African Black Consciousness Movement, who was savagely murdered in police custody by members of the Security Branch. The apartheid operatives who committed the murder appeared before the TRC, applying for amnesty and confessed their part in his death. They were denied amnesty because the Commission was of the opinion that they had not made full disclosure and their actions were not politically motivated as required by the Act.³ Despite their clear and self-confessed culpability, the NPA refused to pursue the matter claiming there was insufficient evidence.

During apartheid, disappearances were an effective means to get rid of activists, without the mess of paperwork or public scrutiny. It was also effective in psychologically torturing the families of the missing, and instilling fear of the unknown among the communities where the activists came from. It is estimated that roughly 2,000 people might have disappeared during apartheid at the hands of the government.⁴ The Khulumani Apartheid Reparations Database at present contains the records of the disappearance of 1,200 people.⁵ While 477 of these cases were officially recognised by the TRC, those working in the field have estimated that there are another 1,500 cases that are not officially recorded.⁶ These are well documented, but the government has been unwilling to prosecute.

After the end of apartheid, the NPA established the Missing Person’s Task Team. The mandate of the task team is to search for

and bring back home the remains of political activists. The testimonies provided at the TRC provided a starting point for the team of experts to begin searching. The Missing Person’s Task Team is housed under the NPA, as it was hoped that through the location and exhumation of bodies, prosecutions would follow. Although a number of individuals have been exhumed, prosecutions have yet to be done. The head of the task force has very controversially claimed that prosecutions would undermine perpetrator assistance in locating bodies. This is an argument that has been vehemently rejected by other activists and former TRC commissioners.

Identification of perpetrators has also been done through the release of classified records. The Promotion of Access to Information Act (PAIA) was designed to ensure that the public can gain access to public records held by the State. The South African History Archive (SAHA) has been a leading organisation in South Africa in using PAIA to gain access to records that reveal the crimes of the apartheid government. Through the access of now declassified records, individual researchers and investigators have been able to weave a thread that begins to sift out the atrocities of the government and pinpoint who the perpetrators in the system were. An example of this are records released through SAHA whose documents show the planning of the assignation of the liberation operatives known as the Craddock Four by the apartheid government.⁷ The released records detail the plot and the names of those who were involved and aware of the impending murders. And yet even with this information available, the prosecution process has still been stalled.

The courts in South Africa have been clear about the duty of the prosecutors to investigate where there is a possibility of justice being served. In the case *S v Basson* the Constitutional Court held that the NPA is under an international obligation to prosecute crimes committed during the apartheid era. It held that: “the State’s obligation to prosecute offences is not limited to offences which were committed after the Constitution came into force but also applies to all offences committed before it came into force. It is relevant to this enquiry that international law obliges the State to punish crimes against humanity and war crimes. It is also clear that the practice of apartheid constituted crimes against humanity and some of the practices of the apartheid government constituted war crimes.”⁸ There is no doubt in law that the prosecution of identified and known perpetrators is imperative for the legitimacy of the post-apartheid government.

3 Amnesty decision on death of Steve Biko, 16 February 1999, <http://www.justice.gov.za/trc/media/pr/1999/p990216a.htm>

4 Jeremy Sarkin, “Dealing with Enforced Disappearances in South Africa (With a Focus on the Nokuthula Simelane Case) and Around the World. The Need to Ensure Progress on the Rights to Truth, Justice and Reparations in Practice”, in *Speculum Juris*, 2015, Vol. 1, 21–48.

5 See <http://www.khulumani.net/truth-memory/item/519-khulumani-remembers-the-unresolved-loss-and-pain-offamilies-affected-by-enforced-disappearances-on-this-anniversary-of-international-day-for-the-disappeared.html>

6 Jay Aronson, “The strengths and limitations of South Africa’s search for apartheid-era missing persons”, in *International Journal of Transitional Justice*, 2011, 262–281.

7 “Unveiling the mystery of the Craddock Four: 25 years later”, South African History Archive, 27 June 2010, http://www.saha.org.za/news/2010/June/commemorating_the_craddock_four_25_years_later.htm

8 *S v Basson* 2007 (3) SA 582 (CC), at paragraph 37.

POLITICAL INTERFERENCE WITH INVESTIGATIONS AND PROSECUTIONS

In January 2018, the NPA identified 20 cases dating back to the apartheid era that would be prioritised for investigation. Disturbingly, it was later revealed the two of the officers who had been deployed as lead investigators in the matter were in fact former Security Branch officers themselves. One of the officers has been identified and accused of being involved in the torture of a surviving anti-apartheid activist. The NPA responded by removing the officers, but the damage was already done. These events raise serious questions about the competency of the NPA, and whether the State institutions are still riddled by apartheid forces.

Despite the fact that the NPA was handed hundreds of potential cases for investigation, to date none have been prosecuted. There appears to be an intricate web of political manipulation that has been persistent in blocking prosecutions from taking place. For a number of years, it was unclear what exactly the reasons were for failure to prosecute, until the landmark case of Nokuthula Simelane began to reveal some of the background interference that halted prosecutions.⁹

In an application brought by Simelane's sister to compel the NPA to fulfil its duties, there were affidavits submitted by prominent figures including former NPA head Vusi Pikoli and former head of apartheid prosecutions, Anton Ackermann. In their affidavits they allege that there was high level interference from the current government that hampered any effective prosecutions. It appeared from the papers submitted that the reason for the ANC's position on prosecutions was linked to the fear that if they began to prosecute the apartheid agents, then those ANC operatives, who were vulnerable, would also be prosecuted. This reaction from the ANC is consistent with previous actions that included attempting to block the release of the TRC reports publicly.¹⁰ In addition to the fear that ANC activists would be prosecuted, there has been speculation that there were additional secret deals that were struck amongst the political parties, which gave assurances that there would be no prosecution of apartheid era crimes on either side.

Nokuthula Simelane was an ANC activist who joined the military forces, Umkhonto Wesizwe, as a university student. She was betrayed and taken by apartheid state police and tortured, presumably to death. After years of her missing, the apartheid police claimed to have conducted an investigation, which amounted to nothing. For years there was no lead until the TRC was established. Five police officers appeared before the TRC requesting amnesty for her abduction and torture.¹¹ They were all granted amnesty in relation to her abduction and torture except for one. They presented contradicting stories to the TRC as to her whereabouts, and what they did to her, claiming they last saw her alive. Since they all claimed she was alive; however, they were not granted amnesty for her death.

It was decades after her disappearance and relentless campaigning by her family that eventually led to the NPA instituting prosecution proceedings, using the evidence that was gathered at the TRC to hold accountable the three remaining officers of her likely murder. They were finally arrested and charged in 2016. The trial is the first of its kind which led to the actual prosecution of perpetrators for apartheid crimes. The case itself encountered a number of delays. The most significant delay to the matter leading to the trial was that the accused insisted that the South African Police had to pay their legal fees, as they were employed

by the State and they were acting under orders. The judge made a decision in 2018 that was in agreement with their demands, mandating the State to cover their legal costs thus paving the way for the trial to finally begin.

POST-TRC PRESIDENTIAL PARDONS

Over and above the failure to prosecute, there was an attempt to further subvert the TRC process. In 2007, the then president of South Africa, Thabo Mbeki made the decision to use his Presidential Powers to pardon individuals who were implicated in the criminal activities during apartheid. He stated that pardons would serve to assist the country in truly moving forward and achieve national unity, as was the mandate of the TRC. The Pardons Reference Group, consisting of all political parties represented in Parliament, considered 2114 applications for pardons and made recommendations. Civil society organisations vehemently opposed the process as it did not involve any public participation and consultations. The desire to further pardon individuals and absolved them of their guilt was another signal that the new dispensation was not interested in following-up with prosecutions or holding individuals accountable for their crimes.

Currently, the process of pardons has still not been finally resolved. There has been a series of setbacks and interruptions, specifically, the two previous presidents, Thabo Mbeki and Jacob Zuma, did not complete their full terms as they were recalled by the ANC. There has been a lot of other, more pressing, political issues in more recent years which can be partly attributed to the halting of the entire process. Another reason for the delays of the process has been the incessant activism by civil society groups to ensure that the political pardons are not granted. The main source of activism has come from a group known as the South African Coalition for Transitional Justice (SACTJ), which sought to interdict the president from granting pardons without consulting the victims of past human rights violations and communities which had the same experience. The matter was appealed all the way to the Constitutional Court which upheld the principle that victims have the right to be consulted.¹² The process has thus been temporarily stalled and it remains to be seen whether the new president, Cyril Ramaphosa, will continue the work of his predecessors and finalise the project.

RE-OPENING OF INQUESTS

At the height of apartheid violence and brutality, a number of activists died whilst in custody. The causes of death that were given by the police at the time were never satisfactory. A common cause

9 Thembisile Phumelele Nkadimeng vs. National Director of Public Prosecutions & 8 Others, Gauteng Division Case Number 35554/2015.

10 "Anc Interdict Throws TRC's Final report Into Disarray", SAPA, 28 October 1998, <http://www.justice.gov.za/trc/media/1998/9810/s981028n.htm>

11 The original transcripts applying for amnesty are available here <http://sabctrc.saha.org.za/hearing.php?id=53362&t=Nokuthula+simelane+coetzee&tab=hearings>

12 Albutt v Centre for the Study of Violence & Reconciliation 2010 (3) SA 293 (CC) at par 61 notes "the principles and the spirit that inspired and underpinned the TRC amnesty process must inform the special dispensation process whose twin objectives are nation-building and national reconciliation. As with the TRC process the participation of victims and their dependents is fundamental to the special dispensation process".

of death proffered by the state security agents was that individuals committed suicide. However, some families had the opportunity to question the narratives put forward by the security branch, and demanded that the government open an inquest investigating the true cause of death. These inquests were nothing more than a public relations stunt that would eventually corroborate the initial report that the police had submitted. This was the case with Ahmed Timol, whose inquest in 1972 alleged that he had committed suicide when that was unlikely the case.

Timol's nephew, Imtiaz Cajee, has been a relentless champion in pursuing justice for his uncle. Since 2003, Imtiaz has been at the forefront in advocating for the NPA to prosecute the individuals who murdered Timol. As is clear from the Simelane matter, the NPA was operating under orders not to continue investigations and prosecutions. At some point, the NPA was disingenuous and pretended to have investigated the matter, when in actual fact no such investigation had taken place.¹³ The family of Timol had to go to great lengths, including threatening the NPA with possible court action, to ensure that action was taken. Both the Timol and Simelane cases revealed in shocking detail the lengths to which the State would go to prevent the police from investigating and the prosecutors from pursuing matters further.¹⁴

After the victory of the inquest being re-opened with the court finding that the cause of Timol's death was not a suicide as previously reported, the hope of a prosecution was ignited. Joao Rodrigues, the only surviving officer involved in the direct murder of Timol was charged with murder. Rodrigues however, applied to the High Court requesting that a permanent stay of prosecution be granted on the matter. The Court rejected the application, and he is due to stand trial for the murder of Ahmed Timol. Rodriguez has applied for leave to appeal the decision. This case has the potential to be revolutionary in matters related to the investigation and prosecution of regime crimes in South Africa, and has ignited the hope of other families that perhaps justice will eventually be served.

The Timol matter has ignited renewed activism in other organisations such as the Southern African Litigation Centre (SALC), who joined in the proceedings. The submissions made by SALC assert that it is not sufficient to prosecute Rodrigues only for the crime of murder, but that there is a clear basis for him to be prosecuted under international law for crimes against humanity.¹⁵ According to SALC's Executive Director, Kaajal Ramjathan-Keogh, the Timol case is not an isolated matter, rather "it is about how a single murder is connected to the human rights violations committed during apartheid and therefore becomes a crime against humanity. This case should pave the way for the crime of apartheid to be prosecuted".¹⁶

The re-opening of these inquests has been hailed as a step in the right direction by activists who advocate for accountability

of apartheid crimes.¹⁷ In February, 2019, a group of former TRC Commissioners wrote an open letter to the President. The letter calls upon the President to "appoint a Commission of Inquiry into the political interference that has stopped the investigation and prosecution of virtually all the cases referred by the TRC to the NPA".¹⁸ Thus far, it has been up to the civil society organisations, partnering with law firms and legal advocates on a pro-bono basis, to support the families who are seeking prosecution. No meaningful prosecution has been instituted willingly by the State at its own behest. The limited cases that have made it to the courts have been as a result of sustained public pressure and relentless pressure by family members. However, not every family has the social capital and resources to fight this battle on their own. Hopefully, the government will fulfil its promises, and mandate, of ensuring that justice is ultimately served.

RECOMMENDATIONS

- The NPA should immediately re-open all cases handed over by the TRC and honestly pursue prosecutions.
- A public investigation should be conducted into the operations on the NPA and SAPS since the end of apartheid and the reasons for the delay in prosecution to be made public.
- The government should urgently re-open all inquests that were carried out during apartheid involving the deaths of activists who died in police custody or under suspicious circumstances.
- A dedicated process should be established for the prosecution and judicial hearings of apartheid era crimes. The constant delays currently in the system are only serving to deny survivors of their right to justice.

13 Kevin Bloom, "History Suppressed: What Didn't Get Revealed in Timol Inquest", in *Daily Maverick*, 22. 8. 2017, <https://www.dailymaverick.co.za/article/2017-09-22-history-suppressed-what-didnt-get-revealed-at-the-timol-inquest/>

14 Ra'eesa Pather, "NPA Admits to Political Interference in Prosecutorial Decision", in *Mail & Guardian*, 6. 2. 2019, <https://mg.co.za/article/2019-02-06-npa-admits-to-political-interference-in-prosecutorial-decisions>

15 Rodrigues v NDPP et al, Permanent Stay of Prosecution, Seventh Amicus Curiae Heads of Arguments, Case No. 76755/18, 18 Feb 2019

16 "Johannesburg High Court dismisses apartheid police officer's application to cease prosecution", Southern African Litigation Centre, 3 June 2019, <https://www.southernafricalitigationcentre.org/2019/06/03/statement-johannesburg-high-court-dismisses-apartheid-police-officers-application-to-cess-prosecution/>

17 Other cases that are now currently pending are the matters relating to the assassination of the Cradock Four and the murder of Dr. Neil Aggett.

18 Yasmin Sooka and Dumisa Ntsebenza, "Inquiry needed into political interference in post-TRC prosecutions", in *Politics Web*, 7. 2. 2019, <https://www.politicsweb.co.za/archive/inquiry-needed-into-political-interference-in-post>

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REHABILITATION OF VICTIMS

TASNEEM KALLA, HUGO VAN DER MERWE

INTRODUCTION AND DESCRIPTION OF THE DEFAULT SITUATION

During the oppressive apartheid era (1948 to 1994) and the preceding three centuries of colonial rule, the majority of South Africans were subject to human rights abuses and violent and dehumanising treatment. The scope of what black South Africans were forced to endure ranged from economic, social and cultural injustices, such as the dispossession of their land, displacement, cultural marginalisation, unequal access to health and education and civil and political rights abuses such as political disenfranchisement, arbitrary arrests, extrajudicial executions and torture. The majority of the South African population was excluded and economically marginalised to the point of keeping them “just above destitution.”¹ The apartheid system of racial discrimination and the accompanying repressive measures were implemented through a legal framework that rendered most of these human rights abuses as legal measures, leaving victims with very limited recourse to remedies through the courts.

With a history characterised by brutality, South Africa’s democratic transition presented an opportunity to construct a democracy and secure protection for human rights, as well as the prospect to provide redress for the historical injustices perpetrated by the State. As part of the transitional justice process, the South African government established numerous mechanisms to address the injustices of the past, including land redistribution, affirmative action in employment, education and tenders. The mechanism that drew particular attention however was the Truth and Reconciliation Commission (TRC), which included processes to address rehabilitation for victims of gross human rights violations.

In the South African context, reparations and rehabilitation are terms often used interchangeably to refer to the measures that can be taken to help “victims overcome the damage that they suffered, to give them back their dignity and to make sure that these abuses do not happen again.”² While not formally recognising the rights of victims to reparations, the Promotion of National Unity and Reconciliation Act 34 of 1995 (the TRC Act) makes provision for various forms of reparations for victims of gross human rights violations.³ However, chapter 5 of The Act, which deals with the entire reparations process, falls short in spelling out what reparations should be provided. Instead it states that the committee established to receive reparation applications “may make recommendations which may include urgent interim measures ... as to appropriate measures of reparations to victims.”⁴ The final outcome of the reparations process however, was left undefined and remained at the discretion of the Parliament and the President, once they have considered the recommendations developed by the TRC.

TRANSITION

The transition to democracy occurred as part of a negotiated settlement which granted amnesty to those who had committed politically motivated human rights abuses during the conflict.

This meant that these perpetrators could not be held criminally or civilly responsible for their actions. It also meant that victims could not hold them accountable. Instead of criminal accountability, victims were promised truth and reparations. The TRC was established by the South African parliament in 1995 by means of the Promotion of National Unity and Reconciliation Act, No. 34 of 1995. The South African TRC was the product of a widely consultative process involving civil society, political parties, human rights lawyers, religious communities, as well as international actors who had dealt with similar challenges, particularly in Latin America.⁵ The TRC operated between 1996 and 1998 with the mandate to investigate gross human rights violations committed from 1960 to 1994. It was tasked with facilitating truth-telling, justice, reconciliation, rehabilitation, and reparations – with the expressed aim of restoring the human and civil dignity of victims of gross human rights violations.⁶ The Act stated that the TRC must aim to “make proposals for measures that will give reparation to victims of human rights violations; and rehabilitate and give back the human and civil dignity of people who suffered human rights violations.”⁷ The Rehabilitation and Reparations Committee (RRC) was one of the three committees established to carry out the TRC mandate, along with the Human Rights Violations Committee, and the Amnesty Committee. While the Human Rights Violations Committee investigated and made findings regarding human rights abuses, and the Amnesty Committee considered, approved and denied amnesty applications, the RRC was established to restore the dignity for victims by formulating policies and recommendations on reparation and rehabilitation for victims, including their families and affected communities.⁸

In the South African transitional justice context, rehabilitation was envisioned to address the needs of victims for medical and psychological care and services and include interventions at both community and individual levels.⁹ The TRC’s framework for reparations were broad and provided for two stages of

1 “A history of apartheid in South Africa”, in *South African History Online*, 2016, <https://www.sahistory.org.za/article/history-apartheid-south-africa>

2 Ibid.

3 Government Gazette, 1995-07-26, TRC Act, Vol. 361, No. 16579, Promotion of National Unity and Reconciliation Act 34 of 1995, <http://www.justice.gov.za/legislation/acts/1995-034.pdf>

4 Department of Justice and Constitutional Development, Republic of South Africa, “A Summary of Reparations and Rehabilitation Policy, Including proposals to be considered by the President”, (no date), <http://www.justice.gov.za/trc/reparations/summary.htm#SECTION%201>

5 Alex Boraine, Janet Levy, Ronel Scheffer, eds., “Dealing with the Past: Truth and Reconciliation in South Africa”, in *Institute for Democracy in South Africa*, 1997, 175.

6 We acknowledge that the term “victims” has been challenged as imposing a narrative and experience on people that they might not identify with. Some people who experienced human rights violations prefer the term “survivors”.

7 TRC Act op cit note 3, chapter 1.

8 Desmond Tutu, “Truth and Reconciliation Commission, South Africa”, in *Britannica*, 2019, No. 8, <https://www.britannica.com/topic/Truth-and-Reconciliation-Commission-South-Africa>

9 Truth and Reconciliation Commission Website, TRC Final Report, Vol. 6, 93, <http://www.justice.gov.za/trc/report/>

a reparations processes, Urgent Interim Reparations and Final Reparations. The Act provided that Urgent Interim Reparations be made for those who are in urgent need of reparations to deal with the immediate consequences of the human rights violations they suffered while the TRC was still operating.¹⁰ The Final Reparation were to be included as recommendations in the Report to the President at the conclusion of the TRC process, and only implemented by the State after the report was submitted.

The RRC drew on the TRC framework for reparations and developed extensive recommendations for victim-centred reparations that the state was expected to fulfil. The TRC Final Report (in contrast to the TRC Act) recognises the legal rights of victims to receive reparations. It spells out the legal basis for reparations, in relation to the national legislation and constitutional provisions, as well as the international law obligations of the state. The report dedicates a whole chapter to unpacking “The Case for Reparation and Rehabilitation: Domestic and International Law”¹¹ which unpacks the state’s obligation in relation to victims legitimate expectations to receiving reparations. Drawing from the international normative frameworks and debates about reparations, the Committee’s recommendations for reparations encompassed the five principles of reparations (the five R’s): redress, restitution, rehabilitation, restoration and reassurance of non-repetition. Within this framework, the Committee’s policy recommended that reparations be approached on the individual, community and institutional levels.

The RRC acted within the TRC Act’s definition of victim which recognised both individual and collective victims, as well as direct and indirect victims. The definition includes “persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights” as a consequence of gross human rights violations or an act “associated with a political objective for which amnesty has been granted”; those whose suffering and harm was a result of their “intervening to assist” direct victims “who were in distress or to prevent ‘victimisation’; and relatives and dependants of direct victims.”¹²

FRAMEWORK FOR REPARATIONS

SCOPE AND TYPOLOGY

The TRC proposed a raft of measures to provide reparations and rehabilitation. This included individual reparations and community reparations, along with a range of measures called symbolic, which had both individual and collective components. Individual reparations were mainly framed in terms of individual financial payments, as well as medical and health services. But recommendations were also made to assist with finding and reburying the remains of victims. Individual financial payments were both in the form of Urgent Interim Reparations implemented by the TRC and as part of the Final Reparations recommendations to be implemented by the State.

In relation to communal reparations, these were framed as state-funded community programmes set to restore fractured and damaged communities, but also encompassed symbolic measures related to collective memory in the form of memorial sites. All these measures were strictly tied to the TRC legislation, which specified the time frame and nature of victims who would be considered eligible for reparations.

INDIVIDUAL REPARATIONS

As stated in the Act, only individuals who made statements to the commission or were referred to in others’ statements were considered for reparations. The beneficiaries of reparations were those who were formally declared victims by the Commission who decided this on a case-by-case basis.

The first consideration for the TRC was the provision of Urgent Interim Reparations. These took the form of small financial payments to those victims who were considered to be in urgent need. These were intended to support victims just till Final Reparations for individuals could be implemented on a more comprehensive basis. The Urgent Interim Reparation provided 16 855 payments, totalling R 50 million by the time the TRC final report was released.¹³ Payments were delayed largely due to the State’s slow processing of the related regulations.¹⁴ The payments were assessed on a case-by-case basis and began in mid-1998, just as the TRC was drawing to a close. Final reparation payments were only disbursed after the conclusion of the amnesty process in 2003. This was in marked contrast to the amnesty process which led to the immediate release of prisoners upon the finalisation of their individual cases.

The TRC’s recommendations for individual Final Reparations presented a framework encompassing a range of measures including (1) financial assistance to victims, (2) provision of services to victims and (3) individual symbolic measures to acknowledge the wrongs they had suffered and support healing. The payment of financial reparations – the monetary compensation for gross human rights violations – was intended to help victims deal with the consequences of the violence, while acknowledging the victims suffering and ensuring the provision of a basic standard of living.¹⁵ The recommendation was for all individual victims to receive roughly R 20,000 per year for a period of six years.¹⁶

The TRC also recommended that the state provide victims with other services to alleviate the impact of the victimisation. These included access for them and their families to medical services, education, support with finding remains and the reburials of those who had been disappeared, and legal support with death certificates and clearance of criminal records. Symbolic measures were also suggested to acknowledge individuals such as through renaming of public streets and buildings

COMMUNITY REPARATIONS

The TRC Act had anticipated the need for the Reparations fund to also provide for measures to promote community rehabilitation.¹⁷ The TRC recommendations for Collective Reparations

¹⁰ Ibid., 94.

¹¹ Ibid., 98–111.

¹² TRC Act op cit note 3.

¹³ TRC Final Report, op cit note 9. (R 50 million is equivalent to roughly US\$ 3.5 million)

¹⁴ Ibid.

¹⁵ Oupa Makhalemele, Still Not Talking: The South African Government’s Exclusive Reparations Policy and The Impact of the R 30,000 Financial Reparations On Survivors, in Carla Ferstman, Mariana Goetz and Alan Stephens, eds., “Reparations for Victims of Genocide, War Crimes and Crimes against Humanity”, Brill, 2009.

¹⁶ Truth and Reconciliation Commission Website, TRC final report, Vol. 5, 185, <http://www.justice.gov.za/trc/report> (R 20,000 is equivalent to roughly US\$ 1,400)

¹⁷ TRC Act op cit note 3 [section] 42(2A).

were predominantly addressed in the forms of community benefits, namely community symbolic reparations and rehabilitation interventions to restore divided and conflict-affected communities. Symbolic reparations included the legal and administrative measures to facilitate the process of memorialisation and commemoration of the losses and victories of the past. This involved both provincial authorities who needed to take responsibility for the implantation of certain symbolic reparations such as the renaming of streets and facilities – in order to remember and acknowledge individuals, spaces and events important to communities. On a national level, public facilities were to be renamed, monuments and memorials erected and national holidays, such as a national day of remembrance and reconciliation, established. The responsibility for this would mainly fall with the South African Heritage Resource Agency.

Community reparations recommendations also included community rehabilitation programmes for the “resettlement of persons and communities who were displaced, establishment of treatment centres in communities for physical and psychological healing and rehabilitation, providing support to community-based victim support groups, educational bursaries and kills training, among other things”.¹⁸

CURRENT STATUS

The State’s failure to implement the TRC’s recommendations on reparations led to extensive criticism and protest by victims and other civil society organisations. The reparations process has been characterised by long delays, reluctance by the state to implement the recommendations in full, and concerns about the political manipulation of the measures. Disputes regarding the finalisation of the regulations to implement reparations continue till today, 16 years after the finalisation of the TRC process and 25 years after the transition to democracy.

On 28 March 2003, following the conclusion of the extended amnesty process, the TRC tabled its Final Report which spelled out its various recommendations.¹⁹ The government responded to the TRC’s reparations recommendations with a plan that included four categories of reparations: final individual reparations, symbols and monuments, rehabilitation of communities, and medical benefits and other forms of social assistance, but which provided limited concrete commitments to their implementation.²⁰

The implementation of the various forms of reparations were pursued through processes involving different regulations for these respective measures, namely individual financial payments, exhumations and reburials, educational support, medical support and community reparations. Except for community reparations, these regulations have been adopted and implemented to some extent.

INDIVIDUAL

Instead of the individual payments of R 20,000 per year for six years (R 120,000 total) recommended by the TRC, and after much delay, the State made the decision to provide a once-off payment of R 30,000 per victim. This decision to only pay a quarter of the recommended amount was met with protests from victims.²¹

CSOs and survivors also raised the concern that the reparations payments were restricted to only those who were recognised

by the TRC. Those who fell within the TRC definition of victim, but who had been unable or unwilling to apply for this status during the time of the TRC were disqualified from receiving any payment.²² Many victims were unable to approach the TRC during its short time span as it had limited reach into rural areas, conflict was still ongoing in some parts of the country, and there had been limited communication with victims about how to approach the TRC. The TRC formally identified and acknowledged 21,676 victims of apartheid, of whom 17,408 received reparations in the form of monetary payment from the government.²³

Not only were the payments significantly delayed and substantially lower than recommended, survivors were left with the sense that the State had prioritised perpetrators whose situations were immediately addressed after the amnesty hearings.²⁴ Furthermore, the State introduced additional measures for pardoning political perpetrators – covering those who had failed to apply for amnesty and covering an extended period (till 1999) while making no similar provisions for victims.²⁵

After further delays, in 2011 the State proposed three additional sets of reparation regulations: Regulations Relating to Assistance to Victims in Respect of Basic Education, Regulations Relating to Assistance to Victims in Respect of Higher Education and Training, and Regulations Relating to Medical Benefits for Victims.²⁶ These measures have however been very slowly implemented and the bureaucratic procedures involved have meant that very few victims have managed to access such benefits since their introduction.

Regulations on the Exhumation, Reburial or Symbolic Reburial of Deceased Victims were published by the Department of Justice and Constitutional Development on 7 May 2010.²⁷ These

18 Oupa Makhalemele, op cit note 15.

19 The TRC’s mandate concluded in 1998, however, the Amnesty Committee was granted an extension of their mandate due to the volume of applications received. This consequently meant that the disbursement of reparations was also delayed since the amnesty process was a means toward identifying victims on the basis of the accounts given by perpetrators.

20 Parliamentary Monitoring Group, “Final Report: adoption, Reparation Committee, Meeting Summary”, Appendix 1: *Provisional Draft Report on Recommendations by Sub-Committee on Reparations*, 23 June 2003, available at <https://pmg.org.za/committee-meeting/2624/>

21 Shirley Gunn, “South Africa Reparations Advocacy: The Case of Khulumani Support Group”, *Conference Presentation, African Transitional Justice Research Network Workshop* “Advocating Justice: Civil Society and Transitional Justice in Africa”, 30–31. 8. 2010, Johannesburg

22 Annah Moyo, Maxine Rubin, Hugo van der Merwe, *Reparations for Apartheid-Era Victims in South Africa: The Unfinished Business of the Truth and Reconciliation Commission*, in Carla Ferstman, Mariana Goetz, Alan Stephens, eds., *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, 2018, 17.

23 Adam Yates, “Justice Delayed: The TRC Recommendations 20 Years Later”, in *Daily Maverick*, 5.9.2018, <https://www.dailymaverick.co.za/article/2018-09-05-justice-delayed-the-trc-recommendations-20-years-later/>

24 Ibid.

25 Hugo van der Merwe, *Prosecutions, Pardons, and Amnesty: The Trajectory of Transitional Accountability in South Africa*, in Nicola Palmer, Phil Clark and Daniella Granville, eds., *Critical Perspectives in Transitional Justice*, Antwerp: Intersentia, 2012.

26 Department of Justice and Constitutional Development, Republic of South Africa, *Invitation for Public Comments on A: Regulations Relating to Assistance to Victims in Respect of Basic Education, B: Regulations Relating to Assistance to Victims in Respect of Higher Education and Training, and C: Regulations Relating to Medical Benefits for Victims*, 2011.

27 Promotion of National Unity and Reconciliation Act 34 of 1995: *Regulations on the Exhumation, Reburial or Symbolic Reburial of Deceased Victims*, 2010.

regulations provide financial assistance to relatives of missing or deceased persons to locate their relatives' graves, and if applicable, to exhume their bodies to allow for reburial. Where bodies cannot be located, financial assistance is offered for the symbolic reburial of the missing/deceased persons. This assistance is only available to relatives of victims classified as such by the TRC. These funds were specifically made available for relatives involved in reburials carried out by the Missing Persons Task Team which was mandated to follow up on TRC missing person's cases.

COMMUNITY

Regulations for Community Reparations have still not been finalised as they were only drafted in 2013 and were subjected to intense criticism both within parliament²⁸ and by civil society and survivors. The draft regulations for the community rehabilitation reparations strategy were criticised on several grounds, the lack of criteria in making an assessment and identifying which communities were most-in-need was one of these criticisms. More so, the lack of transparent and consultation in developing the regulations for community rehabilitation measures in addition to the long delay in initiating these reparations were also remarked upon as a concern that the state was not taking its obligations towards reparations seriously.²⁹

A major point of contestation was the link between the rehabilitative measures proposed and redressing human rights violations as defined by the TRC Act. The community rehabilitation measures were more developmental in nature prompting concerns that the responsibility to address developmental needs which should be funded by the general budget rather than through reparations funds intended to support victims. The lack of specifics in the draft Regulations may allow for the reparation funds to be used for developmental projects instead of the TRC mandated aims.

SOCIAL SATISFACTION

In response to the ineffective reparations process and the disappointment and frustration of the victims of the apartheid system, many civil society groups have been very outspoken on issues of reparations. One of the most visible voices in civil society is the Khulumani Support Group (Khulumani) who continue to publicly voice their concerns about the lack of sufficient reparations measures and the failures of the states to adequately consult with victims.

Khulumani, in collaboration with other civil society organisations formed a coalition (South African Coalition for Transitional Justice) which has campaigned around the unresolved issues of the TRC, paying particular attention to reparations as the key challenge. This coalition also receives support in its stand from a range of other civil society organisations. Many of the marginalised population "have lost hope in a government that has made false promises",³⁰ not only in reference to the reparations process but also to the State's pursuit of justice, truth and reconciliation.

LESSONS LEARNT AND RECOMMENDATIONS

1/ The delays in the provision of financial reparations undermined the value of the reparation process, the legitimacy of

the TRC and transitional justice process in South Africa more generally. The credibility of the process was questioned as the victim's sense of justice was violated and their situation, suffering and loss perceived as less important than the granting of amnesty to perpetrators.³¹ Prioritizing the needs of victims is paramount to healing the growing mistrust and dissatisfaction with the "unfinished business of the TRC" and the unfulfilled reparations.

2/ The ambiguous legal framework and unclear information policy (before, during and after the TRC hearings) remain a huge challenge. The Interim Constitution suggested the need for reparations as a part of the South African democratic transition, however, there was no mandated implementation of these reparations. Thus there remains no legal obligation on the state to provide and follow-through on reparation processes.³² In contrast, the implementation of the amnesty process was constitutionally mandated furthering marginalizing victims and their access to redress. Although the provisions concerning the need for reparations were included in the Final Constitution, this was done within the context of legitimizing the TRC Act.³³ The legal ambiguity and lack of State obligation to provide and follow-through on reparations raises the issue of accountability. Particularly, how the individual citizens can hold their State accountable for the reparations they are entitled to as part of the TRC process.

3/ The governments input on reparations remains inconsistent and offhand, the piecemeal approach utilized since the establishment of the reparations programme remains ineffective and without meaningful or sustained conversation between governments, civil society and representatives of the victims.³⁴ There is a need for an integrated framework to function within other mechanisms of transitional justice and justice reforms in general.

4/ The lack of a clear consultation process during the development of the regulations governing implementation of reparations has undermined confidence in the accessibility and commitment of the state. Civil society groups and representatives of victims need to be involved by establishing clear channels of consultation and dialogue about what reparations entail and the implementation of these processes.

5/ Reparations were not implemented in conjunction to the other transitional justice mechanisms. The South African case highlights and questions the holistic implementation of transitional justice mechanisms, specifically reparations in the process of reconciliation.³⁵ The credibility of the entire transitional justice process depends largely on how the government addresses reparations as it represents the prioritisation of victims needs and acknowledges their suffering.

28 Parliamentary Monitoring Group op cit note 20.

29 Ibid.

30 Adam Yates, op cit note 23.

31 Ruth Picker, *Victims' Perspectives about the Human Rights Violations Hearings*, Centre for the Study of Violence and Reconciliation, Research Report, 2005, 17.

32 Christopher J. Colvin, Overview of The Reparations Program in South Africa, in Pablo de Greiff, eds., *The Handbook of Reparations*, Oxford University Press, 2006, chapter 5, 203.

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35 Warren Buford, Hugo van der Merwe, "Reparations in Southern Africa", in *Cahiers d'études africaines*, 2004, Vol. 44, 1-2.

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EDUCATION AND PRESERVATION OF SITES OF CONSCIENCE

GERALDINE FRIESLAAR

INTRODUCTION

At the heart of a society in transition, particularly one that was built on institutionalized racism, secrecy, inequality, human rights violations and state-imposed amnesia characteristic of the apartheid era, are its cultural, heritage and memory institutions. In trying to grapple with the legacies of a complex, contested and fragmented past and in the recasting of a new nation, various mnemonic devices, such as museums, memorials, monuments, public holidays, public art and performance, archives, historiographies, autobiographical writing, social activism and recreational tourism amongst others, have been deployed in the service of the production of collective memory in the post-apartheid. In an effort to serve as a pedagogic tool and *aide-mémoire* of the past, collective remembrance draws on elements from the past to speak to the present and an imagined future. However, the post-apartheid commemorative culture which has gripped South Africa has also accentuated the tension, contestation and compromise between remembering and forgetting, all intertwined with multiple stories of loss, triumph, sacrifice, heroism, victimhood, trauma and violence.¹

HISTORICAL BACKGROUND

The reality is that post-apartheid South Africa is still haunted by the spectre of white minority rule which is palpable in all spheres of life, whether it is through the spatial design of cities, resilient patterns of racialized inequality or through the representation of racial and gender imbalances in cultural, heritage and memory institutions that was established during apartheid. Moreover, the legacy of apartheid left an indelible scar on the landscape of South Africa, when looked through the lens of forced removals, racial segregation and campaigns of state terror, so even if there were no memorialization projects, the materiality of physical sites and objects (whether it contains built environment or have been left vacant after forced removals or displacement), offers a stark reminder to a painful past. In as much as the making of a new “rainbow nation” was premised on the notion of looking forward to the future by forgetting some painful and potentially divisive aspects of the past, in the spirit of reconciliation and nation-building, especially after the fall of apartheid, the creation of a new nation forged out of the crucible of the “triumphing of good over evil”, also required the constitution of processes of collective remembrance. These processes necessarily involved the construction, and reconstruction, of heritage institutions in South Africa, all of which has had varying degrees of success in respect of the production of a shared sense of memory interwoven around the tension between remembrance and forgetting.

With the demise of apartheid and the euphoria accompanying the transition to democracy, the early 1990s saw a flowering of new heritage institutions, national museums, community

museums, memorial projects, monuments and archival institutions. Informed by the newly adopted ethos of the democratic government, these institutions focused on forging a shared and collective sense of history and heritage aligned to the new democratic government’s commitment to reconciliation, redress and nation-building. The early 1990s also saw the beginnings of a transformation discourse which offered a means through which existing heritage institutions could be reimagined, in order to reflect the cultural sensibilities of the changing political conditions within the country, as South Africa transitioned from an authoritarian regime to a democracy.² The political developments and intense transformation processes saw the emergence of various post-apartheid institutions such as community museums, like the District Six Museum and the Lwandle Migrant Labour Museum (both in Cape Town), and national museums such as Robben Island Museum in Cape Town, the Nelson Mandela National Museum in Mthatha, Qunu and Mvezo and Freedom Park in Pretoria, to name but a few.³ The proliferation of post-apartheid heritage institutions and memory projects continued well into the late 1990s and was at the coalface of leading discussions on policy formation around heritage, the politics of issues of heritage and the production of history and heritage.

Framed within national debates regarding transformation and various consultative processes which started to emerge during the early 1990s, the African National Congress’s (ANC) Arts and Culture Desk set up a Commission for Museums, Monuments and Heraldry (CMMH) in 1991 as a vehicle for the formulation of a national policy on museums, monuments, archives, heraldry and national symbols. The purpose of the CMMH was to formulate a policy that would both safeguard and educate people about the heritage of South Africa. Chaired by Wally Serote, head of the ANC’s Arts and Culture Desk and coordinated by Professor Themba Sirayi, director of Centre for Cultural Studies (CCS) at the University of Fort Hare (UFS) in the Eastern Cape, the objective of the CMMH was to work towards “a common integrated and integrating cultural framework that [would help] to promote

1 Marita Sturken, *Tangled Memories: The Vietnam war, the Aids Epidemic and the Politics of Memory*, Berkeley and Los Angeles: University of California Press, 1997, 43.

2 Leslie Witz, Transforming museums on post-apartheid tourist routes, in Ivan Karp, Corinne Kratz, Lynn Szwaja and Tomás Ybarro-Frausto, with Gustavo Buntix, Barbara Kirshenblatt-Gimblett, and Ciraj Rassool (eds.), *Museum Frictions: Public Cultures/Global Transformations*, Durham: Duke University Press, 2006, 108; Also see Verne Harris, “The Archival Sliver: Power, Memory and Archives in South Africa”, in *Archival Science*, 2002, Vol. 2, 76.

3 Ciraj Rassool, Memory and the Politics of History in the District Six Museum, in Noeleen Murray, Nick Shepherd and Martin Hall (eds.), *Desire Lines: Space, Memory and Identity in the Post-Apartheid City*, Abingdon: Routledge, 2007, 113; Also see Ciraj Rassool, Community Museums, Memory Politics and Social Transformation in South Africa: Histories, Possibilities and Limits, in Ivan Karp et al (eds.), *Museum Frictions: Public Cultures / Global Transformations*, Durham & London: Duke University Press, 2006, 288.

the shared cultural identity and to put such identity at the centre of the development paradigm.”⁴

Criticizing heritage institutions that were created under apartheid, the CMMH castigated these institutions for being “otiose, monuments of privilege, waste of money, institutionalized proof of white hegemony and abuse of the environment and culture.”⁵ Having recognized that there was no coherent national policy for the management of heritage resources, the CMMH sought to advance a national policy through which heritage institutions and structures could “foster national unity, reconciliation and democratic values and be accessible to and preserved for the education, benefit and development of all South Africans.”⁶ For example, in the ANC’s proposed national policy, archives were positioned “at the nexus of cultural and civil rights” their role was accentuated as one in which they “should collaborate with cultural and heritage institutions in a people’s history programme aimed at empowering the voiceless, and [where] archival centres [are] positioned as community resources, not simply repositories.”⁷

Following the 1994 general elections that saw the ANC win with a landslide victory, the Minister of Arts, Culture, Science and Technology, Dr. Ben Ngubane, appointed 23 people to form the members of the Arts and Culture Task Group (ACTAG) in November 1994. The purpose of ACTAG was to make detailed recommendations on arts and culture policies which were in line with the principles of South Africa’s new constitution. The emergence of ACTAG, which in turn informed the White Paper on Arts, Culture and Heritage in 1996 and other administrative and legislative framework that stemmed from these recommendations, such as the *National Heritage Resource Act* (No.25 of 1999) also led to the launch of the National Legacy Project “with the aim of redressing and transforming the heritage landscape of this country to ensure that it truly represents the diversity of our society.”⁸

In their analysis of the centrality of nation-building in the formation of museums, archives and libraries, Richard Harvey Brown and Beth Davis-Brown concluded that these institutions “help to preserve a collective national memory and thence, to constitute a collective national identity,”⁹ and “thereby contribute to the social stability and solidarity amid rapid and otherwise more centrifugal change.”¹⁰ Following from their argument, it can be argued that these post-apartheid institutions were configured as one of the ways in which to create modern “imagined communities”¹¹ where heritage institutions became integral in the shaping of new publics and the education of the country’s citizenry. Recognizing that cultural, memory and heritage institutions are “[far] from ... passive receptacles or neutral storehouses for holding onto the remembered past, these mnemonic devices are active agents in shaping the construction of a tenuous collective identity and shared meaning in the everyday lives of South African citizens,”¹² the new democratic government embarked on a process of commemorative practices and nation-building.

Cognizant of the limitations and omissions inherent in heritage institutions formed during apartheid, the new democratic government sought to redress historical imbalances of racial, class and gender representation within the knowledge economy of these institutions. It is in this regard, that the *National Heritage Bill of 1998* came into existence in order to foster an integrated approach to all the national heritage institutions, including museums, archives, monuments, living heritage and national symbols. The Bill makes provision for the national museums and heritage institutions of the colonial and apartheid eras to be subsumed

into two new national flagship museums, the Iziko Museums in Cape Town and the Ditsong Museums in Pretoria. The amalgamation of the museums into flagship museums was intended to facilitate transformation in respect of employment, exhibition strategies and collection policies.¹³

THE NEED FOR PRESERVATION OF WITNESS MEMORY

Although the demise of apartheid signalled the end of institutional racism through a brokered transfer of political power, heritage institutions in apartheid South Africa were traditionally regarded as “spaces where black people were represented only in ethnographic collections and exhibits.”¹⁴ Framed against the apartheid legacies of large scale destruction, imbalances in representation, distortion and the sanitization of historical memory, the birth of the new nation was always going to be fraught with contestation in redressing the imbalances and injustices of the past. The tension around the struggle between forgetting and remembering in the service of the negotiated settlement and the subsequent political compromise that was reached among the multi-party democracy in 1994, has played itself out in various ways in heritage institutions established during the apartheid era and in the post-apartheid in the form of contestations and tenuous debates. The contestations around the politics of remembrance have problematized what should be remembered and the way in which it should be remembered in the post-apartheid.

Notwithstanding the underlying tensions inherent in the act of remembrance, the repressive apartheid regime has

4 ANC Policy for Transformation and Development of Heritage Resources (Museums, Monuments, Archives and National Symbols) for a Democratic South Africa, Discussion paper presented on behalf of the ANC Commission for Museums, Monuments and Heraldry to the ANC Culture and Development Conference, Civic Theatre, Johannesburg, May 1993 (NA-HECS, University of Fort Hare, Alice), 1.

5 Ibid., 1.

6 Ibid., 2.

7 State of the Archives: An analysis of South Africa’s national archival system, 2014, prepared by Archival Platform, University of Cape Town: Cape Town, 2015, 28.

8 Arts and Culture on National Legacy Projects <https://www.gov.za/speeches/arts-and-culture-national-legacy-projects-24-jun-2017-0000>; The National Legacy Project was a memorial project mandated to commemorate leaders, cultures and historic places that had been neglected in the past. See Khwezi ka Mpumlwana, Gerard Corsane, Juanita Pastor-Makhurane and Ciraj Rassool, Inclusion and the Power of Representation: South African Museums and the Cultural Politics of Social Transformation, in Richard Sandell (ed.), *Museums, Society, Inequality*, Abingdon: Routledge, 2002, 250.

9 Richard H. Brown and Beth Davis-Brown, “The Making of Memory: The Politics of Archives, Libraries and Museums in the Construction of National Consciousness”, in *History of the Human Sciences*, 1998, Vol. 11, No. 4, 19.

10 Ibid.

11 See Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, London: Verso, 1991, 6–7.

12 Martin Murray, *Commemorating and Forgetting: Challenges for the New South Africa*, Minnesota: University of Minnesota Press, 2013.

13 Leslie Witz, Transforming Museums on Postapartheid Routes, in Ivan Karp, Corinne A. Kratz, Lynn Szewaja and Tomás Ybarra-Frausto, with Gustavo Buntinx, Barbara Kirshenblatt-Gimblett and Ciraj Rassool (eds.), *Museum Frictions: Public Cultures/ Global Transformations*, Durham & London: Duke University Press, 2006, 108.

14 Ibid., 107.

demonstrated the importance of the preservation of memories, especially when juxtaposed with State machinery that not only destroyed records of those it oppressed, but also sought to dehumanize, classify and codify its citizens in line with its discriminatory policies and legislation. Preceding the end of apartheid, were the emergence of resistance art and literature the 1970s, and the conceptualization of a people's education and oral history programmes during the 1980s. The development of resistance art, literature and a people centred education was to counter apartheid and to document the memories of those opposed to apartheid. Although these developments can be traced back to the 1970s, it finally gathered momentum during the 1990s with the emergence of a transformation discourse.¹⁵ More importantly, as Gary Minkley and Ciraj Rassool argued, "[p]eople's history produced a politics of history as weapon, tool, and vehicle for empowerment, as part of 'a broad project to develop an education for a post-apartheid South Africa'".¹⁶ The transformation discourse facilitated an acute impetus to memorialize "as a form of symbolic justice or reparations to the victims, an instrument for reconciliation, a mechanism for nation-building and political legitimacy, and a pedagogical tool to inculcate the preventative lessons of 'never again'".¹⁷

ROLE OF MEMORY INSTITUTIONS

As mnemonic devices, post-apartheid sites of memory in South Africa have primarily attempted to provide a space for reflection or mourning in addition to functioning as pedagogical instruments and conduits for reconciliation and forgiveness as framed within the confines of the ideals of South Africa's "rainbow nation". Given the apartheid legacy of exclusion, post-apartheid sites of memory were also tasked with the responsibility of giving voice to the hidden and marginalized voices of society by focusing on an inclusive approach to heritage. More importantly, as "theatres of memory",¹⁸ sites of memory affirms the humanity of those that suffered as a result of apartheid's atrocities and as result the heritage landscape of post-apartheid South Africa are dotted with memorials, monuments, museums and heritage sites. Some of these include, but is not limited to:

- Robert Sobukwe Memorial, Graaff-Reinet
- Red Location Museum, Port Elizabeth
- Freedom Park, Pretoria
- Nelson Mandela Museum, Mthatha
- Heroes Park, East London
- Mandela House, Soweto
- Bhisho Massacre Memorial, Bhisho
- Freedom Charter Monument, Kliptown
- Steve Biko statue, East London
- Hector Pieterse Memorial and Museum, Johannesburg
- Nkosi Albert Luthuli Statue, KwaDukuza
- Holocaust Centre, Cape Town
- Solomon Mahlangu statue, Mamelodi
- Slavery Emancipation Monument, Elim
- The Workers' Library and Museum, Johannesburg
- Mahatma Gandhi statue, Pietermaritzburg
- The Gallows, Pretoria Central Prison
- The Unknown Miner, Johannesburg
- The Apartheid Museum, Johannesburg

While it falls outside of the scope of this chapter to discuss each post-apartheid memory institution in detail, I will provide

a brief overview of three memory institutions that have been built around respective campaigns of social justice, human rights, education, preservation and reconciliation.

TYPES OF MEMORY INSTITUTIONS

THE DISTRICT SIX MUSEUM

The District Six Museum is regarded as a site of memory and of conscience in the sense that it functions at the intersection of human rights advocacy and heritage conservation, as it interprets the history of District Six through the site and engages its community in public programming. The District Six Museum emerged out of the developments of material restitution for those affected by forced removals in District Six after its demarcation as a white group area in 1966 under the *Group Areas Act*. In 1989, the District Six Museum Foundation emerged as a living memory project around the history of District Six and the impact of forced removals on the once vibrant and diverse community of District Six. Out of these early developments, the District Six Museum was established and was officially opened in 1994 with an exhibition entitled, *Streets: Retracing District Six*, which focused on the people and streets that made up the District. In reclaiming the space, the aim of the exhibition was "not to recreate District Six as much as repossess the history of the area as a place where people lived, worked, loved and struggled".¹⁹ It is significant that the emergence of the museum in the 1980s occurred at the same moment that the social history movement gained momentum in South Africa. Emanating from its memory work around the histories of District Six and memory retrieval, "[o]ral history practice, as means of bringing to light the hidden and erased histories of the area, was embraced by the museum as an empowering methodology which would facilitate memory work around District Six".²⁰

THE ROBBEN ISLAND MUSEUM

Following in the footsteps of the District Six Museum, after an intense period of contested discussions regarding the future of Robben Island, it was proclaimed a national monument in January 1996. With this declaration, Robben Island came under the jurisdiction of Department of Arts, Culture, Science and Technology

15 Considered to be the forerunners of some post-apartheid heritage institutions, the History Workshop at the University of the Witwatersrand (Wits) and the Western Cape Oral History Project at the University of Cape Town (UCT), the People's History Project at the University of the Western Cape (UWC) sought to teach students how to do research before sending them into their communities to write the "hidden" or marginalised histories of these oppressed communities.

16 Gary Minkley and Ciraj Rassool, *Orality, Memory and Social History in South Africa*, in Sarah Nuttall and Carli Coetzee (eds.), *Negotiating the Past: The Making of Memory in South Africa*, Cape Town: Oxford University Press, 1998, 93.

17 Lisa M. Moore, "(Re)covering the Past, Remembering Trauma: The Politics of Commemoration at Sites of Atrocity", in *Journal of Public & International Affairs*, 2009, Vol. 20, 47.

18 Raphael Samuel, *Theatres of Memory: Past and Present in Contemporary Culture*, London: Verso, 1994.

19 See www.districtsix.co.za

20 For a richer discussion on the oral history strategies employed by the District Six Museum see Chrischene Julius, *Oral history in the exhibitionary strategy of the District Six Museum*, Cape Town, MA dissertation, University of the Western Cape, 2007, ii.

(DACST). After centuries of being used as a site of banishment, repression and imprisonment, the island prison finally closed its gates in 1996 in anticipation of being developed into the first national museum of a new democratic South Africa. As argued by Harriet Deacon, “[l]ike the death camps of the Holocaust, the island prison, a site of repression built by its inmates, [was] to be the first monument to the death of apartheid.”²¹ Although Robben Island was envisioned as a place of commemoration, the general consensus among the leaders of the liberation movement was that it should be represented as a site of resistance and “a symbol of the triumph of the human spirit over adversity” rather than as a site of suffering and repression.

With the establishment of the Robben Island Museum in January 1997, the museum became the first and foremost intervention of the National Legacy Project Programme, which was constituted in 1996. With the museum focused on fostering reconciliation and nation building by transforming the representation of the island into positive and universal terms, Nelson Mandela fittingly opened the Robben Island Museum on Heritage Day in September 1997. In attempting to navigate the tensions of being a sacred site and a tourist destination framed within the bureaucracies of heritage, only served to exacerbate a very contentious environment which has continued to haunt the museum.²² This contestation was further exacerbated by fierce debates about the role of ex-political prisoners in the development of the museum.²³ Despite the raging debates about the ownership over Robben Island’s history, between the interests of tourism and the demands for memorialization, the Island attained World Heritage status in December 1999. Strengthening its iconic and universal status, Robben Island was declared a World Heritage site as a result of its long historical association with imprisonment and banishment.

As the museum positioned itself as part of a nation-building project fostering reconciliation and promoting a shared sense of identity through the production of a national heritage, tensions ultimately arose, especially within political circles about the way in which liberation history was constructed and interpreted. These tensions were expressed even before the establishment of the museum and have since continued, with some critics charging that the “ANC had hijacked the island narrative as *the* narrative of the struggle.”²⁴ In fact, as Noel Solani argued, “[w]hen the Robben Island Museum was opened in 1997, it perpetuated the Mandela myth.”²⁵ This focus on Mandela, or the “Mandelaisation” of Robben Island can, in part, be understood given his centrality in brokering a relatively peaceful transition from apartheid to democracy and in answering the demands of an international tourism market that desired to participate in South Africa’s liberation story as epitomized through the figure of Mandela.²⁶

Despite these contentious debates that have plagued the museum since its establishment, Robben Island has become one of South Africa’s premier cultural tourist destinations with high volumes of visitors flocking to the island each year. According to Ciraj Rassool, this was in line with the new government’s efforts of “constructing, packaging, and transmitting images and representations of the ‘new’ society and its past to a perceived growing audience of international visitors”²⁷ in post-apartheid South Africa “in the service of nation building, social justice and economic advancement.”²⁸ Marketed as a site of resistance and a symbol of the “indomitable nature of the human spirit”²⁹ and its triumph over adversity, the Robben Island Museum has offered its visitors the opportunity to share in the “South African miracle” through

a narrative of peace and reconciliation. Commemorated of as one of the primary sites that deploy the healing logic of restorative justice in South Africa, Robben Island has drawn universal appeal, primarily because of the way in which its dark past has been reshaped into a story of victory over oppression.³⁰

CONSTITUTION HILL

Facing similar challenges, “at the often fraught intersection of nation-building, urban renewal and tourism,”³¹ Constitution Hill struggles to navigate between the tensions of positioning itself as a site of memory and conscience, and as a tourist destination. Emerging as one of a host of post-apartheid memorial projects, Constitution Hill came into existence in the very same space that once was a punitive symbol of the apartheid regime, and was occupied by the Old Fort Prison, which at different points in time held Mahatma Gandhi and Nelson Mandela for opposition against discrimination. Functioning as a multi-purpose urban space which includes prison buildings, a museum, the Constitutional Court and various non-governmental organizations primarily focused on social justice and human rights, Constitution Hill became one of the foremost sights in Johannesburg to commemorate the past through its guided tours, education programmes and exhibition strategies of engaging the audience through accounts of witness memory or special guided tours by ex-political prisoners, specifically those that were held in the Women’s Jail. In as much as Constitution Hill serves as a sacred space for commemorating the injustices of apartheid, the precinct has also been charged with the responsibility of reinvigorating the surrounding area through its urban renewal priorities. This in itself presents a daunting challenge in the way Constitution Hill will have to navigate the demands of heritage tourism juxtaposed with preserving the sanctity of the space as a site of conscience.

21 Harriet Deacon, Remembering tragedy, constructing modernity: Robben Island as a national monument, in Sarah Nuttall and Carli Coetzee (eds.), *Negotiating the Past: The Making of Memory in South Africa*, Oxford: Oxford University Press, 1998, 164.

22 Heather Hughes, Rainbow, Renaissance, Tribes and Townships: Tourism and Heritage in South Africa since 1994, in Sakhela Buhlungu, John Daniel, Roger Southall and Jessica Lutchman (eds.), *State of the Nation: South Africa 2007*, Pretoria: HSRC Press, 2007, 276.

23 Deacon, “Remembering tragedy, constructing modernity”, 170–171.

24 Annie E. Coombes, *History after Apartheid: Visual Culture and Public Memory in a Democratic South Africa*, Johannesburg: Wits University Press, 2003, 99 (emphasis in the original).

25 For a further discussion on the Mandela myth see Noel Solani’s article about the construction of the Mandela myth in which Solani explored the making of Mandela through autobiographical accounts, the media and the museum. Through a careful consideration of the various constructions of Mandela, Solani attempted to unsettle the Mandela myth. In Noel Solani, “The Saint of the Struggle”, in *Kronos*, August 2000, Vol. 26, No. 1, 51; Also see Ciraj Rassool, “The Rise of Heritage and the Reconstitution of History in South Africa”, in *Kronos*, August 2000, Vol. 26, 17.

26 Coombes, *History after Apartheid*, 95.

27 Rassool, “The Rise of Heritage”, 5.

28 Hughes, “Rainbow, Renaissance, Tribes and Townships”, 276.

29 Robben Island Museum Nomination File: World Heritage Site Status, (1999) Cape Town, Robben Island Museum.

30 Desmond Tutu, *No Future Without Forgiveness*, London: Rider, 1999, 33–36; Veronique Riouful, “Behind Telling: Post-apartheid Representations of Robben Island’s Past”, in *Kronos*, August 2000, Vol. 26, 24.

31 Marie Kruger, “Commemorating the past in the urban present: Living heritage on Constitution Hill/Johannesburg”, in *African Studies*, 2019, 4.

LESSONS LEARNT

The South African heritage landscape is punctuated with various forms of mnemonic devices, some of which are reminiscent and nostalgic of a colonial and apartheid past, and some of which speak to a more inclusive past informed by the drive to memorialize the hidden and marginalized histories that were suppressed during the oppressive regimes of colonialism and apartheid. The nostalgia and yearning towards the old regime, perhaps better understood through the lens of the compromises of a brokered peace deal, has found expression in the maintenance and prominence of apartheid era heritage institutions, as primarily national heritage institutions which at once indicates the recalcitrant and resilient patterns of apartheid, and in a way, also arrests the possibility of post-apartheid memory institutions problematizing the very presence of these apartheid inherited heritage institutions. Far from being “embarrassing reminders of a discredited past,”³² or removed or destroyed, apartheid heritage institutions enjoy prominence within the heritage landscape, both in respect of funding and a steady flow of visitors, nicely packaged within the framework of a reconciliation meta-narrative.

While this has been the dominant approach to heritage making and memorialization in South Africa, specifically with a focus on the biography of leaders during the liberation struggle and their contribution to reconciliation and redress, contestation continues to plague both sites of memory of the apartheid era and post-apartheid sites of memory. There have been growing calls to address sites of memory dedicated to the colonialism and apartheid as was evident from the emergence of the #Rhodesmustfall movement.³³ Within the same vein, there have been mounting discontent in the way in which post-apartheid memory institutions primarily have been framed around the memorialization of the great man paradigm of history with the exclusion of

ordinary citizens that also contributed to the liberation struggle. The contestation around sites of memory in the post-apartheid era, is also particularly fraught when framed within the socio-economic disparities and inequality prevalent in South Africa.

RECOMMENDATIONS

- Encouraging public debates and providing a forum for public discussions on future memorialization projects as a way of engaging all stakeholders in a consultative process that will encourage ownership and a shared sense of history.
- Undertaking a campaign in which to document and record stories and testimonies of victims, witnesses and perpetrators of apartheid era atrocities in furthering the ideals of the Truth and Reconciliation Commission.
- Identification of physical traces of the regime’s atrocities, mass graves of the victims, sites of torture, prisons, offices (those known and underground) of state security units, as it could become sites of conscience and memory, and could also be used as a pedagogical tool in the teaching the lesson of “never again”.
- Civil society should further develop the preservation of sites of memory as part of working with issues of social and transitional justice and in the ongoing work of truth recovery, however government should also work towards creating a memorial framework that speaks to a more inclusive agenda of the contribution of women, the youth and others that have been marginalized by the dominant narrative of nation-building and reconciliation.

32 Murray, *Commemorating and Forgetting*, 20.

33 See Derek Peterson, Kodzo Gavua, Ciraj Rassool, *The Politics of Heritage in Africa: Economies, Histories and Infrastructures*, Cape Town: Cambridge University Press, 2015 for a discussion on the #Rhodesmustfall movement.

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TIMELINE OF THE MAJOR EVENTS

1922	The national archives service under the auspices of the Department of the Interior came into being
May 1948	National Party wins national elections on platform of promoting apartheid as official state policy
1950	Population classified by race with the implementation of the Population Registration Act and Group Areas Act passed to segregate blacks, coloureds and whites
	Suppression of Communism Act led to the banning of the Communist Party
1952	Launch of Defiance Campaign led by the African National Congress
March 21, 1960	Sharpeville Massacre where 69 unarmed protestors were killed during a peaceful march
April 1960	Banning of political parties including African National Congress (ANC) and Pan Africanist Congress
December 1961	Launch of ANC military wing, uMkhonto weSizwe
1962	Implementation of the Archives Act, transformation of the State Archives Service (SAS) into a formidable system with wide-ranging regulatory powers
1964	ANC leader Nelson Mandela and other Rivonia Treason trialists sentenced to life imprisonment
1976	More than 600 killed in clashes between black protesters and security forces during uprising, which started in Soweto
1982	Adoption of Protection of Information Act (PIA)
1984	Township revolt
June 1986	State declares National State of Emergency and bans various anti-apartheid organisations
1989	FW de Klerk replaces PW Botha as president, meets Mandela
February 2, 1990	President F.W. de Klerk announces the unbanning of the African National Congress and other pro-democracy organisations
February 11, 1990	Nelson Mandela released after 27 years in prison
1991	Commission for Museums, Monuments and Heraldry (CMMH) was created as a vehicle for the formulation of a national policy on museums, monuments, archives, heraldry and national symbols
December 1991	Opening of the Convention for a Democratic South Africa (CODESA)
December 1993	Multi-party negotiations conclude with agreement on interim constitution with provision for amnesty for apartheid era crimes
April 27, 1994	South Africa holds its first democratic elections in which the African National Congress wins a majority of the seats in parliament. At this point the 11 existing police forces are merged to form the South African Police Service.
November, 1994	Appointment of the Arts and Culture Task Group (ACTAG) to make detailed recommendations on arts and culture policies which were in line with the principles of South Africa's new constitution
May 10, 1994	Nelson Mandela inaugurated as first president of democratic South Africa
July 26, 1995	Promotion of National Unity and Reconciliation Act, providing for the establishment of the Truth and Reconciliation Commission (TRC), is passed by Parliament
December 1, 1995	TRC legislation adopted after lengthy consultations and parliamentary discussions
1996	The National Archives of South Africa Act comes into being in response to the shifting political changes and the need for transformation within the national archival system
April 1996	First hearings of the TRC are held in city of Port Elizabeth
May 1996	The Constitutional Assembly approves a draft final constitution
December 1996	President Nelson Mandela signs the final constitution into law
February 1997	The final constitution takes effect

1998	The National Heritage Bill of 1998 comes into existence in order to foster an integrated approach to all the national heritage institutions, including museums, archives, monuments, living heritage and national symbols
1999	Adoption of the National Heritage Resource Act (No.25 of 1999) to provide standards for conservation and maintenance of heritage resources that are in control of State Departments and Supported Bodies
2000	Promotion of Access to Information Act (2000), also known as PAIA, was passed which gives effect to the constitutional right of access to information held by public and private bodies as outlined in the South African Constitution
March 2003	TRC concludes its works and submits final report with recommendations
2003	State starts implementation of financial reparations for victims
November 2007	President Thabo Mbeki announces pardons process for political perpetrators
2019	State reopens investigations into various apartheid era cases where TRC did not grant amnesty

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MEMORY OF NATIONS

Democratic Transition Guide

[The Spanish Experience]



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AUTHORS

ANNA KATARZYNA DULSKA

Research fellow at the Institute for Culture and Society of the University of Navarra, as well as an Associate Professor lecturing Modern World History in the degree program of International Relations and Law. Visiting scholar in Malta and Germany (Universität Hamburg). Before becoming a full-time scholar, she combined her academic research with professional activity in international corporations.

JOSÉ MANUEL FERRARY

Cooperates with the research group Grupo de Investigación en Historia Reciente (GIHRE) from the University of Navarra. His research focuses on the study of francoism. Currently he is writing his PhD. thesis at the University of Navarra.

PABLO PÉREZ-LÓPEZ

Historian, Head of the Department of History and Academic Director of the Institute for Culture and Society of the University of Navarra. He specializes in recent political history and works in particular with the history of the democratic transformation in Spain. Among over one hundred of his publications, the stand outs are: *El mundo actual. De la Segunda Guerra Mundial a la globalización* (2019, a comprehensive history of contemporary world) and a biography of Charles de Gaulle.

SANTIAGO DE NAVASCUÉS

Visiting researcher in the University of Notre Dame and the University of Geneva. His research focuses on European History, International Relations and Spanish Intellectual History. Currently he is finishing his PhD at the University of Navarra.

JOSÉ LUIS ORELLA MARTÍNEZ

Professor at San Pablo University. An author of numerous books and book chapters. He specializes in recent political history and works in particular with the history of the democratic transformation in Spain and Basqueland: *La España del desarrollo*, and *Los otros vascos* and *La Tregua de ETA*.

GEMA PÉREZ HERRERA

Visiting Scholar at Georgetown University (USA) and a contracted professor at the University of Piura. Member of the Grupo de Investigación en Historia Reciente (GIHRE). She is a specialist in history, film issues and women's studies, fields in which she has several academic publications.

RAFAEL ESCOBEDO ROMERO

Associate Professor of Modern History at the Universidad de Navarra, Spain. Visiting researcher at the University of Chicago and Georgetown University. His research focuses on U.S.-Spain relations during Franco's dictatorship, religious freedom and American Catholics attitudes towards Franco's Spain.

RICARDO RUIZ DE LA SERNA

Associate Law Lecturer at San Pablo – CEU University (Madrid, Spain), an Associate Researcher at the Institute CEU of Historical Studies and a practicing lawyer. His specialization is Criminal and International Law. Among others, his work is focused on Nazism and communism, antisemitism and Holocaust denial, hate crime and hate speech. As well, he teaches law on hate crime, hate speech and discrimination at the Madrid Bar Association for the lawyers serving at the legal aid for victims of hate crime.

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TRANSFORMATION OF THE POLITICAL SYSTEM

PABLO PÉREZ-LÓPEZ

INTRODUCTION

The Transition to democracy in Spain occurred after the death of General Francisco Franco in 1975. This political change established a democracy which had previously failed (1931–1936) and led to the tragic Civil War of 1936–1939. The memory of that failure was very present in the democratization process in the seventies.

In order to understand Franco's regime, it should be kept in mind that it was not an appendix to the defeated totalitarian regimes. It has sometimes been identified with the losers of World War II, as if the victors had been only democratic countries. Such an identification forgets that communist totalitarianism was also a great victor of the war, a fact that prevented the democratization of half of Europe. And an even more important issue: that the Spanish Civil War took place prior to World War II. Thus, it was neither a replica nor an anticipation of the World War, even if it was a precedent.

At the end of World War II, the Spanish Republican exiles promoted an intervention in Spain to depose Franco. Democracies opposed, recognizing that such a complicated problem was an essentially Spanish issue, and that the solution should be Spanish too. The Civil War had been the consequence of numerous breakups in the Spanish society: between right and left, revolutionaries and counterrevolutionaries, radicals and moderates, totalitarians and democrats, secularists and Catholics, separatists and advocates of national unity, republicans and monarchists, etc. Such divisions had crossed the interior of large political groups and had been the cause of an increasing violence which undermined the rule of law until it was finally demolished. The military uprising and the revolutionary movements that opposed it split the country in just two sides, but did not neutralized the differences within each of those groups.

Franco interpreted his victory as a personal triumph that confirmed the validity of his rather unsophisticated political ideas: the communist revolutionary threat was the worst enemy; individualist liberalism and democracy were disintegrating systems that had to be rejected to build a united nation, strong and in peace. The solution was to recognize the greatness of the Spanish past and edify the national coexistence upon it. Traditional institutions would be the way to achieve that restoration.

His approach was tested by the facts: within his own side there were opposed political factions competing for power – the most active one following the principles of fascism, a rising ideology at that time. But the most traditional Spanish institution was its monarchy, and there was in fact a pretender to the throne willing to return to Spain; the international situation was very complicated and threatened to drag Spain into a new war; the Catholics, who had sought refuge in the rebel army in the face of religious persecution, did not agree with the fascists and considered the political project too State dependent ... The Army, which was the General's main support, silenced all dissent and established what would turn to be the main principle during the whole regime: Franco's own "persona" as the key legitimating principle of the political system.

The opposition to Franco abroad remained much divided. Socialists, anarchists and nationalists did not forgive the communists, while some monarchists became anti-Franco when they saw that he rejected the pretender's return. An agreement on how to effectively oppose Franco was not found, a fact that explains both why foreign intervention was the only hope of overthrowing him and why democracies decided not to interfere in the task.

LEGAL FRAMEWORK OF THE POLITICAL SYSTEM

The Civil War was understood by both parties as a confrontation between two incompatible ideas of Spain. The repression, accordingly exerted, attempted to make two things clear: first, that the destiny of those who were not victors was exile or death; second, that those held responsible for the war should pay for it. Franco's victory meant a harsh repression for all those who had supported the Republican regime, even before the military uprising. In its early stages, the regime focused on eliminating the opposition and subduing and unifying the factions that had supported it during the war. Franco did it with extraordinary forcefulness, especially against the defeated ones, but also against those who initially supported him and dared to dissent.

World War II began a few months after the end of the Spanish War and plunged the new Spanish regime into perplexity: Nazi Germany, Franco's friend, agreed to a compact with the Soviet Union (USSR), its greatest symbolic enemy, who on top of that attacked Poland, a Catholic country with which Franco and the forces that supported him joined in solidarity. In the first years of war, the German victories suggested that Spain should implement a Nazi-fascist-style regime and join the winning side; even more so when Germany attacked the Soviet Union in the summer of 1941. But by then, Franco had turned his initial circumspection into a permanent state of caution: Spain remained neutral or non-belligerent during the war; and when the United States entered, it progressively moved away from the powers that had supported it in the Civil War.

Mussolini's removal and Italy's armistice were the turning point: Franco realized that he had to find another way. That was not a problem for him, for the support of the military and the Catholics was his natural way out. But the political structure that he had created during the war did not change: a unified party, *Traditionalist Spanish Phalanx and of the JONS* (FET, *Falange Española Tradicionalista y de las Juntas de Ofensiva Nacional Sindicalista*). Despite being an untenable amalgam of pro-fascists, rightists, monarchists and traditionalists, this platform became Franco's instrument to attract politically interested people and tame them for his own benefit. The repression softened and the ideological backbone of the regime was put in the hands of politicians with a Catholic profile.

The political institutions of the regime were gradually defined. First, the "traditional constitution" of the country was evoked as the basis of the new system. Spain was defined as a kingdom, but without allowing the return of the King, nor name Franco

as a regent. It was thus stated that Franco was above the Monarchy. His political system claimed to embody the tradition of the Spanish people, which he represented, taking power in a moment of political crisis that, once surmounted, would be followed by the return of the power to a monarch. Almost unbearable for the monarchists, this idea – which resulted from the very victory of the civil war – was the guide of Franco's exercise of power. In 1947, a law of constitutional rank ratified in a referendum defined Spain as a Kingdom. Together with the empty throne, the Spanish parliament – the so-called “Cortes” – was established as a representation of the Spanish people. The parliamentarians were partly chosen by Franco, and partly elected by the entitled corporations: state unions (which included businessmen and workers), municipalities and universities, among others. In a very different fashion to the liberal individualist Western democracies, an “organic democracy” was created, attempting to be a synthesis of the traditional Spanish freedoms and the channel of an authentic representation of the people.

CHANGES DURING FRANCO'S MANDATE AND POST-FRANCOIST HORIZON

The regime's resistance and the inability of its adversaries to overthrow it found an ally in the international situation. The Cold War – especially after 1950's Korean War – transformed the American and part of the European conservatism into an anti-communism, and opened the possibility to an understanding with Franco, which was reinforced by the geostrategic interest of the Iberian Peninsula. The General did not miss the opportunity: his regime overcame international isolation through an understanding with the Vatican and the United States. Spain began to open up abroad and joined the United Nations in 1955. In the late 1950s the obvious need for economic reform pushed Franco to shift his policies: an economic opening began to transform the country's economic structure and sponsored a progressive and limited political openness. All this culminated in the adoption of new fundamental laws that slightly modified the architecture of the system and, above all, in 1969, led to the appointment of Franco's successor: Prince Juan Carlos de Borbón, son of the pretender Juan de Borbón and legitimate crown heir in the Royal House that had ruled until 1931.

The initial repression had softened, and civil freedoms were gradually increased. Several legal reforms tended to re-establish the Rule of Law – not without the restrictions of a system that lacked political freedom. At the same time, public administration was modernized; it became more effective and increased its responsibility before the law and before citizens. Freedom of opinion, still very limited, made its way since the mid-sixties. The new generations of professional and political cadres in Spain were formed within the idea of democracy as the future of the country, once the stage symbolized by the General as winner of the war was overcome. Society as a whole pointed towards the same direction. Politically inactive, it underwent very intense changes in the ways of life as a result of the strong economic growth experienced within a few years. Spanish per capita income grew, as well as the level of education. Spain became the tenth largest economy in the world in the late sixties. On the other hand, while it is true that, since the war, Catholicism had been a call to reconciliation, in the aftermath of the Second Vatican Council the idea that a confessional regime

was the best political option for a country with a Catholic majority vanished. Pluralism and religious freedom were the new paradigm.

PREPARING FOR THE TRANSITION

The idea of removing the General from power had proved illusory. The opposition began to think about what would happen after his death. The idea of a transition to democracy emerged among exiles and internal opposition. But there were also groups of university students, professionals, senior public servants and politicians within the regime that began to prepare a change. Different proposals ended up converging on the following solution: a political transformation from within the system into a democracy. To do so, several steps were necessary: first and the most important, the new Head of State, the King, should be willing to lead the change; and second, the Francoist political class should step back from power. It seemed difficult, but possible: there was a reformist minority among the Francoists, determined and young, who could convince the most recalcitrant of the convenience of doing so. It seemed a little bit more difficult that the Army, the most solid cornerstone of the regime, allowed that change. Finally, it was also necessary that society approved the change. It became increasingly clear that Spanish society preferred a peaceful change, without shocks or violence that would take away the danger of confrontation and a new war. Finally, it was essential for the process to have the support of the opposition. Since the late sixties, it seemed that something like this was possible: facing the dilemma of choosing between a Republic (as opposed to a Monarchy) and political freedoms, many Republicans – including some socialists and communists – had conceded that the most important issue was the recovery of political freedom, not the specific kind of constitutional regime. If a Monarchy granted political freedoms, it could be an effective way of transition to democracy. However, some elements of the opposition claimed that the rupture with Franco's regime was an essential condition for democratization.

THE TRANSITION: REFORM THROUGH AN AGREED RUPTURE

Franco died in November 1975 and King Juan Carlos I took the Office of Head of State. He immediately began to drive a democratization process that stagnated in the first stage. In order to accelerate it, the young King appointed a new President of Government in July 1976, Adolfo Suárez, who shared his intentions and skillfully handled the situation among the Francoist political class. His government approved a draft of the so-called *Political Reform Act* (Ley para la reforma política), a statute creating the conditions to transform the political institutions into new democratic ones. The project was sent to the Francoist parliament. By approving this Act, the single political party and the Cortes enabled their own dissolution. The Law was submitted to a national referendum in December 1976. The Spanish people approved it by an overwhelming majority: 94 % voted in favor, with a participation of 78 %. The Government had opened the door to democratization.

There were many dangers that could prevent the successful completion of the transition, but three of them deserve

a particular attention. First, the possibility of a reactionary backlash, especially if it relied on the military and pushed for a military coup; though attempted, it did not finally happen. Second, a radical denial of the opposition refusing to join the proposed transition process. Only the members of the terrorist organization ETA (*Euskadi ta Askatasuna*, “Basque Country and Freedom”) and of some other far-left formations, as well as a small far-right faction, violently tried to prevent the Transition from succeeding.

By contrast, popular support to the project was high and solid. Juan Carlos I and Adolfo Suárez became the spokesmen of that national will, negotiated with the political actors, and gained the support or acceptance to the project by almost everyone, especially the opposition. The last obstacle was the legalization of the Communist Party of Spain in the spring of 1977. With that, everything was ready for the first democratic elections, which took place in June of that year. They were won by the Union of Democratic Center (UCD) a coalition of reformist parties in which former Francoists and opponents of Franco co-existed. The second place was for the Spanish Socialist Workers Party (PSOE); third, the Communist Party; followed by the right-wing party closer to Franco and, finally, by some other groups, including the nationalist parties.

THE NEW CONSTITUTION AND ITS APPLICATION

The new democratic Cortes were commissioned with the task of drafting and approving a new Constitution. The different groups approached such enterprise with the will of working together, jointly, and not in opposition to each other. It was intended to be a work of consensus and not a partisan document, as had happened with the previous constitutions of the 19th and the 20th Century. The challenge was achieved in a relatively short period of time despite the strong terrorist onslaught of the ETA separatists and the economic difficulties experienced during that years – which were managed through a specific compact between trade unions and business organizations aimed *inter alia* at preventing the economic crisis from adding obstacles to the political task. The search for a fundamental political convergence went hand in hand with the granting of a broad amnesty. The amnesty put an end to the political repression of Franco’s time and the criminal consequences of the lack of political freedoms, and it became a symbol of reconciliation. In parallel with the creation of the new Constitution, there was also a decentralization of territorial power that anticipated what would be enshrined in the Constitution: the so-called Spain of the Autonomous Communities. Relations between the parties continually sought “consensus”, a word that became a descriptor and symbol of the constituent period.

All this was possible because of the social consensus found in the referendum and the elections. The people had expressed their support for the proposal of political reconciliation that reflected the one already lived within society. The Constitution was approved by the new democratic Cortes and ratified in a referendum held in December 1978 with an extremely successful outcome: 92 % voted in favor, with a very high participation (67 % of the electorate). Finally, the Constitution was sanctioned by the King, thus transformed into a Constitutional Monarch. Virtually everyone agreed that it had been a historic achievement.

The following year new general elections were held, and the UCD won them again. Local elections were also held, so that the first democratic municipalities were constituted. In the local

elections, although the UCD obtained a majority of votes, it did not obtain the mayoral office of several important cities, including Madrid. It was the symptom of a tendency that would manifest itself in the following elections: the UCD entered into a serious internal crisis in 1980 and the PSOE won by an absolute majority the elections of 1982. The arrival of the left in power with the new Constitution endorsed the validity of the system. Many people consider that moment the end of the Transition to Democracy in Spain.

Yet, before the Socialists arrived in power, there had been other events of great political significance. The first one was the consolidation of a system of distribution of territorial power that enshrined the creation of autonomous governments in all Spanish regions. It was a long-standing demand that was expected to be resolved with the new Constitution. The elections held in the new autonomous regions, first in Catalonia and the Basque Country, manifested the crisis of the political center and the strength of some nationalists. Second, it was hoped that this democratization and decentralization would mean the end of the ETA separatist terrorism, but it was not so. On the contrary, the terrorist group increased their violence and caused more deaths than ever in the first years of democracy, thus demonstrating that their war was not only against Francoism but against democratic Spain. Third, partly as a result of the terrorist offensive and doubts about whether decentralization could degenerate into disintegration, there was an attempted internal coup d’état, promoted by the military, in February 1981. However, it was aborted by the political forces due to the lack of adhesion of most of the Army. The King and the institutions were the key players in redirecting the situation. The judicial process that followed the coup helped to reaffirm the supremacy of civil power over the military and to prevent further coup attempts.

LESSONS LEARNT AND RECOMMENDATIONS

The Spanish Transition to Democracy surprised many by its effectiveness, its relative speed, and its peaceful nature. It was seen and studied by many as a beacon and inspiration for the replacement of a dictatorial regime with a democratic one. To a large extent it was that, but it should be noted that Franco’s regime in the 1970s was more an authoritarian regime with features of a Rule of Law system than a personal dictatorship. J.J. Linz defined it as an authoritarian regime of limited pluralism. Although Franco kept the ultimate management of the levers of power and there were no political freedoms, respect for the law was a fact in many areas. It should also be kept in mind that a good part of the forces that had supported the regime were eager for a change to a more democratic society, and they publicly expressed it in a more or less explicit way. It was the case of most of the educated classes, the Catholic hierarchy, moderate right-wing groups, a part of the Army, a part of trade union organizations and most of the businessmen, etc. They were joined by a political opposition that understood the advantages of a pragmatic negotiation preventing a breakup in exchange for full and guaranteed political freedoms. The King acted as a pilot of that transformation and allowed an orderly change in which the symbol of power, the Crown, while not changing, completely transformed its role: from a rather limited personal power, to a neutral and symbolic one.

Over the years of political practice, some shortcomings of the process began to arise. The most important one was

the difficult integration of autonomous territorial powers into a unitary project. Certainly, the territorial model enshrined in the Constitution had been an audacious choice attempting to solve the difficult problem of combining diversity and unity, and it did not work as expected. In some cases, the autonomous governments became competitors to the central power, and that has put the State itself (and, consequently, Spanish democracy) at risk. At the same time, it seems to have left those who claim their own political personality unhappy. This political dissatisfaction has been connected with the terrorist problem and with the State's response to terrorism, since the most tenacious and bloody terrorism in Spain has had a separatist aim. When, after a long struggle, ETA stopped killing, it seemed that democracy had won the police and judicial battle against terror. Nevertheless, the same has not happened with the problem of political

legitimacy. This was partly a consequence of the fact that, during the Transition, some political groups granted legitimacy to ETA as a fighter against Francoism, a support that was difficult to remove when it continued to fight against democracy. For many, it was a bitter lesson that some people paid for with their lives. Military power, despite appearing to be the greatest initial problem, has adjusted well to the functioning of democracy. Finally, the question of the victims of the Francoist repression and of the historical memory, which initially seemed resolved, was re-awakened as a political argument in the late 1990s. From this approach, a tendency to denounce the Transition as a process of deception and camouflage arose – a claim that is not supported by the available historical evidence. A clear balance of the victims and the historical memory, which could have been better managed, cannot yet be made.

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DISMANTLING THE STATE SECURITY APPARATUS

RICARDO RUIZ DE LA SERNA

INTRODUCTION

The authoritarian nature of the Francoist regime made the police apparatus a central element of the power structure in Spain. This apparatus comprised of two planes. On the one hand, the police forces with successive denominations that were adapting to the times from the first years of the Post-War period until the advent of democracy. On the other hand, the Civil Guard has maintained its denomination, although its structure keeps changing?

Both corps used the usual techniques of police work, i.e., infiltration, capture of confidants, interception of communications, monitoring, tracking, etc., in a legal framework in which the system pivoted on the notion of “public order”.

In fact, perhaps the greatest change performed during the transition is the replacement of the notion of public order with that of “citizen security”, as of article 104 of the Constitution of 1978.

This transformation, however, was not accompanied by the dismantling of the police apparatus, but rather by its reform.

On the one hand, a general framework of the State Security Forces and Corps, in which both regional and local police entered, was redefined.

On the other, the officiality was not depurated, but it kept renewing as retirements or, where appropriate, the steps to the reservation were taking place. The cadres of the security forces complied with the constitutional order that had emerged from the transformation of the Francoist State to the democratic State in the famous formula of Torcuato Fernández-Miranda “from law to law through law”.

Of course, this did not prevent the practices of the dictatorship from surviving during the beginning of the democratic period: the practice of torture and ill-treatment at the police station, arbitrary detentions, etc. However, the consolidation of the constitutional regime was eradicating these practices and normalizing the system of fundamental rights enshrined in the Constitution.

POSITION AND STRUCTURE OF THE STATE SECURITY APPARATUS BEFORE THE TRANSITION

The police forces during Franco’s regime (1939–1975) were of a different nature. As a characteristic of the police State, the entire administrative apparatus was at the service of police control and, in this sense there was no scope of administrative action that could not be made available to those corps.

During the Civil War, the Information and Military Police Service (*Servicio de Información y Policía Militar*, SIPM), as its counterpart, the Military Information Service (*Servicio de Información Militar*, SIM) of the Republic, assumed spying, counterespionage and political police tasks. Created in 1937, its antecedents were the Military Information Service (1936) and the Northeast Spain Information Services (1936) as well as the Information and Investigation Service, which depended on the Traditionalist Spanish *Phalanx* (*Falange Española Tradicionalista*, FET) and of the National Syndicalist Offensive Boards (*Juntas de Ofensiva Nacional*

Sindicalista, JONS). The functions of these bodies were assumed, at the end of the war, by the Political-Social Brigade.

After the war, the armed forces controlled most of the police activity and social control. The Police Services Reorganization Act of 1941 created a police structure comprising of two bodies: the General Police and the Armed and Traffic Police Corps.

The General Police Corps was in charge of the investigation and political repression tasks while the Armed and Traffic Police Corps was assigned the task of operational intervention and public order.

Attached to the General Police Corps was the General Public Order Police Station and the most relevant force depended on it for the purposes of political repression: The so-called Social Political Brigade.

Indeed, the police force that performed during most of Francoism was the Social-Political Brigade, which was active from 1941 to 1978. Its official name was the Social-Investigation Brigade. The Decree of June 24, 1938 indicated among its functions “the control of matters in political action” as well as the prevention and repression of activities that obstruct or divert the general guidelines of the government.

Together with the Falange’s police and information services, it is necessary to mention the Civil Guard that, under the Act of March 15, 1940, “reorganizing the Meritorious Civil Guard Corps”, had a military nature and was entrusted with “the surveillance and safeguarding of the fields, towns, rural agglomerations, factories, industrial and mining centers isolated from the populations, coasts and borders, the persecution of smuggling and fraud, the forecasting and repression of any subversive movements and, at all times and places, the persecution of criminals”.

Thus, this organization of the apparatus led to the creation of archives of a different nature, namely, civil and military, which in turn were distributed according to the respective deployments.

NUMBER OF MEMBERS OF POLICE FORCES, APPARATUS AND NETWORK OF COLLABORATORS

Perhaps it was Joaquín Bardavío who has best described the police forces and the functioning of the power of the State’s order forces during the Transition:

“The General Directorate of Security, under the Ministry of the Interior, is a fundamental department in the structure of the country. [...] The Directorate is entrusted, in large part, with the support of the social and political structure of Spain. Its functions are diverse: repressive of common crimes and of politicians who undermine the established legal status; administrative in issuing passports and hunting licenses; humanitarian in the search for a lost child or insane person; informative for the location of a friend or a relative distant for years; but always preventive for the safety of citizens and for the security of the State.

8,200 officers of the General Police Corps and almost 20,000 members of the militarized Armed Police are responsible for

maintaining, together with the Civil Guard, order in the Spanish society.”¹

The police command apparatus was divided into two scales: the superior with 750 chief commissioners and commissioners and the executive with 7,450 chief inspectors, inspectors and sub-inspectors. Within the police scheme, the General Commissariat of Social Investigation is highlighted for its special political importance, whose mission is to “maintain the internal security services of the State, preserve its institutions from danger and defend and preserve public order.” Thus, it has “preventive and repressive functions for crimes punishable by common and special legislation that refer to alterations of order, illegal organizations, attacks on institutions, etc.” This police station is entrusted with the supervision and coordination of the Social-Investigation Brigades spread throughout Spain: It “centralizes information and issues orders, guidelines and news to prevent the type of crime entrusted to it and neutralize all illegal activity.”²

The General Police of Public Order also highlighted because of its competences and some of its functions “the preparation and establishment of the security services for the displacements and trips and travels of the Head of State, the Prince of Spain and their respective families as well as the trips and travels of Government ministers and foreign personalities”, as well as “the processing of orders for and ratifications of imprisonment” and “authorizations for the conduct of detainees or incarcerated in prisons or before the presence of governmental or judicial authorities that require them”. It was also in charge of guarding “the number of foreigners detained at the request of other countries for the application of extradition and of those who for various reasons await their immediate expulsion from the national territory”.

At the end of the Civil War, all State institutions were reformed and this affected the forces and corps of public order. The Civil Guard was reorganized after the Civil War under the Act of March 15, 1940 and had merged with the *Carabineros*. In this way, the Armed Institute, as Bardavío states, assumed the surveillance of ports and borders for the suppression of smuggling. During the Transition, it had approximately 60,000 men.

The Meritorious, as the Civil Guard is known, depended administratively on the Ministry of the Interior, but its organization, instruction and weaponry depended on the Ministry of the Army, thus reaffirming its status as a military corps. Hence, the new Civil Guard “adopted all the characteristics of a large Army corps unit while retaining in the background its characteristics of a uniformed police institution.”³

It has to be added the numerous information services that operated at the political level to the two corps with police functions. Under the Decree of August 30, 1939, created by the High General Staff, there was granted to its Third Section the mission of “providing the supreme command with the necessary information for the most accurate assessment of the military and economic potential of other countries”. In February 1944 this mission was extended to “confront in and out of Spain the complex foreign spying services and coordinate the action of the various agencies responsible for repressing them.”⁴

Around this Third Section, a complex apparatus of information services that made necessary a reserved order of December 20, 1945 in which the powers were distributed among the different ministries was developed:

“The senior management of the military-type information services corresponds to the High General Staff, coordinating the actions of the specific ones of the three Armies [...] To the Ministry of the Interior, with its specific body, the General Directorate of Security, corresponds the full responsibility and competence with regards to the general information services related to public order and the internal security of the State [...] The questions of competence will be resolved by the Presidency of the Government.”⁵

At the beginning of 1968, the Third Section was articulated in the Bureau of Studies and Reports, the Bureau of Operations, with the sub-bureaus of Interior and Exterior, and the Technical Bureau, in charge of encryption, encoding and decryption services, transmissions, listening and other technological needs.

From the Third Section, the so-called Central – Information Service Bis of the Army – (*Central-Servicio de Información Bis del Ejército*, CESIBE), which assumed powers in political research both at the espionage and counterespionage level, was detached. It was fed by the military information services, but also from the General Directorate of Security, the Civil Guard and the information services of the Traditionalist Spanish Phalanx and the JONS, the Spanish Trade Union Organization and other informants of the political and social organizations.

Following the 1968 student mobilizations, the National Counter-subversive Organization (*Organización Contrasubversiva Nacional*, OCN), dependent on the Third Section whose function was the control of student organizations and then expanded to intellectual, social and religious circles was created. As of 1972, its mission was continued by the Central Documentation Service (*Servicio Central de Documentación*, SECED), which was structured in the areas of “information” and “operations”. Some of the most important operations of the Transition were directed from the SECED, such as obtaining information about the XII Congress of the Socialist Party in Suresnes (France).

Thus, in the years of the Transition, as Ernesto Villar mentions, “Spain had eleven information services. The Caudillo had wanted it that way; following the manual for use among the dictators (the principle of ‘shared information’) according to which the best vaccine against a coup d’etat is to distribute knowledge of sensitive data. In other words, ensure that everyone has a part of the information that they must convey to their superior, but not all.”

POWERS OF THE SECURITY APPARATUS

As General Andrés Cassinello, under the pseudonym of Carlos I. Yuste, described in the famous book “Subversión y reversión en la España actual”, published in a year as emblematic as 1975 by the now disappeared Editorial San Martín, “the danger of subversion increases as part of an organized, powerful and coherent front, of an enemy who knows what he wants and has the necessary

1 Joaquín Bardavío, *La estructura del poder en España*, Madrid: Ibérico europea de ediciones, 1969, 223.

2 Ibid., 232.

3 Antonio Morales Villanueva, *Las fuerzas de orden público*, Madrid: San Martín, 1980, 176. Also Antonio Morales Villanueva, *Administración policial española*, Madrid: San Martín, 1988, 202.

4 Juan María de Peñaranda, *Los servicios secretos de Carrero Blanco. Los orígenes del CNI*, Barcelona: Espasa, 2015, 20–21.

5 Ibid., 21.

experience and means to achieve it. Such is the case of Marxist subversion, spread throughout the world. [...] In the face of this ideological aggression, it is necessary to consider the problem as a real battle and conduct a detailed study of factors that allow us to achieve victory. We have plenty of means to achieve it, but it is necessary to use them with opportunity and efficiency”.

Indeed, the means and powers available to law enforcement agencies to combat what they considered “subversion” were very remarkable and served to bring about “reversion”, i.e., in Cassinello’s words, the “reaffirmation and relaunch of principles on which society is based; the strengthening of the institutions in which it is articulated and the destruction of the groups and of the ideas that try to subvert it”.

To that purpose, the actions of the safety apparatus are distributed in two different orders:

“[...] the first, strengthening the attacked society, in the double aspect of its organic and spiritual structure; it constitutes the fundamental, essential means, the channel of the natural dissatisfaction and of the legitimate hopes that justify, before ourselves, the commitment; the second, totally sterile if not accompanied by the first, responds to the principle of legitimate defense of society against an implacable and persevering enemy. In the general development of the process it will be necessary to implement psychological actions to modify the ideas and attitudes of the population, political actions to adapt the system to the aspirations and needs of the population; administrative actions for the resolution of old and new problems and police and judicial actions for the location and neutralization of hostile groups.”⁶

In the terminology of the anti-subversive struggle, what will be called “destruction action” is based on three possibilities that can be coordinated: informative possibilities, police possibilities and psychological actions of consolidation.

The scope of the informative actions refers to the knowledge of the enemy and it is the responsibility of the internal and external intelligence services that work at the service of the State. They ascertain who the people and groups “committed to the revolutionary adventure” are, where they act (universities, professional associations, religious organizations, etc.) as well as their forms of action (strikes, pickets, assemblies), and the moments chosen for it (for example, revolutionary commemorations). The internal and external intelligence services analyze the types of subversive propaganda, its origin, its dissemination and, in general, the ideological and doctrinal aspects. For this, the security apparatus will use both open sources accessible in Spain and abroad as well as information obtained through networks of confidants and infiltrated agents. This intelligence purpose can be coordinated with the strictly police purpose of prosecuting common and political crimes.

There are many cases of famous infiltrators such as the Agent Conesa, with whom the infiltration of the Communist Party of Spain in 1947 and the subsequent fall of a good part of its organization in 1952 was achieved, but also those of confidants and collaborators who are often “natural members of the same group captured by the information service for their secret identity with the cause of the reversion or due to the benefits of any kinds that this collaboration could provide (money, protection of police records, etc.)”.

Along with these possibilities of information, there are the police that start from a “legal system for the description of offenses

against society, intended to be punished, and with an agile system to empower the police to exercise their functions”.⁷

Here, the change in the Transition from the model of public order enshrined in the pre-constitutional order through the Public Order Act of 1959 to the democratic constitutional order that, as of the Constitution of 1978, would replace that notion with that of citizen security, becomes of the utmost importance. Indeed, the Law of Public Order of 1959 defined the different states of normality, of exception and of war in a different graduation that oscillated “between the total exercise of defined freedom and its limitation for the sake of a serious need.” However, it warned about the danger of abusing situations of exception: “the occasions of limitation of freedoms must be few and short in time, since they have an unfavorable impact on the mass of citizens not engaged in subversion.”

Here it is the background of police thinking during the years of the Transition in which, in the words of Alfredo Grimaldos, it produced “the repressive action of the Armed Police and the Civil Guard against concentrations of strikers and popular demonstrations” that “causes dozens of deaths and countless wounded between 1976 and 1980”. In this sense, the triumph of the Transition “from above” instead of the “revolutionary process” that the communist parties had theorized meant the continuity of the security apparatus, which was adapted to the constitutional order but not radically substituted. There were, no doubt, retirements, dismissals and substitutions in the command posts, but there was not, in general, a depuration of the police cadres, the Civil Guard and the information services.

In effect, the Police Forces Act of December 4, 1978, changed the name of the Armed Police to National Police and supposed important symbolic modifications such as the disappearance of gray uniforms and their replacement with brown ones, but this did not prevent, for example, that the commands continue to feed on the military cadres. Figures such as the Creix brothers or the aforementioned Conesa benefited from the Spanish Amnesty Act 46/1977 of October 15, which also benefited the opponents of the regime.

Thus, the different police techniques to combat subversion, infiltration, monitoring, tracking, observation and interception of correspondence, records, seizures, capture of confidants or informers, etc., had the dual purpose of obtaining information for intelligence purposes and the police, and, where appropriate, judicial persecution, of the “subversive” organizations. The legal framework after the Constitution of 1978 will limit, on the one hand, these police powers and will subject the intelligence services to the internal and external parliamentary and judicial controls that are applied nowadays.

REACTION TO POLITICAL CHANGES

As has been said, the Spanish Transition was considered as a transformation “from above” in which one would go “from law to law through law” in the phrase coined by Torcuato Fernández-Miranda.

Thus, the reaction to political changes by the political forces of Francoism was more an internal matter between

6 Carlos I. Yuste [Andrés Cassinello], *Subversión y reversión en la España actual*, Madrid: San Martín, 1975, 215.

7 Ibid., 239.

the “open-minders” and the so-called “bunker”, the whole of the involution forces, than the response to changes imposed from outside. These tensions grew as Francoist Cortes made themselves the “hara-kiri”, according to the expression that became popular in the Transition, through the approval of the Law 1/1977 for the Political Reform that Torcuato Fernández-Miranda wrote to execute the “controlled demolition” of General Franco’s regime. In statements to the press cited by the famous *Diario 16*, “since one thousand eight hundred we, the Spaniards have had procedures to modify the laws that political groups never followed, while now we are faced with the possibility of creating a radically different political assumption starting from the Fundamental laws themselves that are reformed”.

In this sense, article 5 of the legal text gave King Don Juan Carlos the power to lead the change through a constitutional referendum:

“The King may directly submit to the people a political option of national interest, whether constitutional or not, to decide by referendum, the results of which will be imposed on all the bodies of the State.

If the object of the consultation refers to matters of the competence of the Cortes and they will not make the corresponding decision in accordance with the result of the referendum, they will be dissolved, proceeding thus to call for new elections ...”

This consolidated its role as the “engine for change” that had been in evidence since the death of the General. Thus, the involution attempts clashed with the support that, from outside Spain and from the opening forces of the interior were given to the figure of the King and the change he represented. Of significance was, for example, his trip to the United States between May 31 and June 6, 1976.

The speech of King Don Juan Carlos on June 2, 1976 to the United States Congress was an obvious commitment to openness:

“The evolution of our society continues to offer tensions, difficulties, setbacks and even violence. We suffer from the current crisis in the world, i.e., unemployment, inflation, the contraction of demand and high production costs are among our priority government concerns. But no obstacle will decisively oppose our Spanish community to continue working towards the creation of an increasingly prosperous, fairer and more genuinely free society.

The Spanish Monarchy has committed, from the first day, to be an open institution in which all citizens have a comfortable place for political participation without discrimination of any kind and without undue pressure from sectarian and extremist groups. The Crown protects the entire people and each of the citizens, guaranteeing through the right, and through the exercise of civil liberties, the rule of justice.

The Monarchy will ensure that, under the principles of democracy, social peace and political stability are maintained in Spain, while ensuring orderly access to power of the different government alternatives, according to the wishes of the people freely expressed.

The Monarchy symbolizes and maintains the unity of our nation, a free result from the determined will of countless generations of Spaniards, as well as crowning a rich variety of regions and towns, of which we are proud.”

Continuity and involution sectors of the regime failed in their attempts to disrupt the transition process through political

violence. From the so-called “last great political crisis of Francoism”, the cessation of the Minister of Information and Tourism Pío Cabanillas Gallas, until the coup d’état of February 23, 1981, all efforts to disrupt the Transition will fail. As Juan Tomás de Salas wrote in the pages of *Diario 16*, “when the past turned in the form of Girón and the blues, when Arias Navarro was defeated and forced to go back, it was too late for any design to perpetuate the dictatorship. The country had spoken, it had been seen, it had been confirmed that the peaceful Spaniards were a crowd”.

It was not, therefore, a linear process.

Adolfo Suárez, appointed as President of the government and personally elected by King Don Juan Carlos as President to lead the reform, had to face the opposition from the continuity sectors, first, and then from the leftist opposition. In both cases, the information apparatus provided the President with services without which the Transition would have been difficult or, perhaps, impossible. As Ernesto Villar states, “every time the terrorists have filled their hands with blood, the men of Valverde and Cassinello [the intelligence services] have stood firm next to the President, even to defend the so shaken Anti-Terrorist Law. But this does not mean, much less, that the government must take a step back in its reforms. Not even those of the ‘bunker’ triumph. Rather the complete opposite. It must be, the SECED says, a punch on the table so as not to entrench behind it, but to open the doors of the ‘essential reforms’ in the political and social fields”.

Thus, in general, the security apparatus was on the side of the institutions that, at the same time, led the change and embodied it. Both King Don Juan Carlos and President Suárez embodied this change that, by legal means, was taking place in Spain. The forces of the State were limited, in general, to fulfill the orders emanating from who, at any time, was the legal authority.

There were stops and setbacks, for example, the contradiction between the opening of Arias Navarro and his spirit of “February 12” of 1974 and his retreat on June 15 of that same year, but the steps towards democratic reform were decided and coming from the structures of the regime itself. Thus, on August 31, 1974, a group of officers founded the Democratic Military Union (*Unión Militar Democrática*, UMD) (remember that in April of that year there was the Carnation Revolution in Portugal). There are terrorist actions of the extreme right, the extreme left, for example, the attacks of the First of October Anti-Fascist Resistance Group (*Grupo de Resistencia Antifascista Primero de Octubre*, GRAPO) and the Anti-Fascist Revolutionary Front (*Frente Revolucionario Antifascista*, FRAP), and the Basque and Catalan separatists. ETA blows up the Rolando cafeteria on Correo street, next to the Puerta del Sol in Madrid: twelve dead and eighty injured. The carrying out of death penalties of terrorists of ETA and of the FRAP unleash international campaigns to support those convicted and criticize the regime. However, none of these forces manages to stop the process.

Nor can the forces on the left stop it. The legalization of the Communist Party on April 9, 1977 marks a milestone in the Transition because it integrates the most powerful political force of the non-nationalist opposition into the system. It joins the more moderate forces that had been organized in the Democratic Junta of Spain and the Democratic Convergence Platform (*Plataforma de Convergencia Democrática*, PCD), which in turn are grouped in March 1976 into a new opposition body: Democratic Convergence, also known as “*Platajunta*”.

Thus, the Transition has a centripetal force that will bring the liberalizing sectors to the opposition forces within the system

and the opposition forces outside it to an institutional game that evolves towards a democratic regime. Unions, the Catholic Church, professional associations and corporations are joining a process that, with terrible stops and episodes such as the shooting of Montejurra (May 9, 1976), the murder of Atocha labor lawyers (January 26, 1977), the murder of two policemen and a civil guard at the hands of the GRAPO (January 28, 1977) or the bombs placed by ETA on the slogans of the Atocha and Chamartín railway stations, which killed seven people and wounded a hundred more on July 29, 1979.

The resistances in the forces of public order had their swan song in the coup d'état attempt on February 23, 1981, which meant the consolidation of the King as guarantor of the process that had begun in the early 70s. Its weak monitoring and the determined reaction in support of the King and the Constitution in the whole of Spanish society marked the end of the opposition to the Transition. Henceforth, only terrorist organizations will try to end the democratic regime in various ways.

FORMS OF TRANSFORMATION OF THE SAFETY APPARATUS; LEGAL AND POLITICAL FRAMEWORK OF CHANGES IN THE SECURITY APPARATUS

The transformations in the security apparatus had to be performed in three areas: the police forces, Civil Guard and intelligence services. In all cases, the way to undertake them was through normative instruments, i.e., laws and regulations, which led the system to transform both in the pre-constitutional period as it did when the Constitution of 1978 itself was already in force.

POLICE FORCES

In the case of the National Police and the Civil Guard, the greatest transformation was the change from a police model based on the notion of public order to another that started from the concept of citizen security.

The desire to maintain public order justified the administrative, legal and police controls that inspired the "Police State" of the Francoist regime. From a system in which, often, the direct prohibition or the need for permits is the norm and freedom the exception, it had to move to another in which everything that was not expressly prohibited was understood as to be allowed. The State had to assign quotas of power so that civil society and citizenship could be developed.

The first step was the Royal Decree 1558/1977, of July 4, which laid the foundations for the restructuring of certain organs of the Central State Administration and reorganized ministries and departments. The justification, as indicated by the explanatory statement itself, was the changes that Spanish society was facing:

The magnitude and intensity of the political changes that Spanish society has experienced, the deeply felt need to achieve greater efficiency in the direction of political-administrative tasks, the convenience of coordinating dispersed bodies that coincide in their actions on the same social sectors, the demand for more intense public action in some fields that require greater emphasis and more specific treatment, made the corresponding changes in the structure of the State Administration imperative.

This led to the old Law of 1941 that reorganized the police services being replaced by a new rule that introduced that new sensitivity that displaced the center of the police action from the maintenance of public order to the guarantee of citizen security. Thus, the Law 55/1976 abolished the Armed Police Corps and structured the police force into two bodies, the Superior Police Corps and the National Police Corps, whose functions were in accordance with its second article, as can be seen below:

- a) Maintain and restore public order and the safety of citizens, guaranteeing the exercise of their rights and freedoms.*
- b) Avoid the commission of criminal acts, and, if committed, investigate, discover and detain the alleged culprits and ensure the effects, instruments and evidence of the crime, making them available to the competent judicial authority.*
- c) Provide assistance in case of public calamities and particular misfortunes, collaborate with the Public Assistance Institutions and Organizations and assist, at the request of the parties, the peaceful settlement of disputes between private subjects.*

Finally, the change occurred definitively, since in the constitutional period, with the Organic Law No. 2/1986 on State Security Forces and Services of March 13, which embraced the mandate of article 104.1 of the Constitution, which attributes to the Security Forces and Corps, under the dependence of the Government, *the mission to protect the free exercise of rights and freedoms and guarantee citizenship security*. For the fulfillment of said mission, art. 11.1 attributed to the Security Forces and Corps provides that:

The State Security Forces and Corps have the mission of protecting the free exercise of rights and freedoms and guarantee the citizen security through the performance of the following functions:

- a) Ensure compliance with the Laws and general provisions, executing the orders they receive from the Authorities, within the scope of their respective powers.*
- b) Assist and protect people and ensure the conservation and custody of assets that are in danger due to any cause.*
- c) Monitor and protect public buildings and facilities that require it.*
- d) Ensure the protection and security of high personalities.*
- e) Maintain and restore, where appropriate, order and citizen security.*
- f) Prevent the commission of criminal acts.*
- g) Investigate crimes to discover and detain the alleged culprits, secure the instruments, effects and evidence of the crime, making them available to the competent Judge or Court and prepare the appropriate technical and expert reports.*
- h) Capture, receive and analyze how much data are of interest for public order and security, and study, plan and execute crime prevention methods and techniques.*
- i) Collaborate with civil protection services in cases of serious risk, catastrophe, or public calamity, under the terms established in civil protection legislation.*

A similar transformation occurred in the Civil Guard, which was fully integrated into the model of citizen security assuming, under the Organic Law No. 2/1986 of March 13 and as stated in its explanatory statement, "its authentic mission in the current society: guarantee of the free exercise of the rights and freedoms

recognized by the Constitution and the protection of citizen security, within the collective of the Security Forces and Corps”.

Thus, the Civil Guard move from a role of military force to the service of civil power with functions of maintaining public order and border control, according to the Law of March 15, 1940 and subsequent regulatory development, to be a part of the Security Forces and Corps of the constitutional State responsible for guaranteeing the free exercise of rights and freedoms and for protecting citizen security.

Finally, the intelligence services went from being an area of military action to being part of the constitutional state's security system. This began with the aforementioned Royal Decree 1558/1977, created by the Ministry of Defense, which came to replace those of the Army, Navy and Air Forces, with a broader vision than the management of the armed forces. This reorganization was developed through Royal Decree 2723/1977, of November 2, which organically and functionally restructured the Ministry of Defense, providing it with a certain desire for transparency through the creation of the Directorate for the Information, Dissemination and Public Relations of Defense and ordering its intelligence services “in order for the Defense to have the information it needs to fulfill its functions” for which it created the Superior Defense Information Center, (*Centro Superior de Información de la Defensa*, CESID). Already in the constitutional period, by Royal Decree 726/1981 of March 27, the CESID function was defined as “the body responsible for obtaining, evaluating, interpreting and providing the head of the Department as much information as necessary and of interest to the National Defense and to the fulfillment of the missions entrusted to the Armed Forces by article 8 of the Constitution, first and foremost attending the needs of the Board of Joint Chiefs of Staff”. In 2002, the Law 11/2002, of May 6, regulator of the National Intelligence Center was approved.

Thus, in the three areas of transformation, this one was operated through formally valid regulatory changes that were adapting the security and information corps to the democratic and constitutional framework to which it was transited.

CITIZEN CONTRIBUTION TO THE TRANSFORMATION

In general, as has been seen, the transformation of the security apparatus was done through legal means and with strict submission to the principle of legality as it corresponded to a Transition process “from above” directed from the institutions and channeled through the reform of the political system through its own formal channels.

In this way, in general, civil society organizations did not have such an active role as in other countries when it came to changes in the security apparatus. The transition from a public order model to a public security model had, without a doubt, a legal framework in which citizens participated to the extent that they participated so much in the referendum of the Political Reform Act (December 15, 1976, participation of 77 % of the census) as in the general elections of June 15, 1977 (participation of 78.83 %) and in the referendum on the draft of the Constitution of December 6, 1978 (participation of 67.11 %).

Of course, as the transition progressed, civil society gained increasing prominence in the Spanish political and social life and this resulted in criticism and some influence on the security apparatus. Thus, for example, the return of the Catalan nationalist leader Josep Tarradellas and his appointment as president

of the pre-autonomous Generalitat of Catalonia on October 17, 1977 gave clear signs that police pressure on the so-called “subversive forces” should be mitigated. Secret political appointments with the opposition, the emergence of political parties, the PSOE congress in Suresnes, the legalization of the PCE and many other gestures towards those who had been in exile, hiding or ostracism indicated to the apparatus of security the political and social changes that were coming.

Similarly, the resistance of terrorist organizations to the transitional process and, especially the attempt to seize the occasion for their own purposes by ETA and other terrorist groups identified the need to keep the security apparatus alert to those who had declared war on democracy as titled *Diario 16* in its history of the Transition.

Thus, what really favored the Transition process, along the lines of demobilization and depoliticization of the Spanish society, which did not align with the side of the continuist sectors or the violent rupturist sectors, but rather it supported by the formal channels the process towards democracy through the established formal channels.

LESSONS LEARNT: POSITIVE AND NEGATIVE

In the first place, the transformation of the security apparatus was possible because it was conducted through the legal and administrative instruments that the current Law required. The inability of the opposition forces in hiding to overthrow the regime and the power of law enforcement forces prevented a transformation into a revolutionary key. On the contrary, the Transition model “from above” was adapting these corps to the new reality of evolution towards democracy.

Similarly, the gradual but inexorable change from a model based on the notion of “public order” to others based on that of “citizen security” allowed the Security Forces and Corps to move from one model of a police State to another in which they themselves were guarantors of rights and freedoms. The last involution attempt of the immobilist forces, the coup d'état of February 23, 1981, was thwarted by the lack of support within those security forces.

However, despite these changes, peripheral nationalisms used the continuity of police forces to create regional police. This has resulted in the fragmentation of the security and information apparatus and certain coordination problems between the bodies.

RECOMMENDATIONS

The main recommendation that could be made in view of the described period is the importance of using legal channels for the transition from authoritarian regimes to democratic systems. In this sense, the law provides stability that, for example, a charismatic leadership does not offer.

CONCLUSION

The transformation of the security apparatus was one of the essential processes for the success of the Transition. The use of the law was the starting point for adapting the bodies of public order to the new democratic reality to which it was moving.

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ARCHIVES OF THE REGIME

RICARDO RUIZ DE LA SERNA

INTRODUCTION

The first archive to be mentioned, as an introduction, would be the National Historical Archive, created by Royal Decree of 28 March 1866 and which was, until the creation of the General Archive of Civil Administration, the main recipient of collections from ministries with competence in police matters from the end of the nineteenth century and the first decades of the twentieth century. It conserves 32 collections from Contemporary Institutions, as well as 40 personal and family archives, of personalities corresponding to the scientific (Isaac Peral y Caballero, etc.), political (Margarita Nelken, Marcelino Pascua, etc.), literary (Luis Rosales Camacho, Juan Ramón Jiménez, etc.), diplomatic (Juan Antonio Rascón Navarro, etc.), and military (Vicente Rojo, Valeriano Weyler and Nicolau, etc.) fields.

Mention should also be made of the Central General Archive of Alcalá de Henares, created under the Public Instruction Act of 1858 and destroyed by fire at the end of 1939. It was the first great ministerial archive, although its collections are only partially known to us.

It was not until 1969 that the General Archive of the Civil Administration of the State was created by the Decree of 1969 to continue the work of the archive destroyed by fire in 1939. Initially, its function was purely administrative. Custody of the documentary collections corresponding to the bodies of the Peripheral Central Administration and the Spanish Administration in North Africa, as well as the documents produced by the political-administrative institutions of the period 1939–1975. The collections produced by the activity of the organs of the Judicial Branch are especially interesting for this topic.

Finally, the relevance of the Civil War Archive of Salamanca, today called the Documentary Center of Historical Memory, which was created by Order on 29 May 1937 and whose collections began to house the documentation of the closed Masonic lodges, should be pointed out. Next to the “Masonic Section”, a “Social Political Section” was created. In 1999 it was elevated to the rank of general archive with the denomination of General Archive of the Spanish Civil War.

Today, the Documentary Center of Historical Memory holds the collections coming from the Documentary Services of the Presidency of the Government and from the Special Court for the Repression of Freemasonry and Communism of the Franco era and those incorporated after 1979.

In addition to the collections with documentation relating to the ministries, it should be noted the importance of both the archives of trade unions and political parties in hiding and the private archives, which often keep public documentation among their collections.

These include the personal collections of the University of Navarra’s Historical Collection. It should be noted that personal archives are one of the most valuable sources for historical research. For this reason, the University of Navarra, as an institution committed to quality research, is responsible for safeguarding, organizing and disseminating all the donations it receives. The aim

of these collections is to put them at the service of researchers of different chronologies and various themes, hence the plurality of these collections. At present, it includes the archives of more than one hundred outstanding personalities both from Franco’s regime and from the opposition.

CONTENT OF POLICE AND JUDICIAL ARCHIVES

POLICE ARCHIVES

The police forces during the Franco regime (1939–1975) were of various kinds. As a characteristic of the police state, the entire administrative apparatus was at the service of police control and, in this sense, there was no scope of administrative action that could not be made available to those forces.

During the Civil War, the Information and Military Police Service (SIPM), like its counterpart, the Republic’s Military Information Service (SIM), took on the tasks of espionage, counter-espionage and political police. Created in 1937, its antecedents were the Military Information Service (1936) and the Information Service of Northeastern Spain (1936) as well as the Information and Investigation Service, which depended on the Traditionalist Spanish Phalanx and the Councils of the National Syndicalist Offensive. The functions of these bodies were assumed, at the end of the war, by the Political-Social Brigade.

After the war, the armed forces controlled most of the police activity and social control. The Police Services Reorganization Act of 8 March 1941 created a police structure comprising two bodies: the General Police Corps and the Armed Police and Traffic Corps.

The General Police Corps was assigned the tasks of investigation and political repression, while the Armed Police and Traffic Corps was assigned the task of operational intervention and public order.

The General Police Corps was attached to the General Commissariat of Public Order and the most relevant body for the effects of political repression depended on it: the so-called Social Political Brigade.

In fact, the police force that acted during most of Franco’s regime was the Political-Social Brigade, which was active from 1941 to 1978. The Decree of 24 June 1938 indicated among its functions “the control of matters in political action” as well as the prevention and repression of activities that obstruct or deviate from the general guidelines of the government.

In addition to the police services and the information services of the Phalanx, the Civil Guard should be mentioned which, under the March 15, 1940 Act “reorganizing the meritorious Civil Guard Corps”, had a military nature and was entrusted with “the surveillance and guarding of the camps, villages, rural agglomerations, factories, industrial and mining centers isolated from the populations, the coasts and borders, the persecution of smuggling and fraud, the anticipation and repression of any subversive movement and, at any time and place, the persecution of criminals”.

Thus, this organization of the apparatus led to the creation of archives of a different nature, civil and military, which in turn were distributed according to the respective deployments.

THE JUDICIAL ARCHIVES

Among the judicial archives, those relating to the special courts dedicated to the prosecution of elements opposed or disaffected to the regime are of particular importance. The three that are mentioned are conserved in the Documentary Center of Historical Memory.

a/ Special jurisdiction for the repression of Freemasonry and Communism (1939–1966)

Created under the March 1, 1940 Act, this new jurisdiction was aimed at persecution and punishment of supporters of ideas “against Religion, the Fatherland and its fundamental institutions and against social harmony”. The Court has the services of the Special Services Section of the Special Delegation for Document Recovery, which was attached as an Auxiliary Office. Its function was to collect the documentation in the Masonic Archives, where the documents seized from the lodges were kept. In 1963, the special jurisdiction for the repression of Freemasonry and Communism was replaced by the Court of Public Order (Law 154/1963).

b/ National Court of Political Responsibilities (1939–1945)

The February 9, 1939 Act on Political Responsibilities created a special jurisdiction with the same name and charged with the persecution of natural and legal persons who, between October 1, 1934 and July 18, 1936, would have contributed to the creation of the social and political climate that led to the coup d'état of July 18, and from that date to all those who had actively or passively opposed the insurgents.

c/ Public Order Court (1963–1977)

Under of the Law of December 2, 1963, there was created within the ordinary jurisdiction a Court and a Public Order Court to which the rule “confers exclusive jurisdiction to hear crimes committed throughout the national territory, singularized by the tendency in a greater or lesser gravity to subvert the basic principles of the State, disturb public order or sow anxiety in the national conscience”. The Court was also given jurisdiction over the offences provided for in the Law of March 1st, 1940 while the Special Court for Freemasonry and Communism was abolished.

Article 3 of Law 154/1963 provides that it shall have exclusive jurisdiction to try the following offences:

- *Against the external security of the State, against the Head of State, the Courts, the Council of Ministers and form of government, on the occasion of the exercise of the rights of the person recognized by law, for rebellion, sedition, public disorder or illegal propaganda and, provided that they obey a political or social motive, the following crimes: illegal detentions, abduction of minors, breaking and entering, threats and coercion, discovery and disclosure of secrets*
- *Those whose knowledge is inhibited by military jurisdiction*
- *Related offences and incidental misdemeanors of the above-mentioned offences.*

There should be emphasized the work of the Special Court for Crimes Committed in Educational Institutions, which prosecuted cases involving crimes committed by students at universities and other educational institutions. Also important

are the collections relating to the Special Court for the Investigation of Illegal Propaganda in the National Territory.

CHARACTERISTICS AND CONTENT OF THE ARCHIVES

Probably the first remarkable feature was the dispersion. Without prejudice to the corresponding archives of Ministries that could have a certain link with police control tasks such as Justice or Defense, the archives dependent on the Ministry of the Interior were of the utmost importance precisely because both the police archives and those of the Civil Guard depended on it, and previously on the Ministry of the Interior.

In application of the no-law Proposition approved by the Plenary Session of the Congress of Deputies on June 1 2004, the Council of Ministers agreed, on July 23, 2004, to set up an interministerial commission responsible for *studying the situation of those who, as a consequence of their democratic commitment, suffered repressive actions during the Civil War and Francoism, and until the restoration of the democratic freedoms, as well as for proposing the measures, legal or otherwise, that are necessary to offer them adequate recognition and moral satisfaction.*

Within the framework of the work of this commission, the so-called “Report on Archives” was elaborated, which is a privileged source to know the information contained in the archives of the Ministry of the Interior.

The report states that “a summary in figures of the census-diagnosis carried out at a central and provincial level indicates the existence of 65 linear kilometers of documentation of central services in 46 premises in Madrid and 200 linear kilometers in the units of the peripheral services”.

With regard to content, the report states that the documentation of the *Ministry of the Interior can be classified as follows:*

- *Documentation containing general information. The access regime is free, with no conditions other than material restrictions*
- *Documentation with personal data that does not affect the privacy of persons referring to procedures for the application of the law. In addition to its holders, those who demonstrate a legitimate and direct interest may have access to it.*
- *Documentation containing personal data of a police, procedural, clinical or any other nature that affects the security and privacy of individuals (the majority affected by the Commission).*
- *Documentation affected by regulations on classified matters. This is the case, for example, of the one referring to, and generated by, the information services by the agreement of the Council of Ministers of November 28, 1986. Reference is made in the conclusions of this report to the desirability of revising the scope of this declaration.*

Alongside the archives of the Ministry of the Interior, the police matter was also covered by the workers in the General Archive of the Administration concerning “control and repression of the internal opposition”, which the Report on Archives classifies as follows:

- a/ *Administration Control Bodies: As a result of the Civil War, different purification bodies were created in all the Ministerial Departments. A citizen can obtain data on the separation of the public function through the Documentary Series of Political Responsibilities and Purification Files, an archive that contains the purification files of Ministry officials, although those corresponding to the Ministry of Justice are distributed between this Archive and the National Historical Archive.*

b/ Judicial oversight and repression bodies: this includes a number of special jurisdictions that disappeared during the transition, such as the Political Responsibility Court, the Public Order Court (TOP), the Public Order Courts, etc. The General Archive of the Administration contains the documentation of the National Court of Political Responsibilities, as well as the documentation of the extinct General Secretariat of the Movement, Trade Union Organization, Ministry of Information and Tourism, the Administration of Justice, and the Devastated Regions collection, as well as a large photographic collection. The Archive guards the procedures followed before the Public Order Court, although not all of them, given that the Civil War Archive of Salamanca also keeps part of these judicial collections. To these courts should be added the documentation coming from the jurisdiction of Vagos and Maleantes (Vagrants and Mischief-makers), where repression was derived for social (and even ethnic, such as the gypsy population) and not merely political reasons, such as homosexuality, dishonest conduct, pregnancies, abortions, etc. Finally, there is the Penalized and Rebels Archive, already used in previous compensations for the deprivation of liberty which occurred during the Franquist Regime.

c/ Jurisdictional Bodies: the General Archive of the Administration holds the documentation of the First Instance and Instruction and Municipal Courts of the Province of Madrid, where there are archives referring to the non-recognition after the Civil War of judicial resolutions in matters of rights and liberties, subsequently annulled (among others, the final divorce sentences dictated during the republican period).

To these archives must be added two of those deposited in the National Historical Archives: the General Cause and the archive of police files, whose actions continued until 1977.

Thus, in addition to dispersion, we must add the variety of matters that the police archives covered and that included not only criminal matters, but also civil, labor and administrative matters, both judicialized and non-judicialized (follow-ups, confidential information, confidential reports, etc.)

Finally, the time elapsed and the lack of proper preservation and maintenance has put some of the archives mentioned in the report itself at risk of becoming unusable.

THE SITUATION OF THE ARCHIVES DURING THE TRANSITION AND THEIR USE. ARCHIVES CONTROL AND ACCESS RISKS.

Decree 914/1969, of May 8, which created the General Archive of Civil Administration, warned of a secular lack of Spanish archives:

Almost all the archives of the Civil Administration of the State, Ministry, General Directorates and other Organisms have currently exhausted their capacity due to the interruption, as of the year nineteen forty, of the periodic remittances that, since the time of Philip II, had been made, first to the General Archive of Simancas and then to the disappeared General Archive of Alcalá de Henares.

This led, continues the explanatory memorandum of the Decree, to the destruction of a large part of the official documentation that possesses not only historical interest, but also on many occasions, full administrative validity.

To this was added the Decree for economic reasons to conclude that it was essential to establish a current of documentation that would guarantee the preservation of documents that have to

have historical value and give adequate treatment to those that have a temporary value as a reflection of the rights and duties of the State or citizens, while decongesting public offices and streamlining administrative action.

This normative provision affected the archives we are now dealing with insofar as it authorized the General Archive of the Civil Administration to make a proposal to the General Directorate of Archives and Libraries to send to the National Historical Archive that documentation which, in its opinion, is more than twenty-five years old, lacks administrative validity and has historical value. The General Directorate will decide in each case, after consulting the interested Departments.

Along the same lines was Law 26/1972 of 21 June on the Defense of the National Documentary and Bibliographic Treasure and regulation of the export trade of works belonging to the same.

In effect, the Law integrated in the nation's documentary treasure "the existing collections in the Libraries and Archives of the Public, Central, Local and Institutional Administration, whatever the time to which they belong" but fixed a negative administrative silence to the consultations on whether or not a document was included in this treasure: "Any doubts that may arise regarding the content of this article shall be resolved by the Ministry of Education and Science at the request of the interested party, within two months of the formulation of the consultation, by means of the competent technical services. Once the two-month period indicated has elapsed without the Ministry having replied, it shall be understood that the document or work in question is not included in the concept of Documentary and Bibliographic Treasure of the Nation".

This law foresaw the inclusion of a series of documents in the nation's documentary treasure, but sent the initiative to the Administration: "the National Service of Documentary and Bibliographic Treasure of the Nation will proceed to make a Register-Inventory of the documentary series, collections or pieces that must be integrated in the National Documentary and Bibliographic Treasure".

Thus, the legal framework during the transition was not conducive to the conservation of archives that might have political relevance as such, from the purging of responsibilities to the restitution of property, but only their historical value.

The last law relating to archives, we are referring to Law 16/1985 of 25 June, on Spanish Historical Patrimony, establishes measures for the conservation of documents due to their age, another way of indicating a pretended historical value, but not due to their political transcendence. Thus, article 49 of the law, which is still in force, provides as follows:

Article Forty-nine.

1. For the purposes of this Law, a document is understood as being any expression in natural or conventional language and any other type graphic, sound or image expression given on any type of material medium, including computer media. Non-original copies of publications are excluded.

2. Documentary heritage includes documents from any time generated, preserved or collected during the exercise of its function by any public organization or entity, by legal entities in which the State or other public entities hold a majority share of the capital and by private persons, physical or legal entities managing public services with regard to the management of such services.

3. Documentary heritage also includes documents more than forty years old that are generated, preserved or collected during

the exercise of their activities by entities and associations of a political trade union or religious nature and by entities, foundations and cultural and educational associations of a private nature.

4. Documentary heritage also includes documents more than one hundred years old that are generated, preserved or collected by any other private entities or persons.

5. The State Administration may declare that certain documents, though not as old as those mentioned in the above sections, shall form part of the documentary heritage.

Only with the approval of the no-law Proposition of the Plenary Session of the Congress of Deputies, of June 1st 2004, approving a text relating to the recognition of the victims of the Civil War and Francoism, and with the approval of Law 52/2007, of December 26, to recognize and broaden rights and to establish measures in favour of those who suffered persecution or violence during the Civil War and the Dictatorship, were specific measures adopted for the conservation and management of the police archives inherited from Francoism. However, as will be seen, the measures did not arrive in time to prevent the destruction of documents during the Transition.

In general, the use of public archives during the Transition remained unchanged since, in a model of political change “from above”, it cannot be said that there were “risks of access” in the sense that whoever wanted access would be exposed to an evil or a harm. Naturally, there were limits to access, which, as we have seen, were ceded as the Transition process progressed. However, it would be an exaggeration to state that there was a risk which, in fact, could be summed up in the denial of access.

In general, access to the archives was controlled by the administrations owning them and this was maintained throughout the entire Transition process as befits a process directed from power so that those administrations continued to function until the democratic period and, in some cases, until the present, after adaptation to the constitutional regime.

ATTEMPTS TO DESTROY ARCHIVES

There is no doubt that, between 1939 and 1975, there was destruction of archives due to different circumstances.

First, archives were destroyed or expunged to prevent or limit future investigations. As Urquijo Goitia points out, “the last years of Francoism and the first years of the Transition were a real disaster for the historical documentation of this country. The Franco dictatorship not only repressed, but also laid the groundwork to make it difficult to study this period. In the last moments, collections of the legitimating organisms of the Regime (Phalanx, Feminine Section, etc.) or police files of opponents disappeared”.

The Order of the Presidency of the Government of December 19, 1977 published in the Official State Gazette (BOE) of January 13, 1978 arrived too late to save all the collections and, although it had a mechanism to prevent uncontrolled destruction, it also referred to the Ministry of the Interior the establishment of limits on access to certain time series:

FIRST. – By personnel of the General Directorates of Security and of the Civil Guard, of the Ministry of the Interior, and of the General Directorate of Artistic Heritage, Archives and Museums, of the Ministry of Culture, an analysis will be carried out of all the data, antecedents and documents relating to legally

recognized political and trade union activities and organizations that exist in the archives of the two general directorates mentioned above, in order to declare their administrative uselessness and to select those that, due to their historical value, should be conserved.

[...]

THIRD. – At the proposal of the general directorates indicated in the first article, the Ministry of the Interior shall determine the periods during which the documentary series selected for conservation may not be consulted, in accordance with the legislation in force

With regard to the destruction of documents, in the early years of the Transition, the debate arose as to whether or not the police archives should be destroyed, precisely in order to prevent the information collected by the Francoist police apparatus from implying illegitimate interference in the privacy of those under investigation.

In 1978, Senator Josep Benet i Morell led an interpellation in the Senate regarding an internal order of the Ministry of the Interior “ordering the elimination and destruction of the part of all the archives dependent on the General Directorates of the Civil Guard and Security that contains documentation relating to the membership or participation of people in activities or political organizations and trade unions yesterday clandestine and today legally recognized”. In his interpellation, Mr. Benet asked “what measures he has taken and intends to take to prevent the continuation of the savage destruction of archives of public bodies and entities, unfit for a modern State, which are the historical heritage of all the citizens and peoples of Spain, and why a commission, made up of historians and archivists, of the various peoples of the State, with parliamentary representation, has not been created to decide which documents should be preserved because they have historical value”.

The response of the Minister of the Interior, Mr. Martín Villa, was that “the decision to proceed to the administrative disablement of personal records in the archives of the General Directorates of Security and the Civil Guard, containing data and records relating to the membership or participation of persons in political and trade union organizations and activities, prohibited under previous legislation and now legally recognized, responds, as I also had occasion to indicate to Senator Fernández Viagas, in a session of the Committee on Justice and Home Affairs of this House, to a spirit of concord derived from the normalization of Spanish political life”.

Thus, for the sake of the “spirit of concord”, archives were expunged and documents destroyed. The aforementioned order of December 19, 1977, the limitations of which we have already seen, was invoked as a defense against the accusation of destruction of documents.

However, most of the documentation is preserved. As the report on archives itself pointed out, “in Spain an enormous amount of collections related to the Civil War and Franco’s regime are conserved. Neither the conflict itself, nor the transition to democracy, produced a massive destruction of documentation”.

DECLASSIFICATION OF ARCHIVES

As indicated in the “Report on Archives”, the non-law proposition on the recognition of the victims of the Civil War and Francoism,

approved on June 1st 2004, already mentioned, “urged the Government to organize, promote and open the archives, both public and private, where the data required for individuals to have access to existing aid would be kept, and to collaborate in the search for those personal data that would allow them to know the particular cases and recall them in a general way, in order to project them in the social culture of our country, what happened during the Civil War and the subsequent Franco repression. Consequently, one of the tasks entrusted to the Interministerial Commission for the study of the situation of the victims of the Civil War and Franco’s regime is to draw up a report on the conditions allowing access to the public and private archives necessary to carry out its purpose (article 2 of the Royal Decree of September 10, 2004), which, according to paragraph (a) thereof, is the general study of the rights recognized to the victims of the Civil War and to those persecuted and retaliated by the Franco regime, as well as to elaborate a report on the state of the matter”.

Law 52/2007, of December 26, to recognize and broaden rights and to establish measures in favour of those who suffered persecution or violence during the Civil War and the Dictatorship, guaranteeing the right of access to both public and private archives held with public resources:

Article 22. Right of access to the resources of public and private archives.

1. *For the purposes of the provisions of this Law, the right of access to documentary resources held in public archives and the right to obtain any copies requested is hereby guaranteed.*
2. *The provision of the preceding paragraph shall be applicable in full to those private archives which are maintained in whole or in part by public funds.*
3. *The public authorities will adopt necessary measures for the protection, integrity and cataloguing of such documents, in particular in those cases where there is serious deterioration or a risk of degradation*

In order to give effect to this right, an administrative procedure has been articulated which, however, is not absolute. There are certain limits:¹

- *The legal accessibility of the document for not having complied with the deadlines established in article 57 of Law 16/1985, of 25 June, on Spanish Historical Heritage. The documents are accessible if they are older than 50 years old or if more than 25 years have passed since the death of the person affected by the file.*
- *If none of the above requirements are met, access to and reproduction of the documents are reserved for persons whose personal, police or procedural data are included in the documents, or third parties, by means of a request for authorization, provided that they have the permission of those affected or their relatives to consult or reproduce the documentation or prove its use for research.*

Simple or certified copies of the documents may be obtained by requesting them from the respective archive centers that hold the documentation.

RIGHTS AND ACCESS PROBLEMS

ACCESS TO ARCHIVES AND CLASSIFIED INFORMATION

As Julio Aróstegui pointed out in his famous 1992 article “Franco’s historiography of Spain. Promises and weaknesses”, “the archives

usable for the history of the Franco period are subject to several types of limitations”. The first of these was the documentation relating to living persons. The second, said the author, “is the serious question of the destruction of certain types of political or police archives, of which there is news, but not enough or contrasted. Third, the illegal removal from the public domain of official documentation of what may be a clear example of what is happening with the documentation emanating from the Head of State during the period, which is currently illegally in private hands”. Aróstegui concluded by pointing out that “certain pretended private archives are, in reality, the result of the improper appropriation of public documents”.

Therefore, there is a problem with access to private archives, which depends on the will of the owner of the archive or, as the case may be, the custodian. However, not all private archives are in the same situation. Perhaps the most interesting case is that of the Francisco Franco National Foundation, which is integrated into the Spanish Archives System, as provided for in Article 66 of Law 16/1985 of 25 June on Spanish Historical Heritage while retaining its status as a Private Archive, and is publicly and freely accessible.

Another issue that should be pointed out is that relating to classified matters which, although they do not directly affect police or judicial archives, may affect other archives such as those of the Foreign Office, which may be relevant to police investigations.

Antonio Malalana Ureña and Lorena Moreno Pérez have analyzed the legal framework that limits the activity of researchers on the basis of the classification of information:

- Law 9/1968 of 5 April 1968 on Official Secrets, as amended by Law 48/78 of October 7, 1978.
- Decree 242/1969 of 20 February 1969 implementing the provisions of Law 9/1968 of 5 April 1968 on Official Secrets.
- Agreement of the Council of Ministers of 28 November 1986 classifying certain matters and matters under the Law on Official Secrets, as extended by the Agreement of the Council of Ministers of 17 March and 29 July 1994.
- Agreement of the Council of Ministers of 16 February 1996 classifying certain matters and matters in accordance with the Official Secrets Law.

The first interesting thing is that two of the four rules that apply date back to the period of the Franco regime. It is true that Law 9/1968 was modified in 1978, in full Transition, but the current regulatory framework presents, as we shall see, notable deficiencies.

In effect, there have been successive agreements of the Council of Ministers which, since Decree 242/1969, have extended the matters considered to be classified. Malalana-Ureña and Moreno Pérez echo a letter from the Ministry of Foreign Affairs listing the matters considered secret:

1. *Spain’s basic positions and strategies in political, security, economic and trade negotiations [...].*
2. *Information on Spanish positions in international or internal conflicts [...].*
3. *Information concerning the actions of terrorist groups and movements associated with them, organized crime and trafficking in drugs, human beings and arms [...].*

¹ See: <http://pares.mcu.es/victimascfportal/staticContent.form?viewName=copia>

4. Information regarding the deployment of units of the Spanish Armed Forces and State Security Corps and allied both in Spain and in international missions.
5. Negotiations and good offices on kidnappings and the release of Spaniards or foreigners, as well as information on extraditions or transfers of sentenced persons.
6. Contacts for mediation or good offices [...] with third countries and opposition groups and leaders [...].
7. Protection of Human Rights.
8. Asylum and refugee issues.
9. Processing of approvals of Spanish and foreign heads of mission.
10. Issues affecting the sovereignty, independence and territorial integrity of Spain or friendly countries [...].
11. Information relating to the implementation of bilateral or multilateral security and defense agreements, including overflights, stays and stopovers of ships and aircraft.
12. Matters relating to the most serious crimes of international concern over which the International Criminal Court may have jurisdiction.
13. Preparations for the journeys of the King and Queen and the President of the Government and, when circumstances so advise, of ministers and other State authorities.
14. Keys and cryptographic material

Thus, as Malalana Ureña and Moreno Pérez denounce, the classification of documents has gone from a restrictive criterion to extensions that can restrict the freedom of investigators.

ACCESS TO ARCHIVES, INDIVIDUAL RIGHTS AND PERSONAL DATA

The legal framework for access to archives in relation to individual rights and personal data is marked by article 57 of Law 16/1985, of 25 June, on Spanish Historical Heritage, which establishes a triple access regime:

Consultation of documents forming part of the Spanish Documentary Heritage referred to in article 49.2 shall be covered by the following rules:

a) In general, once such documents have been duly processed and deposited and registered in the central archives of the appropriate official entities in accordance with legally-established procedure, they shall become available for consultation unless they relate to subjects classified under the Official Secrets Law or that must not be made known publicly because of an express provision of the Law, or unless dissemination of their content

may involve risks for State safety and defense or investigation of a crime.

b) In spite of the provisions of the above paragraph, it may be possible to request administrative authorization for access to documents excluded from public consultation. Such authorization may be granted, in cases of secret or reserved documents, by the Authority which made the respective declaration, and in other cases by the head of the department responsible for safeguarding the documents.

c) Documents containing personal details of interest to the police, courts, medical services or of any other type that may affect a person's safety, honour, personal and family privacy and image may not be publicly consulted without the express consent on the part of those involved or until twenty-five years have passed after the person's death, if the date is known and, if not, fifty years after the date of the documents

Thus, there is a general principle of free access for consultation with the exceptions of classified information or information relating to State security or the investigation of criminal offences.

This principle is complemented by two rules. The first is the consent of the data subject to access to documents containing certain personal data. The second is the setting of time limits from death or, in any case, from the date of the document.

In principle, this provision is consistent with paragraph 33 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

LESSONS LEARNED AND RECOMMENDATIONS

With regard to access problems, it is only appropriate to recommend, with the majority of historians, that the expansion of subjects considered to be the object of official classification be discontinued and that at least the cases provided for in the Official Secrets Law be re-conducted.

Similarly, it would be desirable to arbitrate legal mechanisms for the restitution or obtaining of copies of public or official documents held in private archives

Finally, it would be advisable, as recommended in the Report on Archives, to provide the Ministry of Culture with the necessary means to encourage and facilitate the acquisition of private funds, either directly or through agreements with certain countries.

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PURGES OR DEPURATIONS

JOSÉ MANUEL FERRARY, RAFAEL ESCOBEDO

INTRODUCTION

During the transition to democracy, in Spain there was no systematic and legal process of purges or depurations. Both personalities from the Francoist political world, as well as from the majority sectors of the democratic opposition, chose to promote a democratization that included as many citizens as possible. Determined to close the deep wounds of the Civil War, in which purges and purifications were common, they attempted to implement a transition that would not generate new grievances that could jeopardize the establishment of democracy.

The first epigraph shows a synthesis of the political, social and economic situation of the country after the death of the dictator, important to understand the viability and problems of a transition without purges. The second point offers a synthesis of the democratic consolidation measures, an alternative to the depuration which was implemented by the last Francoist government and the first democratic ones. The last epigraph refers to the current situation of the debate around the issue, as the lessons learned from the Spanish case are presented.

SPAIN AFTER FRANCO'S DEATH (1975)

The use of a political purge in a process of transition to democracy is justified, mainly, for two reasons. In the first place, for a pragmatic question: the need to separate individuals or groups from the areas of power that could jeopardize the development of the democratic system. For democratization to be viable, it is understood that it is necessary to remove the elements closest to the previous regime from the inherited state apparatus (administration, security and defense force, etc.), to clear the way for elites committed to democracy. On the other hand, the use of depurations would be justified on moral grounds; justice to the victims of the repression of the authoritarian regime.

The distinction between the first Francoism (1939–1957) and the second (1957–1975), characterized the latter by a progressive opening, modernization and development of the country, as well as by technification of the State apparatus, is a commonplace in the historiography of Franco's regime.

With regard to the Administration, the distinction between the “Regime” and the “State” is consolidated throughout the 1960s. When becoming professional, the political criterion lost weight in favor of a technical one at the time of reaching bureaucratic positions. Progressively, there was a dissociation between the concepts “serving the State” and “serving the regime”. Thus, after Franco's death, we find in Spain a state bureaucracy little politicized in favor of the regime. This was also not very numerous: it was only 9.3 % of the active population, compared to 16 % of the community average.¹ This was the case even in the parallel Administration of the *Movimiento* (the only party of the regime, which also included the *Organización Sindical*, the single union). Although it could constitute a focus of Franco's ideological reserve in some cases, the truth is that it had mostly

become a bureaucratic mass that would end up being docile to its dismantling, already during the Transition.²

In the economic field, the regime favored the “normalization” as of 1959, the year in which it was decided to open and modernize the country with the IMF, the OECD and the World Bank cooperation, ending thus, the years of autarchy, through the implementation of a stabilization and economic liberalization plan. Although the economic system continued to suffer from excessive control by the authorities, during these years progress was made in the construction of an orthodox free market economic system.³ Thus, although there were influences, contacts and transfers, the distinction between the political elite of the regime and the economic elite of the country was becoming sharper since then.

This “depoliticization” of key sectors, as well as the progressive corrosion of the legitimacy of the regime in its second stage, had a decisive impact on Francoist elites. After Franco's death, there were many people who assumed the need for reform, as well as those who agreed to collaborate with the democratic opposition.

Said democratic opposition had undergone a process of growth, consolidation and gradual transformation. Starting with the Communist Party, and progressively assumed by all groups, it promoted a policy of “national reconciliation” since the 1960s with a view to an orderly transition to democracy.⁴ From the beginning of this decade the idea of “purging the fascist apparatus” disappears among the opposition. This is another reason why these types of policies were not promoted during the Transition. A consensus between the opposition groups was generated and later assumed by the government of Adolfo Suárez, in favor of an inclusive process, of reconciliation of the “*dos Españas*” seen in the Civil War, and of the use of amnesty as a means to do so.

Thus, it was intended to attract a broad social mass that, without rejecting Franco's figure or his regime, was open to an opening of the system. It is symptomatic that in a survey conducted at the end of 1975, 53 % of Spaniards declared that they felt “pain or sorrow” for the death of the dictator, while a clear majority declared themselves in favor of democracy, with an overlapping of the two positions in many cases.⁵ Being in favor of democratic change did not always imply, therefore, a total rejection of the previous order, and in this context a demonization of Francoism could have destabilized the process of change, as well as caused a certain loss of legitimacy.

In this way, when Franco died in 1975, there was a situation in Spain at a social level and state structure that, if not clearly in

1 Charles Powell, *España en democracia, 1975–2000*, Barcelona: Plaza y Janés, 2001, 99–101.

2 Ibid., 182

3 A simple work for more information: Joaquín Estefanía, *La larga marcha: medio siglo de política (económica) entre la historia y la memoria*, Barcelona: Península, 2014.

4 Santos Juliá, *Transición. Historia de una política española (1937–2017)*, Barcelona: Galaxia Gutenberg, 2017, 230–235.

5 Charles Powell, *España en democracia, 1975–2000*, Barcelona: Plaza y Janés, 2001, 45–46

favor, at least was open to democratic change. The absence of a purge process is understood, opting for a pragmatic approach, from this point of view: there was no imperative need to perform purges, because the dynamics of the political and ideological evolution of the country already pointed towards democracy. With one important exception: the Army.

If there was an institution in which Francoism was able to penetrate and consolidate itself, these were the Armed Forces, defenders of the legality and integrity of the Francoist State. The Army's status was reflected in its autonomy from the rest of the system: the key to the chain of command was the Head of State, i.e. Franco, and they were represented in the government cabinet by three military ministers, which placed it outside the civil power. Their independence and loyalty to Franco, therefore, did pose a risk of involution, as demonstrated by the coup attempts in 1978, 1981, 1982, and 1985.

And, nevertheless, a systematic purging process was not performed, but it was decided to always act afterwards; i.e. to react by judicial means once punishable acts had been committed. The management of the issue of the Armed Forces is, precisely due to its difficulty, very illustrative of the Transition. Protection of the viability of the process was what prevailed when addressing the problem. Certainly, the Armed Forces could be a focus of opposition. But, in an institution with a strong, closed esprit de corps, where the individual grievance was shared by the whole,⁶ would a depuration have been appropriate?

The danger that a strong corporate reaction would jeopardize the Transition led to the integration of the military into the process; in the first place, through the figure of the Monarch, the Head of State, to whom the Army had sworn its allegiance, despite the erosion of his figure before the eyes of some military sectors; and, in second place, through the reform and progressive subjection and subordination to the military Government. Said reform was made based on the more open elements of the body, as well as those loyal to the monarch, and slowly and progressively, acting comprehensively before an institution that witnessed how its political and social status was reduced.⁷ Without forgetting the tensions produced by the terrorism of the Basque nationalist group, ETA, whose main objective was to provoke the destabilization of this process through its attacks on the defense and security forces.⁸

This way of proceeding with the Army was justified in the "moral" order by the amnesty policies, initiated by the opposition and assumed by the Government, which promoted a message of reconciliation, forgiveness and forgetfulness. In that context, one may also ask whether it would have been coherent not to apply that spirit of reconciliation to the Armed Forces.

THE TRANSITION AND ITS CONSOLIDATION: THE GOVERNMENTS OF ADOLFO SUÁREZ AND FELIPE GONZÁLEZ

The key ideas that explain the absence of a systematic purge policy in the Spanish case have already arisen: absence of an imperative need to perform them and a claim by the opposition; corrosion of the unity of the Francoist regime; consensus on the idea of national reconciliation; an attempt to attract as many social sectors as possible; primacy to the stability of the process over other

considerations, the choice of the path of the reform of the system to reach a democratic rupture proceeding "from law to law".

THE GOVERNMENTS OF SUÁREZ (1976–1981)

As anticipated, one of the ways proposed by the opposition to achieve reconciliation was an amnesty. The government led by Suárez, still within Francoist legality, decreed at the end of July 1976 a first, partial amnesty. A total amnesty for all political prisoners, aimed at freeing the last jailed for terrorist offenses, was approved in October 1977, by the democratic parliament elected in June. The proposed law of the *Partido Socialista Obrero-Español* (PSOE) [Spanish Socialist Workers Party] was completed by the *Unión de Centro Democrático* (UCD) [Democratic Center Union], which added the extinction of criminal responsibilities for crimes of political intent to the officials of the previous regime.⁹ The law was approved by an absolute majority.

Amnesty policies, which thus nullified any attempt to purge individuals who had served the previous regime, were aimed at preventing the creation of grievances in the present, as well as resolving those of the past. In this line, the reparations policy implemented by the Government is understood and explained in the corresponding chapter.

Another of the measures implemented by the first government of Suárez was the dismantling of the organs of the *Movimiento* (Movement), including the *Organización Sindical* (Trade Union Organization), whose officials were distributed to different positions of the Administration. Thus, central institutions of the previous regime were dismantled, but avoiding depurations.

All of this was accompanied by a gradual increase in the influence of the opposition in the process. Government-opposition contacts, reform of symbol laws, trade-union freedom, legalization of opposing parties, the Moncloa Pacts, etc.¹⁰ allowed a regeneration of the country's culture and political elites by consolidating new blocs and political groups with effective political responsibilities.

Key in this regeneration process was the call for elections in a phased manner. The first democratic elections of June 1977 allowed new elements to enter into government organs. From the former Francoist *Cortes*, only 77 of the 557 members would access the new hemicycle,¹¹ and only 24 were among the parliamentarians of the UCD,¹² the majority party, with 165 deputies. Likewise, the municipal elections of 1979 would contribute to give entry to new elites in positions of responsibility at the local level, and the general elections of that same year to consolidate multi-party politics.¹³

The entry into the political system of these new elites consolidated a political speech that indirectly marginalized the political

6 Narcís Serra, *La transición militar: Reflexiones en torno a la reforma democrática de las fuerzas armadas*, Barcelona: Debate, 2008, 185

7 Charles Powell, *España en democracia, 1975–2000*, Barcelona: Plaza y Janés, 2001, 260.

8 Ibid., 262–263

9 Santos Juliá, *Transición. Historia de una política española (1937–2017)*, Barcelona: Galaxia Gutenberg, 2017, 425–438.

10 For more information: Charles Powell, *España en democracia, 1975–2000*, Barcelona: Plaza y Janés, 2001, 145–222.

11 Charles Powell, *España en democracia, 1975–2000*, Barcelona: Plaza y Janés, 2001, 169

12 Santos Juliá, *Transición. Historia de una política española (1937–2017)*, Barcelona: Galaxia Gutenberg, 2017, 510.

13 Ibid., 542–543

groups most strongly associated with Franco's regime, somewhat evident after the general elections of 1979. Democratic Coalition, the party led by Fraga, a former minister of the regime, which integrated personalities from the moderate Francoist sector, barely got 6 % of the votes. National Union, the party of former immobilists, gained only 2.3 % of the votes. Thus, without the need to implement a purge process, the parties identified with the country's recent past, and the political elites that integrated them, were placed on the margins of the electoral spectrum and, therefore, of the centers of political power¹⁴.

THE GOVERNMENTS OF FELIPE GONZÁLEZ (1982–1996)

The electoral victory by absolute majority of Felipe González in 1982 was especially important for giving the Government to a party that was clearly unrelated to the previous regime.¹⁵ Following the line initiated by Adolfo Suárez in the summer of 1976, the PSOE would continue the policies of orderly transition and consolidation of democracy: it reinforced the legal framework of the new order, but avoided insulting ostracisms. Thus, the PSOE assumed the principle that, in the words of Felipe González himself, consider that "any collaborator, at any stage of the previous regime, is disqualified forever [...] would be an almost insurmountable obstacle to reach a great national agreement that would allow an orderly democratic transition".¹⁶

In these years, the constitutional order was settled. With regard to the regeneration of the political class, the consolidation of the State of the autonomies (process initiated in 1979) was essential because the creation of new parliaments, bureaucracies, laws and autonomous institutions configured a new establishment, without connection with the previous.

Likewise, the socialist governments were able to take the reform of the Army further than the UCD. After the coup crisis of February 23, 1981, and the attempts of 1982 and 1985, the PSOE performed a profound reformist program that definitely subordinated the Army to civil power, by placing the Armed Forces under the jurisdiction of the president and the Minister of Defense. In a coordinated manner, conflicting elements were isolated through legal means and justified by acts of indiscipline or rebellion,¹⁷ while at the same time a policy of approaching the high command and modernization of the Army was undertaken.¹⁸

As for the officials, some modifications were introduced, called to put an end to the corporatist and, according to the Government, excessively conservative tendencies. An example of this was the reform of the Judiciary in 1985, which put in the hands of the parliament the election of the members of its highest authority, the General Council. Politicizing some sectors of the Administration, measures of this type, contributed to consolidate the regeneration of the State at all levels. In other cases, administrative reforms were able to be taken advantage of that, although aimed at improving the efficiency of the civil service, also served to regenerate it. This is the case of the Public Service Reform Act of 1984, which, rigorously applied since January 1987, set the retirement age for public officials at 65 years of age, removing in a clean and orderly manner, elements from Francoism.¹⁹

Another area of reform was that of the security forces, probably the most conflictive aspect of the transition process. During the governments of Suárez, it was attempted to accommodate them into the new democratic constitutional order, through reforms such as the suppression of the political police of the regime²⁰, the recognition of the power to create police

forces particular to some autonomous governments, or the distinction and autonomy between defense and security forces; all this without displacing prominent repressors, who continued to hold positions of responsibility during the socialist government. At the end of the government of Felipe González it was decided to renew the police leadership, as a reaction to the government crisis caused by the involvement of the Government in dirty war operations against the terrorist group, ETA, in which agents from Francoism had played an important role.²¹

While it is true that the police aspect may be one of the black points of the transition, it is also worth asking whether the media and judicial pressure, and the social rejection to which the government was subjected to, which would end losing the elections, do not reveal precisely the consolidation of a solid democratic system. Also, without excusing it, the use of shock measures (illegal or on the verge of legality) by governments in contexts of great terrorist tension has been relatively common in democratic states such as Germany, France or the United Kingdom.

CURRENT SITUATION AND LESSONS LEARNED

The crisis of confidence in the Spanish political class after the Great Recession of 2008, the corruption scandals within the two main parties at the national level (PP and PSOE), the social protest phenomena that some commentator called the "Spanish spring" (2011), as well as the Catalan separatist crisis (since 2012) have introduced the questioning of the transition into the political debate, often emphasizing the absence of a depuration process. This new speech, despite being previously restricted to marginal anti-system circles, has managed to jump into broader opinion sectors, has its roots in the prejudice that the problems nowadays are explained by the original structural deficiencies. From this perspective, the Transition was actually an entelechy, since the power, whether administrative, judicial, police, of course military, as well as even financial and business, continued in the same hands. The rejection that certain sectors of the left or of peripheral nationalisms generated certain actions was interpreted, by elevation, as an extension of Francoism by other means. It is not difficult to find representations of this argument in the press or in political speeches.

However, it is important not to lose sight of the high and increasing rates of popular legitimacy that the system has enjoyed

14 At the municipal level this is more treatable: in spite of the important entry of alien political elites to the previous system, it was common for Francoist councilors to be elected in the municipal elections of 1979. It is also true that, in those cases, appearing under the acronym of the Suárez's party, the symbol of change, increased the chances of electoral success, as evidenced by the results of the UCD compared to the poor results of Fraga's party.

15 Ibid.

16 Sergio Bitar, Abraham Lowenthal (eds.), *Transiciones democráticas: enseñanzas de líderes políticos*, Barcelona: Galaxia Gutenberg, 2016, 504.

17 Narcís Serra, *La transición militar: Reflexiones en torno a la reforma democrática de las fuerzas armadas*, Barcelona: Debate, 2008, 186–208 y 235.

18 Charles Powell, *España en democracia, 1975–2000*, Barcelona: Plaza y Janés, 2001, 373–378.

19 Official State Gazette, August 3, 1984, <https://boe.es/buscar/doc.php?id=BOE-A-1984-17387>.

20 The Brigada Político Social [Social-political brigade]

21 For more information: Charles Powell, *España en democracia, 1975–2000*, Barcelona: Plaza y Janés, 2001, 532–540

since the 1980s. In a study conducted for the newspaper *El País* 20 years after Franco's death, 82 % said they felt proud of the way in which the transition had taken place.²² In 2008, the percentage of those who valued democracy as the best possible system had increased to 85 %, ²³ remaining stable until today.²⁴

Precisely, these data indicate that the success of the transition must be valued in perspective, focusing not only on the process, but on the result. With its deficiencies, Spain enjoys a solid democratic system, comparable to that of the rest of the countries of the European Union. It could hardly have achieved a peaceful transition and with a high degree of acceptance of the system, growing in time, were it not for the search for ways of democratic consolidation alternatives to the depuration.

In Spain there were social conditions and a concrete common political will to make this possible. However, it is possible to extract some lessons applicable in other contexts; in the first place, the pragmatic approach to the question. It is vitally important to consider the extent to which purges are essential to ensure the democratizing process. The social tension and the grievances that purges can generate could increase the risk of involution or civil confrontation, or the exclusion from the system of an important social mass.

Likewise, the development of a State policy, aimed at democratizing the system in a progressive, slow but sure way, through

recourse to legislative reform through consensus, was fundamental to the final success. A renunciation of maximalist projects implied a renunciation of purges, which would probably have destabilized the process. The primacy of the possible over the desirable by some groups is another of the lessons of the Spanish case.

As it has been seen, for all the above, Spain opted for an integrating transition, reinforced by the moral argument of amnesty policies, a supposed starting point for the reconciliation of the country and a new political culture.

Another lesson learned refers to memory policies. An adequate "memorialization" of the process and of the values of the transition would help as a counterweight to the new stories, which distort the reasons and consequences of the decisions taken at that time, and which require an explanation in historical perspective, as is the case of the option for democratic change without depurations.

22 *El País*, 19/11/2001. Ver https://elpais.com/diario/1995/11/19/portada/816735602_850215.html

23 Omar G. Encarnación, *Democracy without justice in Spain: the politics of forgetting*, Philadelphia: University of Pennsylvania Press, 2014, 196

24 Barometer of the Centro de Investigaciones Sociológicas (Sociological Research Center), September 2018, http://www.cis.es/cis/opencm/ES/2_bancodatos/estudios/ver.jsp?estudio=14424

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INVESTIGATION AND PROSECUTION OF REGIME CRIMES

JOSÉ LUIS ORELLA MARTÍNEZ

INTRODUCTION

The investigation of crimes committed by supporters of the totalitarian ideology in Spain is complex due to the political evolution. After 1939, with the configuration of the authoritarian regime of General Franco, numerous criminals guilty of torture and murder (around 72,344 victims from the Popular Front according to Ramón Salas Larrazabal) were prosecuted in trials where those responsible for the national area were not included, due to being the winners. After some violent episodes produced by the Maquis (anti-Francoist Guerrilla Organizations), the following experience will come from the emergence of a new symbol of terrorism during the second Francoism. As of 1957, the best known was ETA, but which would be accompanied by different groups of revolutionary communist ideology; many of them coming from extremist splits of the PCE (Communist Party of Spain, which exerted an almost hegemonic work of the opposition to Franco's regime in its eagerness to demolish it). The fight against its activities will be performed by the Political-Social Brigade, whose components will shape, during democracy, the fight against terrorism through the Central Research Brigade, for being faithful servants of the executives of the UCD and the PSOE. These people are those who, due to their interrogation procedures, similar to the French or American police in the Cold War, have appeared in the press accused of being "Francoist criminals" even though their best-known crimes were committed in the first twenty years of Democracy.

DESCRIPTION OF THE STATUS OF THE ISSUE

According to the historian Ramón Salas Larrazabal in his work *The Exact Data of the Civil War*, he quantified 72,500 deaths in the Republican rearguard and 35,500 in the National one. National repression focused on the elimination of cadres and activists from the Popular Front parties. On the contrary, in the Republican zone, the highest number of deaths was because the official authority disappeared in favor of the Revolutionary Committees, who throughout the conflict initiated a systematic hunting of the ambushed enemy, exterminating those groups considered counter-revolutionaries, as was the Catholic clergy. In the repression after the Civil War, until 1952, the figures speak of 22,716 death penalties issued by the War Councils, from which only half of those convicted were executed, replacing the remaining penalties with mere imprisonment. With respect to the internal population, prisoners amounted to 270,719, mostly soldiers surrendered from the popular army. However, with the policy of redemption of sentences, in 1947, 36,379 inmates remained in prisons.

In the field of political opposition, the parties of the Republican period were non-existent, except the PCE, who had adapted to the new circumstances, and had the economic and media

support provided by the USSR during the time of the Cold War. The recruitment of upper-class students, and the infiltration into the Church labor associations, will provide the PCE with the political hegemony of the opposition. However, the Communists will have their own splits, such as the Maoist Communist Party of Spain (Marxist-Leninist) PCE (m-l) in 1964, from which, ten years later, the terrorist group Revolutionary Anti Fascist and Patriot Front (*Frente Revolucionario Antifascista y Patriota*, FRAP) will be organized; In 1967, the Paris PCE group will follow the same path, due to its Maoist tendency, as the Marxist-Leninist Organization of Spain (*Organización de Marxistas-Leninistas de España*, OMLE), although in 1975, it became the PCE (reconstituted) and created its armed wing that will be the First of October Anti-Fascist Resistance Groups (Grupos de Resistencia Antifascistas Primero de Octubre, GRAPO); In 1968, the PCE (VIII-IX) comes on the scene, following a pro-Soviet line, because of the criticism that the PCE made of the invasion of Czechoslovakia. These groups will be persecuted by the Political-Social Brigade. One of the most important international cases will be the arrest of Julián Grimau in 1962. The communist leader was during the war the head of the Criminal Investigation Brigade and inspector of the Military Intelligence Service (*Servicio de Inteligencia Militar*, SIM). Identified as one of those responsible for the communist Cheka (Secret Police) in Barcelona where he practised torture, and for also being responsible for the murder of 62 supporters of the Nationals, Grimau was sentenced to death and shot on April 20, 1963. Shortly after, the Official State Bulletin (*Boletín Oficial del Estado*, BOE) of 1 April 1969, said: "Article first. All crimes committed prior to April 1, one thousand nine hundred and thirty-nine are declared prescribed. This prescription, through the Ministry of the Law, does not require being judicially declared and, consequently, will take effect with respect to all kinds of crimes, whatever their perpetrators, their seriousness or their consequences, regardless of their qualification and alleged penalties, and without taking into account the rules established by the Codes in force regarding the calculation, interruption and resumption of the statute of limitations for the offense ...". Since then, criminals of the Civil War, such as Santiago Carrillo, General Secretary of the PCE in the final years of Francoism, had been accused of being responsible for the Public Order in Madrid, during the war, and also, for being responsible for the murder of four thousand detainees on the outskirts Madrid. The Measure of 1969 closed the prosecution of criminals on the defeated side, who could no longer be prosecuted for their crimes during the Civil War. Those on the winning side were never prosecuted during the Francoist period.

DESCRIPTION OF THE TRANSITION

The Amnesty of 1969 and the development of the Rule of Law, oriented the regime towards an openness that led to a Democracy

recognized by the rest of the western countries. Repression will be irrelevant in the years of economic growth, except in communist groups. Opponents of other ideologies were part of the regime and helped the evolution of the regime. As for the death sentences, they will not be applied until the end of the regime in 1975, after the fall of the technocrats of Carrero Blanco, killed in December 1973, and the replacement of his team by his greatest enemies, who were the ones who visualized the images of police repression in the street, which remained during the first governments of Democracy.

During that period, the greatest violent totalitarian element was the ETA terrorist group (Euskadi Ta Askatasuna) born in 1959. The group members came from the group called EKIN, who were university students, children of families of Basque high society and supporters of Basque Nationalism. The group had formed seven years before and had been integrated into the Basque Nationalist Party (*Partido Nacionalista Vasco*, PNV) youth organization, the EGI (Euzko Gastedi-Basque Youth). However, the passivity developed by the Jetzales (Basque nationalists), raised the criticism of the former members of EKIN, who became independent again to fight for Basque independence through violence. The resulting ETA will be organized into four fronts: political, cultural, economic and military, similarly to the Algerian FLN that in those years fought for its independence against France. The terrorist organization will not have the authority to fight on all fronts. The majority ideological current will be the one that defends the Third World thesis. This stated that each action encouraged a repression and in a phased manner, the people would be encouraged to support the armed struggle, by the repressive action of the police. The establishment of a Basque socialist and sovereign State could only come from the use of violence, as the Algerian case had been. Some leaders, such as Eduardo Moreno Bergaretxe, "Pertur", leader of the ETA political-military, who was favorable to an evolution towards political activity in the new Spanish Democracy, would disappear in France in 1976, at the hands of his comrades.

In December 1970, a trial of sixteen members of ETA, accused of four murders, provoked one of the biggest campaigns in favor of the terrorists. The defense lawyers seized the moment to prosecute the regime. The clashes between the police and demonstrators, supporters of ETA, took place in Madrid, Barcelona, Bilbao, Oviedo, Seville and Pamplona. On December 12, three hundred artists occupied the Abbey of Montserrat claiming an Amnesty and the right to self-determination. However, five days later, half a million Spaniards gathered in the Plaza de Oriente proclaiming their adherence to the regime. At this time, ETA increased their capacity for action, thanks to the media effect of the trial, taking advantage of it to make new recruits and rebuild the group. The assassination of the president of the government, Admiral Luis Carrero Blanco, in December 1973 and a subsequent attack, in September 1974, with fourteen dead, will be ETA's most violent blows during Francoism.

The arrival of democracy caused ETA to play a decisive role in the new political configuration in the Basque Country. The murders of Basque citizens of rightist sympathies increased, taking on the aspect of true ethnic cleansing. The police, thanks to the work of an infiltrator, will get to arrest much of the leadership dome of ETA political-military. In the same year, on September 27, the death penalty of three members of the FRAP and two of ETA, who were responsible for blood crimes was carried out; however, due to there being a campaign of political support from

the opposition and from abroad that made people forget their victims, on the contrary, the regime was condemned. In those years the GRAPO, one of the terrorist groups that emerged from the radicalized dissent of the PCE, had begun its bloody path.

Already in the Transition to Democracy, on October 15, 1977, the General Amnesty Law that released political prisoners and hundreds of ETA activists and other terrorist groups was signed. In the case of ETA, those released quickly reconstituted an organization that was dismantled and starred in the deadliest period of terrorism with one dead every three days in the Basque region. Its performance until the arrival to Democracy was 44 murdered. It will be thereafter, with the arrival of the amnestied militants, the economic aid provided by the extortions and the security protected by France, when their offensive against Basque society is unleashed. In 1976, 18 were killed; in 1977, 12; but in 1978, with the reorganization of the terrorist group, they rise to 66; in 1979, they increase to 80; and in 1980, they reached their annual maximum, 98. The profile of the murdered was a person of local importance whose elimination extinguished the possibility of being able to found a rightist party in that locality, which with his disappearance consolidated the hegemonic position of the Nationalist Party Basque (PNV) in the Basque rural area. To achieve its objectives, the following years will be of real importance with the massive elimination of members of the Armed Forces, public order and Civil Guard. The indiscriminate actions against the military were an attempt to provoke repressive action by the military that led to massive support for the ETA cause.

The Spanish Democratic Transition has been disclosed as a role model, especially in Latin America, for describing the evolution from an Authoritarian system to another Democratic system in a bloodless way. However, the streets were bloodied by the action of virulent groups of the extreme left and by groups directed from the State, which were cataloged from the extreme right, to recruit their activists in that ideological field. The data provided by Mariano Sánchez Soler in his work are devastating. Between 1975 and 1983, there were 591 deaths from political violence (terrorism of the extreme left, extreme right, dirty war and repression). Of these, 188 of those killed, the least investigated, fall within what the author defines as "political violence of institutional origin". From the death of the Head of State on November 20, 1975 until December 31, 1983, in just eight years of Democratic Transition, 2,663 victims were counted for political violence between the dead and hospitalized wounded. Of these 2,663 victims, a total of 591 people had lost their lives. As for the injured, according to the only data available from the Interior Ministry, more than 1,000 were victims of leftist and nationalist terrorism (ETA, GRAPO, FRAP and others), and a total of 1,072 injured were victims of violence triggered by police repression and groups promoted by the State.

A report of the Basque Government's Office for Aid to Victims of Terrorism of 2010, directed by Maixabel Lasa and José María Urquijo, and commissioned by the Basque Parliament, recorded between 1975 and 1990, 74 terrorist acts of the parapolic groups in the Basque Country in that time, with a balance of 66 dead. The murders of this terrorism were claimed by the GAL (*Grupo Antiterrorista de Liberación*) (24), Spanish Basque Battalion (18), Triple A (8), Spanish Anti-Terrorist Groups (6) and others. The linking of these groups with Gladio (a secret intelligence network that operated in Europe under the direction of NATO) was discovered on October 24, 1990 when the Italian Prime Minister Giulio Andreotti announced their existence. One

of the police officers of this period, with a strong presence, was Roberto Conesa, head of the Political-Social Brigade, who in subsequent services against the terrorist fight, was awarded in 1977 with the Gold Medal for Police Merit by the Minister for Home Affairs, Rodolfo Martín Villa, who was in office from July 5, 1976 to April 5, 1979, one of the moments of greatest political violence in the streets. Conesa was a man of the regime, a young talent of the single party, an enemy of Carrero Blanco's technocrats, and who made a career in politics and in public enterprise, as one of the main leaders of the UCD, the centrist formation that led the governments of Democracy. His predecessor had been Manuel Fraga Iribarne, in office from December 12, 1975 to July 5, 1976, who was the founder of the AP, one of the sworn enemies of technocrats. During his term, the events that confronted traditionalist factions and caused the Acts of Montejurra, with two dead in May 1976, followed. Another important event was the events of Vitoria, on March 3, 1976, with five dead, because of a labor protest, which was severely repressed and ended in a bloody way, endorsing the discourse of nationalists and independentists about the repression of the Spanish State.

On April 14, 2010, a complaint before the Courts of Justice of the Argentine Republic requesting an investigation of the crimes committed by the members of the Franco dictatorship to be conducted identifying those responsible and penalizing them was filed. The petition came from relatives of PCE members, although without distinguishing victims from guilty parties who had been tried for their crimes after the Civil War. However, most of the facts raised as crimes of Francoism, are subsequent to the death of the Head of State, Francisco Franco, and the defendants, are the aforementioned ministers and their police teams, who participated in the service of former governments.

CURRENT STATUS

The legal process that has developed in the recognition of the right-wing of the populist front-side during Democracy was to equate in social services those who served on the defeated side. The laws and decrees issued in their favor were the following:

- Decree 670/1976, of March 5, which regulates pensions in favor of the Spaniards who, having suffered mutilation because of the past contest, cannot be integrated into the Honourable Corps of Disabled in the War for the Fatherland (*Benemérito Cuerpo de Mutilados de Guerra por la Patria*, BCMGP)
- Law 46/1977, of October 15, on Amnesty.
- Law 5/1979, of September 18, on the recognition of pensions, medical-pharmaceutical assistance and social assistance for the widows, children and other relatives of the Spaniards who died as a result or on the occasion of the last Civil War.
- Law 35/1980, of June 26, on pensions to the mutilated ex-combatants of the Republican zone.
- Law 6/1982, of March 29, on pensions for Civil War mutilates.
- Law 37/1984, of October 22, on the recognition of rights and services provided to those who during the Civil War were part of the Armed Forces, law enforcement agencies and the Carabineros corps of the Republic.
- Eighteenth additional provision of Law 4/1990, of June 29, on the General State Budget for 1990, which determines the compensation in favor of those who suffered imprisonment as a result of the assumptions contemplated in Law 46/1977 of 15 October, on Amnesty.

However, under the socialist government of Rodríguez Zapatero the process has been to break the consensus, and with the support of the autonomous governments of nationalist ideology, proceed to stigmatize the previous regime, through the control of education and culture, by equating Francoism with Nazism and Fascism, and promoting an idealized version of the Second Republic. The revolutionary vision of the last republican government, which favored murders and attacks that moved a part of society to revolt with a minority part of the army in defense of their freedom as Catholics is denied. The communist and totalitarian character of the PCE in the opposition is denied; the criminal nature of the terrorist groups has been treated very late and the criminal action of members of the State has been hidden because they are politicians of the Democratic Transition.

In that line will be framed the Law 52/2007, of December 26, which recognizes and extends rights in favor of those who suffered persecution or violence during the Civil War and the Dictatorship, popularly known as the Law of Historical Memory, a law of the Spanish legal system, approved by the Congress of Deputies on October 31, 2007, which will equate Francoism with Fascism and Nazism, against the opinion of accredited professionals in History, and that has proceeded in its application to the elimination of street names because of their relationship with Francoism, but which has actually been extended to names of religious people or conservative profiles without links to Francoism.

LESSONS FOR TODAY

POSITIVE EXAMPLES

The Democratic Transition was conducted in a bloodless manner, from power, with the leadership of the future King, in consensus between moderate groups of the regime and moderate groups of the opposition, as a normal channel where the regime would land after the disappearance of the Head of State.

When Spain led its Transition to Democracy without bloody periods, it also favored a role model by maintaining the economic standard of living and naturally deriving a Democratic Parliamentary system. The Spanish governments, later of the Monarchy, accepted the path that led to the accession of Spain to the western bloc for its military integration into NATO and politics in the EEC.

The forgotten Amnesty of 1969, helped to not fracture Spanish society, and that of 1977 helped to start a Democratic regime from scratch, where the consensus between the right and the left, resulted in a constitution that officially included all political forces, even Basque and Catalan nationalists, establishing a framework that should bring everyone together, leaving no arguments for the terrorist struggle of those in favor of totalitarian positions.

NEGATIVE EXAMPLES

The assassination of Admiral Carrero Blanco in 1973 meant the elimination of all his technocratic team and its line of government. The new government of Arias Navarro, was unable at an international level to maintain its open image and ended up reinforcing the need to eliminate a repressive and sterile regime in any type of openness. Even after the death of General Franco himself, the repressive profile was maintained by the Minister of the Interior, Manuel Fraga, and his successor Rodolfo Martín

Villa. Both responsible for the main crimes of Francoism made after the death of the dictator.

The repressive apparatus of the last two years of Francoism remained under the orders of its superiors without debugging, and it was those who staged the dirty war against terrorism, maintaining a mode of conduct similar to that of the era of Francoism, under the subsequent guidelines of their bosses with the centrist and socialist governments. In a very similar way to characters like the Papon case in France.

RECOMMENDATIONS

The recommendations are mainly in education. The history of Francoism is about to be made and today it has failed. The spirit of the democratic consensus with which the Transition took place

disappears with the generation that led it, but the Basque and Catalan nationalists have not yet proceeded to their integration into a culture of Democracy.

A democracy represents the will of a plural society, which decides to live according to standards respected by all and that are taught through education. Both the left and the right have made efforts to favor criteria in a climate of dialogue, avoiding the use of historical facts or references from the past that arouse social ruptures again.

A study of the memory made by professional and academic criteria and far from the policy that avoids its contamination and fraudulent use is necessary. In the Spanish case, a study of the crimes *of the regime is necessary; it was born from a Civil War, from an undemocratic opposition to the regime, led by communism and the use of the most radical elements of terrorism as a form of political change.*

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REHABILITATION OF VICTIMS

SANTIAGO DE NAVASCUÉS, RAFAEL ESCOBEDO

INTRODUCTION

The Spanish Civil War and the forty years of Dictatorship that followed left a large balance of victims of serious human rights violations both on the National and the Republican sides, i.e., executions, arbitrary detentions, disappearances, forced labor of prisoners, and torture, among others. The consequences of the conflict were dramatic for several generations. The total numbers of victims are unknown, partly because some files have remained closed so far, due to the dispersion of information and the absence of definitive studies. The rehabilitation process has been characterized by political disagreements and a lack of agreement on how to implement a common policy.

DESCRIPTION OF THE INITIAL SITUATION

The most recent demographic studies have calculated a death toll in excess of 540,000 people in the years of the Civil War, among which were those killed in combat, which are close to 300,000, for retaliation, and those who perished due to poor living conditions.¹ We can distinguish two phases in the repression: the one that took place during the years of the war (1936–1939) and that of the regime years (1939–1975). Historians agree that extrajudicial execution, mass incarcerations, various forms of torture, rape and plunder took place on both sides during the first phase. On both sides, specific bodies aimed at the repression of the political adversary by violent methods were established. The whereabouts of many of those people executed are still unknown.

As for the numbers of repression on both sides, the version of historians closest to the Francoist version is expressed in the book by Ramón Salas Larrazábal,² a position in which Pío Moa³ has also reaffirmed. According to this version, those shot by the Republican side would be around 72,500, while those shot by the Francoist side would be about 58,000, including around 23,000 executions after the war. However, investigations of the last twenty years have questioned these figures, which have been increasing in recent years.⁴ The data of the previous historiography have been corrected upwards in terms of the Francoist repression of 1936 and downwards in terms of the Republican repression. Santos Juliá estimates a total of 100,000 shot during the war and 40,000 during the postwar period, while the figures of the Republican repression, which according to the historians of the regime were about 70,000, should not exceed 50,000.⁵

The most recent studies are those collected by Espinosa, which estimate 130,200 victims of the Francoist repression during the war and 49,270 victims of the Republican repression.⁶ At the end of the conflict, the Francoist regime put a lot of effort into repairing the damage done to victims of revolutionary violence, both materially and symbolically.

In addition to the direct victims of repression during the war, there was a second phase of repression. After the victory of the Francoist side, the victors prepared to lay the foundations of the new State. The new regime proceeded to dismantle

the Republican regime, to outlaw political parties and unions, and to pursue any manifestation of political, religious or moral dissent. Thus, the repression of all those behaviors conceived as incompatible with the new regime was formalized. Although violence diminished significantly after the first months of the war, the State repression apparatus continued until the end of the regime.

DESCRIPTION OF THE TRANSITION

The climate of violence in which the transition occurred, such as the increase in attacks committed by ETA (*Euskadi Ta Askatasuna*), the Basque nationalist leftist terrorist organization, or the attack perpetrated by an ultra-right command against a group of militant labor lawyers of the Spanish Communist Party (*Partido Comunista Español*, PCE) and the *Comisiones Obreras*, (CCOO) in his office on Atocha Street, fed in large part a fear of a repetition of the atrocities of the Civil War. The memory of the past was very present at all times, which explains how negotiation, the pact, tolerance and consensus were instituted as a means to resolve the process. In some crucial moments this consensus became not only a means, but an end in itself, regardless of what was agreed. Although in the short term the consensus achieved the formation of a full and stable democracy, nowadays reparation policies have proved incomplete or require updating.⁷

AMNESTY LAWS

This spirit of consensus drove Amnesty laws, the first major conscious and historically mature attempt to overcome civil war and dictatorship. In this process we could distinguish three differentiated and consecutive phases: amnesty, rehabilitation and reparation for victims.

During the Francoist regime some movements had begun from the State for a national reconciliation, such as the promulgation of a series of pardons in 1945, 1961, and 1964; the 1969 law prescribing all crimes prior to 1939,⁸ or the construction of the Basilica of the Valley of the Fallen (*Valle de los Caídos*) with

1 Ortega, José Antonio, Silvestre, Javier, “Las consecuencias demográficas de la Guerra Civil”, in Martín-Aceña, Pablo, Martínez-Ruiz, Elena (eds.), *La economía de la guerra civil española, 1936–1939*, Madrid: Marcial Pons, 2006, 53–105.

2 Ramón Salas Larrazábal, *Pérdidas de la guerra*, Barcelona: Planeta, 1977.

3 Pío Moa, *Los crímenes de la Guerra Civil y otras polémicas*, Madrid: La Esfera de los Libros, 2004.

4 At the opposite end of the scale to the figures of this version is the work of Paul Preston in his controversial book *El Holocausto español. Odio y exterminio en la guerra civil y después*, Madrid: Debate, 2011.

5 Santos Juliá (coord.), *Víctimas de la guerra civil*, Madrid: Lável, 1999.

6 Francisco Espinosa Maestre (ed.), *Violencia roja y azul. España, 1936–1950*, Barcelona: Crítica, 2010.

7 Paloma Aguilar Fernández, *Políticas de la memoria y memorias de la política. El caso español en perspectiva comparada*, Madrid: Alianza, 2008, a237.

8 Decree-Law 10/1969, of March 31, declaring the prescription of all crimes committed prior to April 1, 1939.

the intention of implementing a policy of “unity and brotherhood among the Spaniards”, as a monument to all the fallen “without distinction of the field in which they fought”.⁹ On the other hand, reconciliation was also part of the political discourse of the opponents to Francoism, as evidenced by the “minimum program” approved by the Spanish Communist Party in 1960 to establish a general amnesty “extended to all responsibilities arising from the Civil War, in both contending fields”.¹⁰

1/ Pardons and Amnesty

With the beginning of the Transition, partial grace measures were approved, such as the pardon of November 25, 1975, motivated by the coronation of King Juan Carlos I. But the first amnesty law was the Royal Decree of July 30, 1976, which granted amnesty for all crimes and lack of political intent and opinion included in the Criminal Code “as long as they had not endangered or injured the life or integrity of people”.¹¹ On June 1, 1976, of the 373 inmates, incarcerated for crimes of lack of political intent or opinion included in the Criminal Code, 287 were amnestied with release and 43 were amnestied but held for other reasons. Another 43 inmates were not amnestied, among which there were some prisoners of ETA and of several terrorist groups such as the Revolutionary Antifascist Patriotic Front (*Frente Revolucionario Antifascista y Patriota*, FRAP), a terrorist organization of the extreme left.¹²

On October 15, 1977, the first Amnesty Law was passed by the newly released democratic parliament, which complemented the pardon of July 1976.¹³ It was approved by a large parliamentary majority. Its objective was to extinguish criminal responsibility and release those imprisoned for crimes related to acts of political intent, without excluding blood crimes, as well as crimes of rebellion and sedition or conscientious objection. This first Amnesty Law reflected the demands of all opposition parties and consensus that marked the first stage of the Transition. It benefited 153 prisoners, of which 140 were released and 13 held for other responsibilities. Due to political crimes, at that time there were 38 preventive prisoners in prisons. This amnesty was specifically addressed to the group of prisoners of ETA who had not been able to benefit from the previous decrees-law on pardon or amnesty for having been prosecuted or being convicted of crimes and lack of political intentionality that had injured life or physical integrity of people.

At that time, the Amnesty Law was enthusiastically received by almost all political sectors. Arias Salgado, a spokesman for the Democratic Center Union (*Unión de Centro Democrático*, UCD), the parliamentary group that represented the majority of the government, declared in the parliamentary debate that “amnesty is the ethical-political precondition for democracy, of that democracy to which we all aspire, which upon being authentic does not look back, but, fervently, wants to overcome and transcend the divisions that separated and faced us in the past”.¹⁴ For his part, Camacho Zancada, representative of the *Grupo Parlamentario Comunista*, claimed that “amnesty is a national and democratic policy, the only consequence that can close that past of civil wars and crusades”. Santiago Carrillo, historical leader of the Communist Party and its secretary-general, was in favor of an amnesty “for all those on one side and those on the other”, to make a “cross and line over the Civil War once and for all”.¹⁵

2/ Rehabilitation and reparation measures

In the second phase, the Government complemented amnesty with other measures to rehabilitate the defeated. In March 1978,

“the situation of the military that took part in the Civil War” was regulated;¹⁶ in May of the same year the request for amnesty was regulated by the officials of the Generalitat of Catalonia, an institutional system by which the Spanish autonomous community of Catalonia is politically organized; in November, “pensions were granted to the families of the dead Spaniards as a result of the 1936–1939 war”,¹⁷ and in December “economic benefits were recognized for those who suffered injuries and mutilations in the Spanish Civil War”.¹⁸

These measures were completed in a third phase with reparative laws. In 1979, pensions, medical-pharmaceutical assistance and social assistance were recognized in favor of the widows, children and other relatives of the Spaniards who died as a result or on the occasion of the last Civil War.¹⁹ In 1980, pensions were given to mutilated ex-combatants of the Republican zone.²⁰ Finally, in October 1984, “services rendered” were recognized, as well as pensions and assistance, to those who joined the Army or the Law Enforcement Agencies during the war.²¹ In 1986, a loophole in the Amnesty Law was settled, which prevented the reintegration into the Army of those who had belonged to the Democratic Military Union (*Unión Militar Democrática*, UMD), a clandestine military organization that emerged in 1974 in order to extend the democratic ideology among the Armed Forces, which affected three commanders and nine captains. Finally, a 1990 law that provided compensation for those who suffered imprisonment for three or more years as a result of the assumptions referred to in the Amnesty Act of 1977 is important.²²

LEGAL FRAMEWORK OF THE REHABILITATION

In addition to the above, there are a number of legal problems facing Spanish justice when assessing the victims of Francoism. If the State has the duty to investigate, prosecute and punish

9 Decree-Law of August 23, 1957 establishing the Foundation of the Holy Cross of the Valley of the Fallen (*Valle de los Caídos*).

10 Santos Juliá (coord.), *Víctimas de la guerra civil*, Madrid: Lável, 1999, 49.

11 Royal Decree-Law 10/1976, of July 30, on Amnesty.

12 Ibid.

13 Law 46/1977, of October 15, on Amnesty.

14 Journal of Sessions of the Congress of Deputies No. 27. Plenary Session Number 11. Proposal for the Amnesty Law. 14/10/1977

15 “Sin el rey ya habría empezado el tiroteo. Mitin de Carrillo en Madrid”, in *El País*, 2. 10. 1977, https://elpais.com/diario/1977/10/02/espana/244594804_850215.html

16 Royal Decree-Law 6/1978, of March 6, regulates the situation of the military that took part in the Civil War is regulated

17 Royal Decree 2925/1978, of December 7, for compliance with Royal Decree-Law 35/1978, of November 16, on pensions to relatives of deceased Spaniards as a result of the 1936–1939 war.

18 Royal Decree-Law 43/1978, of December 21, which recognizes economic benefits to those who suffered injuries and mutilations in the Spanish Civil War.

19 Law 5/1979, of September 18, on the recognition of pensions, medical-pharmaceutical assistance and social assistance in favor of widows, and other relatives of the Spaniards who died as a result or on the occasion of the last Civil War

20 Law 35/1980, of June 26, on pensions to former mutilated combatants in the Republican zone

21 Law 37/1984, of October 22, on the recognition of rights and services provided to those who during the Civil War were part of the Armed Forces, Law Enforcement Forces and the Police Corps of the Republic.

22 Law 4/1990, of June 29, on General State Budgets for 1990. Additional provision Eighteen. Compensation in favor of those who suffered imprisonment as a result of the cases contemplated in Law 461/1977, of October 15, on amnesty.

violations (the so-called “duty of guarantee”) against human rights and reparation of victims, we find that it is not clear that, in the thirties, there were obligations to international law referring to human rights, so there is no legal duty of reparation or punishment. Therefore, the events that have occurred have not been described as violations of rights against humanity, provided for in the Criminal Code of 1995, because the principle of legality and the non-retroactivity of the unfavorable criminal law prevent it.

This has generated a recent debate: from when exactly is there an obligation or prohibition in general and conventional international law for Spain. As stated, although “it is possible to sustain the existence of criminal proceedings and, of course, of international norms on the regulation of war prior to 1936–1939, the truth is that it is not easy to be able to assert undoubtedly that crimes committed in an internal armed conflict then compromised the international responsibility of their perpetrators.”²³ Therefore, “it is not clear that the Spanish State has pending obligations derived from the crimes committed during the fratricidal conflict, in regard to the responsibility of its perpetrators, although [...] it would be possible to raise some exception with respect to the forced disappearance of people.”²⁴ Undoubtedly, the investigation about cases of enforced disappearances is the most pressing duty for the Spanish State. The majority of disappearances date from the period of the Civil War (which, in legal terms, is considered prior to possible non-applicability) and those that occurred afterwards have an unsystematic character, so they would become violations of human rights or crimes of international law, but not crimes against humanity.

Secondly, as regards the violations of rights committed after the war, there would be three areas for reparation: torture, which was applied both in prisons and in police stations; homicides derived from police violence and the silence imposed on the disappearances that occurred in the rebellious rearguard during the Civil War. In the case of crimes during the Francoist era after 1945, we find that, once again, “it cannot be said that extrajudicial executions were systematically committed by the regime after 1945, which means that, in any case, they can be valued only as human rights violations and not as crimes against humanity.”²⁵

CURRENT SITUATION

In the last two decades, the rhetoric of amnesty reparation guidelines has changed substantially, which so far did not affect the sufferings of those who had allegedly fought for a legitimate regime, the Republican, or disqualified the Francoist regime and the people who had committed injustices in it. The first mention of the “fight for freedom” is a law of 1984.²⁶ Then, in a Royal Decree of 1996, concerning international brigade members, the nation’s gratitude for their work for freedom was mentioned.²⁷ In December 1998, the first disqualification appears, although indirectly, of some of the actions of the dictatorship.²⁸ In the 2004 to 2008 legislature there was a great change in the way of articulating the reparation rules. With a Royal Decree in 2004, an “Inter-ministerial Commission to Study the Situation of the Victims of the Civil War and Francoism” was created, whose report dated July 28, 2006 sets the standards for reparation.²⁹ Other laws, such as the one of March 2005, on economic and health benefits for children of war, have recognized the “historical debt that Spain has to these citizens,” establishing for the first time in a legal text the legitimacy of the Republic and endorsed the responsibility of the Civil War to

the rebels.³⁰ At this point, with the approval of the law of historical memory in 2007, we arrived at a fundamental change in the laws.

SCOPE AND TYPE OF REHABILITATION

The Historical Memory Law of 2007 has meant a Copernican turn in the rehabilitation of the victims.³¹ Its insertion in the legal system, after a controversial parliamentary debate, has not been accompanied by the social acceptance necessary to achieve the spirit of harmony that the law intended to promote and criticism from various sectors has been increasing. A decade after the law was published, the scenery is uncertain.

First of all, the law recognizes in its preamble an individual right to personal and family memory of those who suffered persecution or violence during the Civil War and the Dictatorship. This recognition is specified in three aspects: moral reparation of the victims through a double official recognition, both general and private; economic reparation through economic benefits that extend or improve those already recognized by previous laws, and recovery of personal and family memory through the location and identification of missing persons. Secondly, it establishes the bases for public authorities to implement complementary policies aimed at the knowledge of our history and to the promotion of democratic memory in the collective sphere, such as the withdrawal of symbols from the Civil War or Dictatorship: changes in the denomination of the streets, destruction or withdrawal of monuments of Francoist exaltation, and revocation of honors, among others.

An example of the implications of this law, which presents serious legal conflicts, has been the lack of budgetary provision for the exhumations of victims since 2012, the year when the government stopped financing them. As a paradigmatic case, we can briefly explain the exhumation at the end of 2016 of General Sanjurjo, one of the leaders of the military uprising in 1936, who died in the early days of the Civil War. In order to materialize it, the municipal government of Pamplona made a misleading interpretation of the general rules of the applicable law, arguing the need to exhume the remains deposited in the Monument

23 Javier Chinchón, “El viaje a ninguna parte: Memoria, leyes, historia y olvido sobre la guerra civil y el pasado autoritario en España”, in *Revista del Instituto Interamericano de Derechos Humanos (IIDH)*, 47, 151–152.

24 Paloma Aguilar Fernández, *Políticas de la memoria y memorias de la política. El caso español en perspectiva comparada*, Madrid: Alianza, 2008, 489.

25 *Ibid.*, 490. This partly explains the failure of some judicial processes, such as that of Baltasar Garzón or the one known as the Argentine Complaint, the litigation filed before the courts of justice of the Argentine Republic in 2010 with the objective of investigating the crimes committed by the members of the Franco dictatorship, to identify and penalize those responsible.

26 Law 18/1984, of June 8, on recognition as years worked, for the purposes of Social Security, of the periods of imprisonment suffered as a result of the assumptions contemplated in the Amnesty Law of October 15, 1977.

27 Royal Decree 39/1996, of January 19, on the granting of Spanish nationality to fighters of the International Brigades in the Spanish Civil War.

28 Law 43/1998, of December 15, on Restitution or Compensation for Political Parties of Assets and Rights Seized in the application of the regulations on political responsibilities of the period 1936–1939.

29 Royal Decree 1891/2004, of September 10, establishing the Inter-ministerial Commission to Study the situation of victims of the Civil War and Franco.

30 Law 3/2005, of March 18, which recognizes an economic benefit to citizens of Spanish origin displaced abroad, during their minority, as a result of the Civil War, and who developed most of their lives outside the national territory.

31 Law 52/2007, of December 26, which recognizes and extends rights and establishes measures in favor of those who suffered persecution or violence during the Civil War and the dictatorship.

to the Fallen (*Monumento a los Caídos*), a building in memory of the Navarrese fallen from the rebellious side, on the mandate to abolish and remove the “symbols” of the Francoist era. Although the exhumation is a private right of the relatives, who were expressly opposed to it, the municipal government did not hesitate to transform it into a public power, whose exercise legitimized qualifying the burial place (a crypt recognized as a private usufruct) as a public cemetery, allowing thus its closure.³²

SOCIAL SATISFACTION AND REHABILITATIONS STATUS

A year after the approval of the Law of Historical Memory, the judge of the National Court, Baltasar Garzón, opened the first formal investigation into disappearances under the Francoist regime. In his order, he attributed to the dictator Francisco Franco and 34 other leaders who led the rebellion against the Government of the Republic, a plan of systematic extermination of their opponents and repression. This also led to some public movements in favor of the victims: Garzón ordered the opening of 19 mass graves and received from several memorial organizations a partial census of names of more than 140,000 missing persons,³³ a figure that, in contrast to academic literature, is at least surprising.³⁴

The judge framed these facts in the context of crimes against humanity, which, as previously seen, is doubtful from the legal point of view. Judge Garzón’s decision was taken against the criteria of the State Attorney General’s Office, so he was forced to abandon the investigation only a few weeks after opening it. The complaints of several associations of the extreme right were admitted by the Supreme Court, which led to the opening of a trial that was finally acquitted in February 2012.³⁵ The controversy hit the streets, causing a long series of debates.

This situation has reached an increasingly bitter public debate about the need to rehabilitate victims, which is currently at a critical point. Misinformation and partisan manipulations have caused a serious flaw in the formation of a coherent account of the victims of Francoism. On the one hand, we find state initiatives such as the map of graves prepared by the Ministry of Justice, which numbers 2,000 illegal burials during the Civil War and Dictatorship.³⁶ On the other, there are organizations such as the Association for the Recovery of Historical Memory (*Asociación para la Recuperación de la Memoria Histórica*, ARMH), which claim that the number can double and work to continue the exhumations.³⁷

In this sense, the Law of Historical Memory has failed to respond effectively to its proposals. Since its inception it has had problems that have ballasted its application, i.e., it has not had a unanimous social acceptance, it has developed in the middle of the controversy, which has generated a lack of agreement and will, as well as its discredit. As Lafuente states, the law “has spoiled its purpose of achieving a democratic and peaceful coexistence of all citizens to the extent that it only recognizes the ‘right to historical and personal memory’ to the victims of the Civil War and of the Francoist Dictatorship, justifying this fact in the need to discriminate positively to achieve the alleged equality between the defeated and the victors.”³⁸ In the balance sheet, it can be said that the recognition of economic benefits to victims or their families as reparation is the only mandate that is peacefully fulfilled. The rest of the provisions are not complied with due to the inactivity of the responsible Administrations for not adopting the necessary public policies for their materialization (such as the budgetary provision for subsidies for exhumations) or for not dictating the legal decisions necessary

to update the regime of certain institutions (such as indecision about the future of the Monument of the Fallen Valley). This has led to public and private actors using procedures outside the law (such as the exhumation of Sanjurjo) to comply with the purposes of the Law of Historical Memory.³⁹

LESSONS LEARNED AND RECOMMENDATIONS

Amnesty laws, which were one of the axes on which the transition to democracy pivoted, have recently been subjected to criticism, linked on many occasions, to political interests.⁴⁰ It has been widely discussed about the supposed “pact of oblivion” that, by promoting forgiveness without first addressing the injustices of the past, i.e., without allowing transitional justice, prevented the establishment of a framework for public articulation of memories and overcoming of trauma.

However, the conception of the Transition as a “pact of oblivion” is a distortion of history. As Santos Juliá has shown, among

32 It is necessary to highlight, on several occasions, laws of historical memory have been enacted in the different autonomies to cover some of the insufficiencies of state regulations (Julián Chaves Palacios, “Consequences of Francoism in democratic Spain: legislation, exhumations of graves and memory”, In *Contemporary History*, 60, 2019, 529–530).

33 “Garzón receives more than 140,000 names of the disappeared in the Civil War and the dictatorship”, in *El Mundo*, 22. 9. 2008.

34 Among the most popular figures at the popular level is the one provided by the association Judges for Democracy, who affirm that Spain is “the second country in the world, after Cambodia, with the largest number of victims of enforced disappearances whose remains have not been recovered or identified” (“Judges for democracy accuses the Government of breaking the law of memory”, in *El País*, 9. 10. 2013, https://elpais.com/politica/2013/10/09/actualidad/1381322308_843838.html). This is a disconcerting figure in view of previous studies that, in addition, is not supported by any study or part of a novel examination of documentary sources, archives or censuses, and has only very recently been disproved (“Por qué España no es el segundo país del mundo con más desaparecidos”, in *El Mundo*, 6. 12. 2019, <https://www.elmundo.es/internacional/2019/11/05/5dc1bb20fc6c8311768b460c.html>).

35 Among the complainants were the Manos Limpias (Clean Hands, a trade union registered in Spain), the Freedom and Identity Association and the Falange Española de las JONS party.

36 Historical memory, “Map of graves”, <http://www.memoriahistorica.gob.es/es-es/mapafosas/Paginas/index.aspx>

37 The ARMH is the most important association in Spain dedicated to locating victims of repression during the Spanish Civil War and the Franco dictatorship. Since its foundation in 2000, it has carried out more than 150 exhumations in which more than 1,300 victims have been recovered; a figure that remains insufficient. However, its ideological affiliation with the Second Spanish Republic makes it difficult for its work to be impartial. Web page: <https://memoriahistorica.org.es>.

38 According to Lafuente, the actions have generated social unrest, as the reparation of some victims becomes discredited for others. The law, in this sense, has reopened wounds and increased litigation (María Mercedes Lafuente Benaches, “Balance de la Ley de Memoria Histórica”, in *Revista española de derecho administrativo*, 188, octubre-diciembre 2017).

39 Ibid.

40 Among others, organizations such as Human Rights Watch and Amnesty International have called for the repeal of the amnesty law and, in 2008, the UN Human Rights Committee first recommended the repeal of the law, the adoption of “necessary legislative measures to guarantee the recognition of the imprescriptibility of crimes against humanity by national courts; provide for the creation of a commission of independent experts charged with restoring the historical truth about human rights violations committed during the Civil War and the dictatorship; and allow families to identify and exhume the bodies of victims and, where appropriate, compensate them” (Human Rights Committee, 94th session, Geneva, October 13 to 31, 2008, CCPR/C/ESP/CO/ January 5, 2009).

others, the huge number of books and research published since 1975 on the Francoist repression and Civil War in general throw down the myth of the pact of oblivion during the transition to democracy.⁴¹ On the contrary, amnesty laws were keys to achieving stability and democratic coexistence in a period characterized by the threat of violence in which forgiveness and oblivion were imposed while moving towards the demand for truth.⁴² Today, however, we must rethink the way in which the right to truth, justice and reparation for victims has been promoted.

One of the most complete reports on the evolution in the rehabilitation of victims was prepared by the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-repetition, Pablo de Greiff, in 2014. The report noted, among other issues, “an excessive formalism in the interpretation of the law that prohibits any reflection on possible alternatives to guarantee the right of victims to truth and justice”, which currently *de facto* prevents investigations into crimes committed during the Civil War.⁴³ Recently, the Rapporteur once again observed that “a determined State policy that does not fall prey to political tensions and divisions is necessary, but that guarantees integrated, coherent, prompt and impartial measures, in favor of truth, memory and reparation”, and advocated a nonpartisan state policy.⁴⁴

POSITIVE AND NEGATIVE EXAMPLES

As positive examples, a long series of amnesties and reparations has been run since the Transition. Criticisms of the amnesty laws are not unanimous. Indeed, as some authors claim and have been demonstrated by the facts, it was essential to avoid polarization and chaos during this time. Thanks to it, and against all odds, the Transition was peaceful and happened through “transition by transaction”, so it became a model worthy of being studied and analyzed for the potential service it could provide to Latin American countries, like Chile and Argentina.⁴⁵

We have, however, negative examples in the rehabilitation of victims. The most important is the neglect suffered by the bodies of the disappeared during the war and the lack of state planning accordingly. In addition, efforts to respond to the legacies of the Civil War and Dictatorship through the Law of Historical Memory have been characterized by fragmentation. In delegating important aspects of reparation in private associations there has been a lack of rapprochement between the State and the victims, and there has been a politicization of attempts at historical trial from the parliamentary level. Two words can summarize this negative experience: the politicization of the problem and the privatization of exhumations derived from the law that, in the words of Pablo de Greiff, has produced “the indifference of State institutions”.⁴⁶

From the above we can summarize some conclusions. In the process of rehabilitation of the victims there have been several positive aspects, such as the amnesty laws, which were a fundamental piece of the Transition gear.

However, we also have negative examples. A historical review reveals the limited scope of the Law of Historical Memory and the lack of budget for its implementation; the validity of the amnesty law according to what has been interpreted by the judicial authorities; the lack of a law on access to information; the difficulty in accessing the archives, and the lack of a national plan to search for missing persons, among others. It should also be added the political and partisan character that has sometimes been adopted in the discussion on memory, which has frequently prevented the achievement of minimum results.

Secondly, we have the specific recommendations of the Report of the Working Group on Enforced or Involuntary Disappearances of the United Nations. In general, the Spanish State was recommended to “act with due urgency and speed in the matter of enforced disappearances as required by the Declaration and other international obligations” and “implement the recommendations made to Spain by different international human rights organizations, in particular those issued by the Committee on Enforced Disappearances and by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-repetition”.⁴⁷ On the other hand, the Rapporteur of the Working Group on Enforced Disappearances recommended that the Spanish State assume its responsibility and lead these initiatives so that they were part of a comprehensive, coherent, permanent, cooperative and collaborative State policy.⁴⁸

There are still open wounds from the Civil War and Francoism that affect part of our society and are unresolved. The State, due to the complex historical and political plot, must satisfy the demands of truth by avoiding sectarian or partisan differences.

41 Santos Juliá, *Transición. Historia de una política española (1937-2017)*, Barcelona: Galaxia Gutenberg, 2017, 48.

42 On the other hand, it should be noted that the amnesty did not obtain peace in any way with ETA. Rather, the opposite happened: persuaded of the effectiveness of its long-term strategy and convinced of the weakness of the Government in the war declared against them, ETA reinforced its commands with new additions and responded by climbing another step in the escalation of targeted attacks. To high military commanders.

43 Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-repetition, Pablo de Greiff, 07.27.2014, A / HRC / 27/56 / Add.1.

44 Pablo de Greiff, “The strength of democracy is measured in the ability to respond to victims’ claims”, 19. 5. 2017, <https://www.ohchr.org/sp/News-Events/Pages/DisplayNews.aspx?NewsID=21641&LangID=S>

45 Santos Juliá, “1977. Amnistía”, in Xosé M. Núñez Seixas (dir.), *Historia mundial de España*, Barcelona: Planeta, 2018, 878.

46 “El relator de la ONU insiste: España debe juzgar los crímenes del franquismo”, in *El País*, 3. 2. 2014, https://elpais.com/politica/2014/02/03/actualidad/1391443224_877477.html

47 Human Rights Council, session twenty-seven, July 2, 2014, A/HRC/27/49/ Add.1.

48 Speech Addressed by the Chairman-Rapporteur of the Working Group on Enforced or Involuntary Disappearances Ariel Dulitzky at the 27th session of the Human Rights Council (September 8 – October 3, 2014). Geneva, September 12, 2014.

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- Decree-Law 10/1969, of March 31, declaring the prescription of all crimes committed prior to April 1, 1939
- Law 46/1977, of October 15, on Amnesty
- Law 5/1979, of September 18, on recognition of pensions, medical-pharmaceutical and social assistance in favor of widows, and other relatives of the Spaniards who died as a result or on the occasion of the last Civil War
- Law 35/1980, of June 26, on pensions to former mutilated combatants in the Republican zone
- Law 37/1984, of October 22, on the recognition of rights and services provided to those who during the Civil War were part of the Armed Forces, the Law Enforcement Agencies and the Cuerpo de Carabineros of the Republic
- Law 18/1984, of June 8, on recognition as years worked for the purposes of Social Security of the periods of imprisonment suffered as a result of the assumptions contemplated in the Amnesty Law of October 15, 1977
- Law 4/1990, of June 29, on General State Budgets for 1990. Eighteenth Additional provision. Compensation for those who suffered imprisonment as a result of the cases contemplated in Law 46/1977, of October 15, on Amnesty
- Law 3/2005, of March 18, which recognizes an economic benefit to citizens of Spanish origin displaced abroad, during their minority, as a result of the Civil War, and who developed most of their lives outside the national territory
- Law 52/2007, of December 26, which recognizes and extends rights and establishes measures in favor of those who suffered persecution or violence during the Civil War and the dictatorship
- Royal Decree-Law 10/1976, of July 30, on Amnesty
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- Royal Decree-Law 43/1978, of December 21, which recognizes economic benefits to those who suffered injuries and mutilations in the Spanish Civil War
- Royal Decree 2925/1978, of December 7, for compliance with Royal Decree-Law 35/1978, of November 16, on pensions to family members of Spaniards who died as a result of the 1936–1939 war
- Royal Decree 1891/2004, of September 10, establishing the Inter-ministerial Commission for the study of the situation of victims of the Civil War and Franco

WEBSITES

<https://memoriahistorica.org.es>

EDUCATION AND PRESERVATION OF SITES OF MEMORY

ANNA KATARZYNA DULSKA

INTRODUCTION

According to Pierre Nora, “self-awareness emerges from the signs of what has already happened.”¹ These signs, the places of memory, shape the public space in which the life of a nation unfolds and evoke its past. When it comes to a society that in its recent history suffered a civil war, as happened in the case of Spain where, in addition, the conflict between two opposing views of the country had worsened long before the military conflict, the management of this memory becomes very complex, because what some want to remember, others prefer to fall into oblivion. The illustrious poet, Antonio Machado thus reflected the Spanish peculiarity: “Little Spaniard just now coming into the world, may God keep you. One of those two Spains will freeze your heart.” Although written long before the Civil War, these verses can serve as a metaphor for the preservation of places of memory after it ended.

THE INITIAL SITUATION

For forty years, from Franco’s rise to power until after his death, Francoism implemented a large-scale memory policy, which initially aimed to establish its power, and subsequently after the victory in the contest, eliminate their adversaries of collective consciousness and memory and legitimize the new regime.² In the public discourse, and therefore, the politics of Francoist memory, three phases can be distinguished. The first corresponds to the years 1936–1959, i.e., from the Civil War until the approval of the Stabilization Plan, and it was focused on extolling the military victory, first underlining the alignment with the Germany of Hitler and the Italy of Mussolini, and then detaching from this awkward image that had cost so much to create; the second phase covers the period of economic growth (“developmentalism”), when the commemoration of the war was replaced by the celebration of Peace; while the third phase coincides with the decline of the Dictatorship and the dawn of the Transition. Said policy consisted mainly of the reordering of public space and time according to the new symbology and iconography and was implemented in all levels of social life: physical, legal, political, intellectual and cultural, so that, referring to Machado’s words – one of the Spains froze the other in the name of the slogan “*Una, Grande, Libre*” which since 1938 stamped the state shield.

SYMBOLOLOGY

Francoism modified the national symbols of Spain. For the flag, the gules and or was restored. In the shield, heraldic elements belonging to the Catholic Monarchs were introduced, i.e., the yoke with the Gordian knot, the beam of arrows, at that time already symbols of the Spanish Phalanx, and the eagle of Saint John, as well as a phylacterium with the aforementioned heraldic emblem which replaced Ferdinand’s “*Tanto monta*” (abbreviation of “It amounts to the same, cutting as untying”). To the letter of the national anthem

composed by José María Pemán during the Dictatorship of Miguel Primo de Rivera (originated as a military march of the eighteenth century, the Spanish anthem never had an official letter) were added the expressions “arms raised” and “yoke and arrows”.

In addition to the shield, other emblems that filled the public spaces were: the monogram known as “*Víctor*”, which until then had been used as *graffiti* in the oldest Spanish universities by the new doctors, but since the Victory Parade of 1939, became one of the main symbols of Francoism, and Franco’s personal weapons (standard, script and shield), inspired by the Royal Band of Castile enriched with the columns of Hercules.³

STATUES

Another element of “the imposition of the present and the will of future permanence inserted in the foundational fact of the military victory”,⁴ were the statues and effigies of the dictator erected throughout the Spanish territory, in the main squares, in the entrances or enclosures of public and military institutions. Here we can also distinguish three periods.⁵ With equestrian busts and statues erected in the forties, the memory of the victory of the Civil War was sought to be eternalized and legitimized Franco’s power; those of the sixties paid tribute to the dictator and his exploits; while those of the seventies tried to root the memory of the Francoist regime in the collective conscience and preserve it for posterity. In addition, the idealized image of Franco, whose real appearance “was not very appropriate for propaganda purposes”,⁶ appeared on coins, stamps and in all kinds of periodicals.

Francoists tried to make visible in the public space also those “fallen by God and Spain” and, he dedicated a multitude of plates, crosses and obelisks placed in cemeteries, squares and churches. In each parish an inscription was to be placed listing the names of the martyrs.

GAZETTEER

Crucial for memory and awareness was the street gazetteer.⁷ Thus, the names of the streets and squares that maintained

1 Pierre Nora, “Between Memory and History: Les Lieux de Mémoire”, in *Representations, Special Issue: Memory and Counter-Memory*. 1989, (26), 7.

2 Walther L. Bernecker, Sören Brinkmann, *Memorias divididas. Guerra Civil y Franquismo en la sociedad y política españolas (1936–2008)*, trad. Marta Muñoz-Aunión, Madrid: Abada Editores, 2009, 127.

3 Today it is used by the Dukes of Franco, a noble title granted by King Juan Carlos I to Franco’s daughter a week after his death.

4 Jesús de Andrés, “Las estatuas de la dictadura y viceversa. El franquismo y sus símbolos (1936–2018)”, in Jordi Guixé, Jesús Alonso Carballés, Ricard Conesa, eds., *Diez años de leyes y políticas de memoria (2002–2017). La hibernación de la rana*, Madrid: Catarata, 2019, 161.

5 Ibid., 161–162.

6 Walther L. Bernecker, Sören Brinkmann, *Memorias divididas. Guerra Civil y Franquismo en la sociedad y política españolas (1936–2008)*, trad. Marta Muñoz-Aunión, Madrid: Abada Editores, 2009, 132.

some relationship with the Republic were eliminated and the urban plans were filled with protomartyrs, “the Fallen”, heroes of the Francoist side (highlighting among them Franco himself, José Antonio Primo de Rivera, José Calvo Sotelo, Gen. José Sanjurjo), the myths of the Civil War (July 18, the Alcazar of Toledo, among others), as well as military and political faithful to the regime. The toponymy of some localities was also modified especially those linked in one way or another to prominent figures of the regime, for example, Ferrol became Ferrol del Caudillo, Alcocero, Alcocero de Mola or San Leonardo, San Leonardo de Yagüe. Certain newly created nuclei within the framework of the agrarian colonization were baptized Villafranco or received the suffix “del Caudillo”.

EMBLEMATIC PLACES

Regarding the places, three are worth mentioning.⁸ The first is the town of Belchite in Aragon. Besieged between August and September 1937 by the Republicans, it was the scene of a bloody confrontation in which no hostages were taken. The Republicans conquered the square and maintained it for half a year until its recovery by the Francoists in March 1938. The Caudillo declared the town, or rather what was left of it, a national monument and prohibited its reconstruction so that its ruins perpetuated the victory. Instead, he ordered a new town to be built using a workforce of a thousand Republican prisoners located in one of the concentration camps.

The second place is the Alcazar of Toledo, the emblematic military academy, in whose ranks Franco had been formed, which was unsuccessfully besieged by the Republicans between July and September 1936, whose defense produced myths that they were for the benefit of the Francoist propaganda and that over time it became the symbol of Franco's Spain.

The third place is the Valley of the Fallen, erected between 1940 and 1959 60 kilometers from Madrid, in the Sierra de Guadarrama, as a monument of war and a mausoleum; the flagship of Franco's memory policy. In addition to the monument itself, the enclosure houses a Benedictine monastery created for the monks to pray for the thousands of fallen, killed in combat and reprisals. As in Belchite, in its construction a workforce of prisoners of war was used, in this case a total of twenty thousand, who thus received the possibility of “reparation”, and “spiritual and political rescue”, as well as a reduction of their sentence. In the crypt inside the basilica rest: the founder of the Falange, José Antonio Primo de Rivera, forty thousand “fallen for God and for Spain”, represented allegorically in the central mosaic, as well as some of the Republicans of the Catholic faith that were moved there when, instead of war it began to celebrate peace. Finally, and without Franco having arranged it, the Caudillo himself was buried there, turning the Valley into a tribute to his regime.

HOLIDAYS

Finally, in addition to the symbolic and physical space, public time was subordinated to memory.⁹ The festivities were eliminated from the festive calendar with some Republican connotation and replaced by others that were Francoist. Thus, to mention the most solemn celebrations, on July 18, the beginning of the Civil War was commemorated; on April 1, the victory of the Movement against the unconditional capitulation of Republicans, on October 1, the proclamation of Franco as Head of

the Government of the Spanish State, the celebration of the 12th day of the same month, called the [Hispanic] Day of the Race (the day when, in 1492 Columbus landed in America) or the Hispanic Day, it definitely became a national holiday, while November 20, the day of the death of José Antonio Primo de Rivera, was converted into National Mourning Day.

Thus, when on November 20, 1975, General Francisco Franco died, the places of memory and conscience supported not only the legitimacy and imagery of the regime, but also the identity and values of the “official Spain” and constituted a true Gordian knot for the architects of the Transition, with the particularity that in a democratic system it is not so much as to cut or untie.

THE TRANSITION

As of 1975, Spain undertook the path of the “without rupture” political Transition towards Democracy. Three years later, the Constitution proclaimed on December 6, 1978 laid the legal basis for the new system, whose configuration was terminated with the electoral victory of the Spanish Socialist Workers Party (PSOE) in the autumn of 1982. The attitude towards recent history and its memory taken by political elites and backed by citizens, who in those years valued economic development and peace over justice and freedom,¹⁰ was called the “pact of silence” and consisted of silencing the debate, not cutting off or unleashing, simply silence, so as not to open the wounds, not instrumentalize history for political purposes and, ultimately, build the present and the future through a reconciliation with the past. In this way, it was intended to avoid incurring the risk of destabilizing the young Democracy, agitated by the terrorism of FRAP (Revolutionary Anti-Fascist and Patriot Front, an armed organization of the extreme left), ETA (Euskadi Ta Askatasuna, a Basque-based terrorist group) and GRAPO (First of October Anti-Fascist Resistance Group, a terrorist group born in Vigo in 1975), with demands for responsibilities and account adjustments that, together with the political tensions of those times, could open the door to a new coup d'état and even to a new civil war.

“SILENCE PACT”

The Transition was, therefore, marked by an inactivity regarding the transformation of public spaces. The national symbols (the flag, the shield and the anthem) and the physical places of memory remained unchanged. The Constitution (art. 4) kept the gules and or flag as the national one, while the shield was slightly modified in 1977 although Francoist symbols were not eliminated until 1981, after the coup of February 23. Law 33/1981 that regulated it set a period of three years to depose the previous

7 Jesús de Andrés, “Las estatuas de la dictadura y viceversa. El franquismo y sus símbolos (1936–2018)”, in Jordi Guixé, Jesús Alonso Carballés, Ricard Conesa, eds., *Diez años de leyes y políticas de memoria (2002–2017). La hibernación de la rana*, Madrid: Catarata, 2019, 162–165.

8 Walther L. Bernecker, Sören Brinkmann, *Memorias divididas. Guerra Civil y Franquismo en la sociedad y política españolas (1936–2008)*, trad. Marta Muñoz-Aunión, Madrid: Abada Editores, 2009, 166–187.

9 Ibid., 192–197.

10 Paloma Aguilar Fernández, “Presencia y ausencia de la guerra civil y del franquismo en la democracia española. Reflexiones en torno a la articulación y ruptura del ‘pacto de silencio’”, in Julio Aróstegui, François Godicheau, eds., *Guerra civil: mito y memoria*, Madrid: Marcial Pons Historia y Casa de Velázquez, 2006, 263.

shields of public spaces, except those existing in buildings declared as historical-artistic monuments or in those constructions whose ornamentation formed a substantial part or whose structure could get damaged by separating the shields.

Regarding the anthem, Peman's letter ceased to be used without replacing it with another one in order to avoid conflicts in the search for a letter that represented all Spaniards. This is not an obstacle so that from time to time in official international ceremonies with a Spanish presence some letter sounds, whether that is from the Dictatorship of Franco, or from Primo de Rivera or from the Second Republic.¹¹

The most emblematic places of memory of the Francoist era, such as Belchite, the Alcazar of Toledo or the Valley of the Fallen were converted into a taboo.

With regard to the holiday calendar, in December 1975, November 20, now with one more meaning, became a military holiday called Memorial Day, which in 1984 was transferred to the 2nd of the same month.¹² The Victory Parade, which in 1976 was chaired by King Juan Carlos I,¹³ was replaced by the Armed Forces Day, and since 1984 its biggest celebrations including the military parade, were integrated into the October 12 party. This, on the other hand, was confirmed as "National Day of Spain or *Fiesta Nacional de España* and the Hispanic Day" in 1981, however, this last name does not appear in the Law of 1987. The day of the constitutional referendum of December 6, 1978, was declared festive as Constitution Day in 1983.

A certain milestone for the management of the places of memory were the first democratic municipal elections of 1979, since the competences over public monuments, street and toponymy were reserved for city councils. In the cities and municipalities where the left won (PSOE, in some cases in agreement with the Communist Party of Spain, PCE), including Madrid and Barcelona, or the nationalist parties in Catalonia and the Basque Country, the names of localities and some streets were changed and the Francoist's monuments were gradually removed, but without coordination from the State. This process lasted until 1987 when, after the partial "cleaning", in some localities, such as Guadalajara, the descendants of the Francoist regime continued to promote new statues of the dictator, the memory was immersed in a silence agreed by the public administrations, under which boiled social conflicts between those who wanted their permanence and those who did not accept it. On the other hand, in rural areas, especially in Aragon and La Rioja, a work was carried out to convert the clandestine graves of the victims of war and persecution during the Francoist regime into public places of memory, while in the Basque Country, Cantabria or Asturias several exhumations were performed, later indicated with commemorative plaques. The coup of February 23 interrupted any form of answer to the silence about the past.

THE GUERNICA

During these early years, when the memories of the Civil War were far enough away and those of the Francoist Dictatorship uncomfortably close, there was only one episode of confrontation with the past linked to places of memory. This is the case of Guernica, or rather *Guernicas*: on the one hand, the Biscayan village bombed by the German Condor Legion on April 26, 1937, which became one of the main symbols of the Basque nationalist thinking and the famous painting by Pablo Picasso, painted for the Spanish pavilion of the Universal Exhibition of Paris, opened

a month later and inspired by the news about what had happened, on the other. Around the fortieth anniversary of the events, the relative German and Spanish archives were opened and a commission of experts subsequently issued a report that attributed to Franco a co-responsibility for the destruction of the municipality. At the same time, the Cortes urged the Government to take the necessary actions to recover the painting, then guarded by the Museum of Modern Art in New York, because at the will of the artist, it could only be exhibited in Spain when Democracy was restored. A Basque senator requested that the painting be displayed in the town of Guernica itself, but the request was dismissed. The work arrived in Spain in 1981, and since 1992 it has been exhibited at the Reina Sofia Museum in Madrid, being one of the most widely known places of consciousness among visitors to the Spanish capital, and therefore, transmitter of the Civil War narrative not only among Spaniards, but also to millions of tourists who visit it every year. For its part, the town of Guernica had to wait almost twenty years, until 1998, for the opening of its own museum space and at the same time the first museum dedicated to the Civil War in all Spanish territory, since 2003 known as, paradoxically, The Peace Museum.

In the eighties, especially its second half and in the context of the Euro-Atlantic integration of Spain, a process of reconciliation, at least superficial, of Spanish society with itself can be observed, as it was time to collect the domestic and international fruits of the Transition, which 80 % of Spaniards considered a source of pride.¹⁴ It was also at that time that in the public imagination some kind of ambivalence about Francoism began to consolidate as "a stage that had good things and bad things" shared by half of society, according to the polls. At the same time, within the other half, opinions diverged more and more clearly, increasing the voices that valued it as a negative period and decreasing those that positively remembered it. At the same time, however, economic and socio-cultural dynamics made the themes of History, the less recent as the Civil War or more recent, but increasingly distant as the Dictatorship passed to a plane of the social agenda, and by both public, farther.

PACT BREAK

A turning point was brought about in 1993, when, after three legislatures in absolute majority and before a growing loss of support, just before the elections the PSOE decided to break the "pact of silence" and the unspoken agreement not to instrumentalize History with political purposes to use the Francoist past of the Popular Party (PP) as a trick in the electoral campaign. The result was partially successful, as the Socialists remained in power, although losing the absolute majority. Likewise, a precedent was established that was used since then in the fight for votes. In 1996,

11 "El himno de España con letra de Pemán se cuelga en un acto del Rey en Nápoles", in *La Vanguardia*, 7. 5. 2019, <https://www.lavanguardia.com/politica/20190507/462099577451/rey-espana-himno-napoles.html>

12 "Los militares ya no celebrarán el Día de los Caídos el 20-N, sino el 2 de noviembre", in *El País*, 2. 12. 1984, https://elpais.com/diario/1984/12/02/espana/470790020_850215.html

13 "El Rey presidió el Desfile de la Victoria", in *El País*, 1. 6. 1976, https://elpais.com/diario/1976/06/01/ultima/202428001_850215.html

14 Paloma Aguilar Fernández, "Presencia y ausencia de la guerra civil y del franquismo en la democracia española. Reflexiones en torno a la articulación y ruptura del 'pacto de silencio'", in Julio, Aróstegui, François Godicheau, eds, *Guerra civil: mito y memoria*, Madrid: Marcial Pons Historia y Casa de Velázquez, 2006, 264.

in the following elections, in which the PSOE could no longer defend itself against the winning PP by removing the canons of the Dictatorship, but instead of saving them, it decided to turn, successfully, the memory and memories of the past into an element permanent in the political agenda of Spain. In this context, the PP government unsuccessfully tried to implement a reform in the field of history teaching, which sought to promote Spanish identity and reduce the weight of regionalisms that had grown considerably since the 1980s, as well as channeling the debate, holding, not without reason, discussion by separate memory, that “the only sequel to the Dictatorship, the only legacy of Francoism that hindered democratic coexistence was the existence of ETA.”¹⁵

On the margin it is worth mentioning two examples that extended the country's borders. First, in 1996, with the sixtieth anniversary of the outbreak of the Civil War in the background, by unanimous vote of the Congress of Deputies there was created a new intangible place of memory as a way to repair the damage of the past: Spanish nationality, this time granted to some four hundred international brigades who were still alive. Subsequently, this measure will be applied to the citizens of Latin American countries and Sephardic Jews. Second, a monument to the fallen Blue Division who fought alongside the Germans on the Soviet front was inaugurated near St. Petersburg in Russia the following year.

TOWARDS THE “LAW OF HISTORICAL MEMORY”

The beginning of the new millennium, having consolidated Democracy and produced a generational and cultural change, brought with it the intensification of the struggle for memory in all areas: political, media, academic and social. In 2000, the Association for the Recovery of Historical Memory (ARMH) that claimed the identification and recognition of victims buried in mass graves was created. In 2002, the July 18 uprising was institutionally condemned. In 2004, after the return to power of the PSOE after social discontent due to the action of the PP government after the March 11 attack, the “Inter-ministerial Commission for the Study of the Civil War and Francoism victims was created”, in order to prepare a report on the status of the relevant issues, among them, the elimination of Francoist symbols. Suffice it to say that there were still thousands of names of streets and towns with allusions to Francoism and still in the mid-1990s coins that were minted during the Dictatorship, despite having been officially withdrawn from circulation in 1988. Meanwhile, they multiplied media repercussions, historiographical publications, exhibitions, commemoration ceremonies of victims and acts of reply of the Francoist relics, especially the statues of Franco and commemorative plaques: peacefully promoted by citizens, or violently agitated by regionalist formations or ETA. The demands for converting mass graves into cemeteries, creating memorial sites (the Lluís Companys mausoleum in Montjuïc in Barcelona was an isolated case) were becoming increasingly apparent, opening military and civil archives related to Francoist repressions and reviewing schoolbooks. In the summer of 2006, on the seventieth anniversary of the outbreak of the Civil War, the Commission delivered its report and, subsequently, the Government introduced its bill. The negotiations lasted until the last days of the following year when, finally, on December 26, 2007, Law 52/2007, “by which rights are recognized and extended and measures are established in favor of those who suffered persecution or violence during the Civil War and the Dictatorship”, better known as the “Law of Historical Memory” was enacted.

As far as the places of memory and conscience are concerned, the law contains four articles in this matter. Thus, Art. 12, “Measures for the identification and location of victims” obliges public administrations to prepare and make available to interested parties a map that locates the remains of deceased persons in defense of Democracy between January 1, 1969 and October 6, 1977 containing information about them; Art. 15, “Symbols and public monuments” provides for measures to remove all types of artifacts (shields, badges, plaques) that exalt the military uprising, the Civil War and the repression of the Dictatorship, prior to drawing up a catalog of them, not being that they are strictly private memorabilia or when they are contradicted by artistic, architectural or artistic-religious motives protected by law; Art. 16, “Valley of the Fallen”, provides for the depoliticization of the monument by applying general rules of places of worship and public cemeteries and prohibiting any political act or exaltation of the Civil War, its protagonists or of Francoism in the enclosure. Finally, Art. 20, “Creation of the Documentary Center of the Historical Memory and General Archive of the Civil War”, constitutes the Documentary Center of the Historical Memory in Salamanca.

CURRENT SITUATION

While it is true that the law “represents a serious paradigm shift in the official treatment of the recent past”,¹⁶ since its promulgation it provoked severe criticism and it soon became clear that many ends were left untied: “The law tried more, to be a symbol in itself than in giving a real solution to the problems it intended to address”,¹⁷ and did not provide an effective settlement to the issue of the uncomfortable presence of the past in public spaces. Returning to the metaphor of the Gordian knot, it could be said that it was still untied, but at least its existence was recognized.

MAP OF MASS GRAVES AND PLACES OF REPRESSION

The Ministry of Justice, in collaboration with the Autonomous Communities and private entities dedicated to the recovery of historical memory, has been commissioned to create an interactive map that visualizes the mass graves of both sides spread throughout the country, and of the symbols that have been placed for its commemoration.¹⁸ As indicated by the ministry itself, “the information, so far incorporated, represents a first approximation or initial version of the map and that its completion will be a continuous and dynamic process, in which there are still missing places of burial already located, and that will be subject both to the incorporation of new locations and to a constant update of the data included in the already located graves”. The platform has a mailbox for citizens to provide their testimonies and contribute to the development of this place of virtual memory. However, there is still much work to study, signal, dignify and “patrimonialize” places of repression.

15 Ibid. 289.

16 Walther L. Bernecker, Sören Brinkmann, *Memorias divididas. Guerra Civil y Franquismo en la sociedad y política españolas (1936-2008)*, trad. Marta Muñoz-Aunión, Madrid: Abada Editores, 2009, 330.

17 Jesús de Andrés, “Las estatuas de la dictadura y viceversa. El franquismo y sus símbolos (1936-2018)”, in Jordi Guixé, Jesús Alonso Carballés, Ricard Conesa, eds., *Diez años de leyes y políticas de memoria (2002-2017). La hibernación de la rana*, Madrid: Catarata, 2019, 168.

18 Mass graves map application, <https://mapadefosas.mjusticia.es>.

SYMBOLS AND PUBLIC MONUMENTS

In 2008, the symbols were removed in accordance with the provisions of the law and conserve the artifacts extracted in the deposits of the Ministry of Culture in view of a possible Interpretation Center. Apparently, due to the economic crisis that hit Spain that same year and later, already during the new PP legislature initiated in 2012, a reduction or even elimination of budget items dedicated to this end, mean progress was not satisfactory, especially, at the regional and municipal level, and raised criticism from the special rapporteur of the United Nations Organization (UN), who presented his report in 2014. In 2016, also in the buildings of the central administration there were still a hundred Francoist remains.

Regarding the street, according to data from the National Statistics Institute, in May 2018 there were still more than a thousand streets with names that refer to Francoism, including more than one hundred dedicated to Franco and more than three hundred to Primo de Rivera.¹⁹ The example of Madrid speaks of the political and legal complexity of removing everything related to Franco from the streets, where since 2016 the City Council has been trying to change the names of fifty streets and cannot conclude the task due to the contentious-administrative procedures that examine the justification of many of the changes, especially the existence of links between the people who gave names to the streets and the Francoist regime.²⁰

VALLEY OF THE FALLEN

Also in 2008, reports were presented with recommendations for the Valley of the Fallen, according to which the monument should remain standing, but it was necessary to transform its meaning into “a place for the memory of the victims and dead of the Civil War”, to which there was a *sine qua non* condition to remove Franco’s mortal remains. The UN report corroborated it, finding that the tomb of the dictator adorned with flowers could hardly be a place of reconciliation and peace. It will not be until the summer of 2018, when the Government returns to the theme of the Valley and the decree (Royal Decree-Law 10/2018) that “enables the exhumation of the mortal remains of people other than those fallen during the War [...] and] expressly consecrates the Valley of the Fallen as a place of commemoration, remembrance and equal tribute to the victims” is approved. The decree sparked several legal debates that involved the State, the Catholic Church and Franco’s family directly, but also indirectly to Spanish and foreign public opinion. In the context of huge political uncertainty in the country after the arrival of the PSOE to power through a motion of censure presented to the government of Mariano Rajoy, and before the inability of Pedro Sánchez to govern because of the unfavorable composition of the Cortes, this activation of society in discussions about the past by putting on the public agenda of such a socially sensitive issue, there was recalled the maneuver used by the PSOE in 1993. After the April 2019 elections Franco and Primo de Rivera were still buried in the Valley in tombs decorated with flowers for a few more months, while Sánchez tried unsuccessfully to get support for his government. When new general elections were called on September 24 and the Supreme Court endorsed the exhumation of the dictator, not without protests from the family and the prior Benedictine of the Valley, the issue again became the key point in the new electoral campaign. One month later, on October 24, Franco’s mortal remains were exhumed and transferred to

the Mingorrubio cemetery in Madrid and deposited with the dictator’s wife, Carmen Polo. Following the event, Sánchez declared that the transfer put “an end to an anomaly in a European democracy” and that since then “we proclaim that the ensign of democracy and coexistence will always fly in our homeland.”²¹ If this issue influenced the electoral result of the elections in April and then November 2019, it is not to be dealt with here, but the truth is that Franco’s exhumation assured Sánchez of going down into the history books and distracting the media from the very serious crisis in Catalonia, where democratic coexistence then fluttered at half-mast in the middle of the barricades. The question of the permanence of Primo de Rivera and the future of the monument was left open for the next legislature.

HISTORICAL MEMORY DOCUMENTARY CENTER

The Documentary Center of the Historical Memory was created in Salamanca in 2007 with the purpose of gathering the archival funds related to the period between 1936 and 1978.²² In addition to the tasks of an archive, the entity organized exhibitions, cultural activities and guided tours, as well as elaborating audiovisual resources and in itself it has become a place of memory. However, due to lack of material and human resources, the reunification of documentary funds dispersed by a multitude of military and civil archives has not yet been completed, while users are exposed to long waiting periods to receive copies of the documents.²³

THORNY TASKS: EDUCATION AND MUSEALIZATION

Spain has two major tasks pending in terms of preserving memory. The first is education, the most serious aftermath from the citizen’s point of view of the lack of a responsible History policy. According to the 2000 surveys, a significant part of the generation of young people born in democratic Spain did not know how to place Franco in their historical context.²⁴ In 2014, as the aforementioned UN report found, education in this area remained poor. In the textbooks, which are the basic support of teaching in secondary and high school education centers, the subjects related to the Second Republic, the Civil War and the Dictatorship occupy only 9 % of the scholarly curriculum about the twentieth century and in some cases they are not even studied, either because they don’t have time, or because professors fear facing “thorny issues”, no matter how “aseptic” their treatment is in

19 “Franco, Primo de Rivera y otras figuras del franquismo conservan 1.143 calles en España”, in *El País*, 10. 5. 2018, https://elpais.com/politica/2018/05/09/actualidad/1525863933_856305.html

20 “El cambio del callejero franquista se le atraganta a Carmena”, in *La Vanguardia*, 1. 6. 2018, <https://www.lavanguardia.com/local/madrid/20180601/443978932587/cambio-callejero-franquista-madrid-atraganta-carmena.html>

21 Transcript of “Institutional Statement of the President of the Government: Exhumation of Francisco Franco”, Presidency of the Government, Secretariat of State for Communication, Directorate-General for Communication 24. 10. 2019.

22 Centro Documental de la Memoria Histórica, <http://www.culturaydeporte.gob.es/cultura/areas/archivos/mc/archivos/cdmh/portada.html>

23 “Fosas sin excavar, símbolos fascistas y nula financiación: diez años de fracaso de la ley de Memoria Histórica”, in *El Diario*, 27. 12. 2017, https://www.eldiario.es/sociedad/simbolos-financiacion-acabado-desmemoria-historica_0_723028328.html

24 Walther L. Bernecker, Sören Brinkmann, *Memorias divididas. Guerra Civil y Franquismo en la sociedad y política españolas (1936–2008)*, trad. Marta Muñoz-Aunión, Madrid: Abada Editores, 2009, 281.

written materials. As a result, students have a greater knowledge of World War II and repressions in the USSR than of the Civil War and Francoist repressions.²⁵

The second task is the musealization of the recent past. Given the role that museums dedicated to contemporary History created in other European countries are having as a platform for debate and historical education, it is alarming that today Spain does not yet have a state museum dedicated to the Civil War and Francoism.

The Army Museum, completely transferred in 2010 to the Alcazar of Toledo, contains a room dedicated to the 20th century, paying special attention to the Civil War. In 2016, the Madrid City Council created the Commission of Historical Memory, whose functions were the study of the feasibility of a museum project on this subject in the capital of the country, but it was dissolved two years later without having submitted a report in this regard.²⁶ In fact, regional and local museums and interpretation centers have been created, such as the aforementioned Museum of Peace in Guernica, the Refuge Museum of the Civil War in Cartagena, Museu Memorial de l'Exili (MUME) in La Jonquera, while in the museum spaces already existing corresponding contents have been introduced. An interesting project underway is the Museum of the War-Battle of Teruel in this town planned for 2019/2020, which aims to be a museum of reconciliation with the ambition to call for reflection rather than seek differentiation between sides.²⁷ Where more dynamism is perceived lately is in the creation of tourist routes on the ground, some examples being the Route of the Battle of the Ebro in Aragon and Catalonia, the Fugue of Ezkaba and the Route of the Bunkers of Franco in Navarra or the Route of the Traces of the Civil War around Belchite, converted into an open-air museum.

ALTERNATIVE MEMORIES

In parallel and in the opposite direction to all of the above, since October 1976 a unique cultural institution known as the Francisco Franco National Foundation has been operating in Madrid, which is dedicated, among other things, to the fight against “the wrongly named Law of Historical Memory, seriously damaging to the coexistence between Spaniards”, as well as to the management of Franco’s personal archive, integrated into the Spanish Archives System and public accessibility but retaining its status as a private archive, and visits to Pazo de Meirás, summer residence of the dictator and property of the Franco family, whose title is being questioned by the Xunta de Galicia.²⁸

On the other hand, it is shocking and worrying the confrontation in the public spaces of the Basque Country and Navarra between the memorials of the victims of ETA terrorism and all kinds of manifestations of support for the people who constituted the group (banners, *graffiti*, and photographs of prisoners).

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LESSONS (NOT) LEARNED AND RECOMMENDATIONS

The experience of democratic Spain, unlike Francoist Spain, around the management of places of memory and consciousness has shown a notable lack of strategic thinking. While the initial “pact of silence” was prudent when democratic institutions and a civic society were consolidated, the tabooization that followed and the politicization with which it alternates both at the state and regional and local levels depending on political cycles, led to, in a democratic and seemingly plural Spain, the two Spains descendants of those, referred to by Machado, surviving. Neither the law, nor politics nor education have been able to defrost, not even at the same time to open the door to true reconciliation, symbolic reparation and forgiveness and the Gordian knot of historical memory is still there. It seems that in order to unleash it, it will be necessary to:

- 1/ Provide the Law of Historical Memory with greater clarity and a sanctioning regime with coercive powers in case of non-compliance;
- 2/ Demand from the political class a sense of long-term responsibility, beyond the political cycle or the election campaign of the moment, in the matter of the politics of History, including places of memory;
- 3/ Encourage citizen participation in the debate about the past, so that they can dialogue with each other different political options, since only then will it be possible to make progress in reconciliation; and
- 4/ Adapt educational programs so that students know their recent history, develop a capacity to reflect on sensitive issues that it presents beyond the political correctness of the moment and acquire historical self-awareness.

25 Enrique Díez, “La Memoria histórica invisibilizada en la educación”, in *El Diario de la Educación*, 1. 4. 2019, <https://eldiariodelaeducacion.com/blog/2019/04/01/la-memoria-historica-invisibilizada-en-la-educacion/>

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CHRONOLOGY OF THE MAIN EVENTS

GEMA PÉREZ HERRERA

November 20, 1975	Death of Francisco Franco.
November 22, 1975	Juan Carlos I de Borbón is proclaimed King of Spain.
December 1975	Carlos Arias Navarro chairs the first Government of the Monarchy.
January 24, 1976	Treaty of Friendship and Cooperation between Spain and the U.S.
March 3, 1976	General strike in Vitoria. Five workers die from police shooting.
June 1976	Journey of the kings of Spain to the U.S.; speech by the King in favor of democratic freedoms. Registration of Political Associations Act.
July 3, 1976	The King appoints Adolfo Suárez, former Secretary General of the Movement as President of the Government.
September 10, 1976	Suárez announces the Law for the Political Reform.
October 4, 1976	ETA assassinates Juan María Araluce Villar, President of the Diputación de Guipúzcoa. Throughout this year 1976 there were 18 fatalities due to ETA.
November 18, 1976	Law for the Political Reform passed in Congress.
December 15, 1976	Referendum on the Law for the Political Reform.
January 1977	Right-wing extremists assassinate in Madrid lawyers close to the Communist Party (PCE) in Atocha. Interview between Adolfo Suárez and Santiago Carillo, leader of the PCE: recognizes the Spanish flag and Monarchy.
February 1977	Reform of the Political Associations Act. Legalization of political parties in Spain.
February 11, 1977	Antonio María de Oriol y Urquijo, President of the State Council and former Minister of Franco, and Lieutenant General Emilio Villaescusa, President of the Supreme Council of Military Justice, who had been kidnapped by GRAPO were released by the police.
March 11, 1977	Expansion of the Amnesty for political crimes, which allowed the release of 1,940 people.
April 9, 1977	Legalization of the Communist Party of Spain.
June 15, 1977	First democratic elections. Victory of Suárez's Union of the Democratic Center (UCD) party.
July 28, 1977	The Government officially requests entry into the European Community.
August 1977	Work on the constitutional paper in the Cortes begins.
September 29, 1977	The Generalitat of Catalonia is restored by decree.
September–October 1977	The Moncloa Pacts and economic agreements between political forces of different ideology. Generalization of pre-autonomies. Amnesty Law.
October 8, 1977	Augusto Unceta, President of the Diputación de Vizcaya dies in an attack perpetrated by ETA. During that year 1977, ETA caused 10 fatalities.
November 1977	The Council of Europe admits Spain as a full member.
January 4, 1978	By decree of the Government, the Basque General Council is created as a pre-autonomous institution.
March 10, 1978	Galicia becomes the third territory with a regional self-government regime.
August 1978	Political and military crisis, fear of an involution.
December 6, 1978	Referendum on the draft of the Spanish Constitution.
December 29, 1978	Approval of the 1978 Constitution in the Cortes.

March 1, 1979	Second democratic elections. UCD victory. The 1st Legislature begins.
May 1979	The Spanish Socialist Workers' Party (PSOE) abandons Marxism.
July–August 1979	Negotiations and approval of the first Statutes of Autonomy: Basque Country and Catalonia.
October 25, 1979	Approval referendum of the Statute of Autonomy of the Basque Country. Referendum of approval of the Statute of Autonomy of Catalonia.
May 30–31, 1980	Motion of censure by the PSOE on Adolfo Suarez.
June 1980	France imposes a pause in negotiations for the entry of Spain into the European Community.
October 1980	Spain becomes a member of the UN Security Council. Negotiations for the entry of Spain into NATO are launched.
November 1980	Madrid hosts the Conference on Security and Cooperation in Europe (CSCE).
December 21, 1980	Referendum of approval of the Statute of Autonomy for Galicia.
January 27, 1981	Resignation of Adolfo Suárez, succeeded by Leopoldo Calvo-Sotelo.
February 23, 1981	Investiture of Leopoldo Calvo-Sotelo. Coup d'état of the Lieutenant Colonel of the Civil Guard, Antonio Tejero, in the Congress.
July 31, 1981	Autonomous pacts between PSOE and UCD to order the transfer of territorial power.
October 20, 1981	Referendum of approval of the Statute of Autonomy of Andalusia.
December 10, 1981	The members of the Atlantic Alliance sign the Accession Protocol of Spain into NATO.
April 2, 1982	Falklands War, Argentina occupies the Falkland Islands then under British sovereignty.
May 30, 1982	The Spanish Government deposits the instrument of accession of Spain into NATO.
June 30, 1982	New Treaty of Hispanic-American Cooperation.
July 28–31, 1982	Suárez leaves UCD and announces the creation of the Democratic and Social Center (CDS).
August, 1982	Announcement of the dissolution of the General Cortes.
October 28, 1982	General elections; victory of the PSOE of Felipe González by absolute majority.
December 2, 1982	Takeover of the Socialist Government chaired by Felipe González.

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LAWS AND DECREES

Decree-Law 10/1969, of March 31, declaring the prescription of all crimes committed prior to April 1, 1939

Law 46/1977, of October 15, on Amnesty

Law 5/1979, of September 18, on recognition of pensions, medical-pharmaceutical and social assistance in favor of widows, and other relatives of the Spaniards who died as a result or on the occasion of the last Civil War

Law 35/1980, of June 26, on pensions to former mutilated combatants in the Republican zone

Law 37/1984, of October 22, on the recognition of rights and services provided to those who during the Civil War were part of the Armed Forces, the Law Enforcement Agencies and the Cuerpo de Carabineros of the Republic

Law 18/1984, of June 8, on recognition as years worked for the purposes of Social Security of the periods of imprisonment suffered as a result of the assumptions contemplated in the Amnesty Law of October 15, 1977

Law 4/1990, of June 29, on General State Budgets for 1990. Eighteenth Additional provision. Compensation for those who suffered imprisonment as a result of the cases contemplated in Law 46/1977, of October 15, on Amnesty

Law 3/2005, of March 18, which recognizes an economic benefit to citizens of Spanish origin displaced abroad, during their minority, as a result of the Civil War, and who developed most of their lives outside the national territory

Law 52/2007, of December 26, which recognizes and extends rights and establishes measures in favor of those who suffered persecution or violence during the Civil War and the dictatorship

Royal Decree-Law 10/1976, of July 30, on Amnesty

Royal Decree-Law 6/1978, of March 6, on regulating the situation of the military who took part in the Civil War

Royal Decree-Law 43/1978, of December 21, which recognizes economic benefits to those who suffered injuries and mutilations in the Spanish Civil War

Royal Decree 2925/1978, of December 7, for compliance with Royal Decree-Law 35/1978, of November 16, on pensions to family members of Spaniards who died as a result of the 1936–1939 war

Royal Decree 1891/2004, of September 10, establishing the Inter-ministerial Commission for the study of the situation of victims of the Civil War and Franco

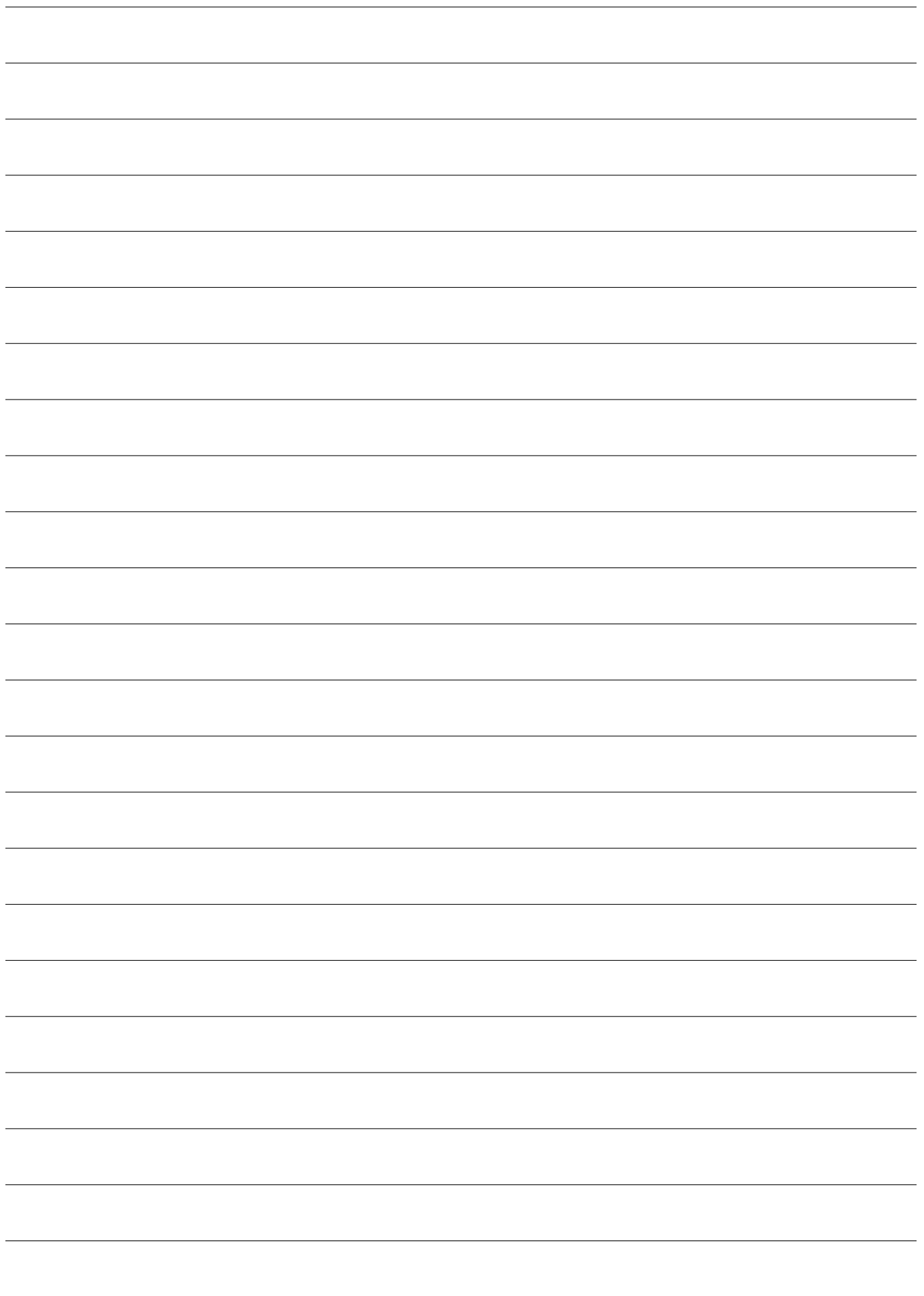
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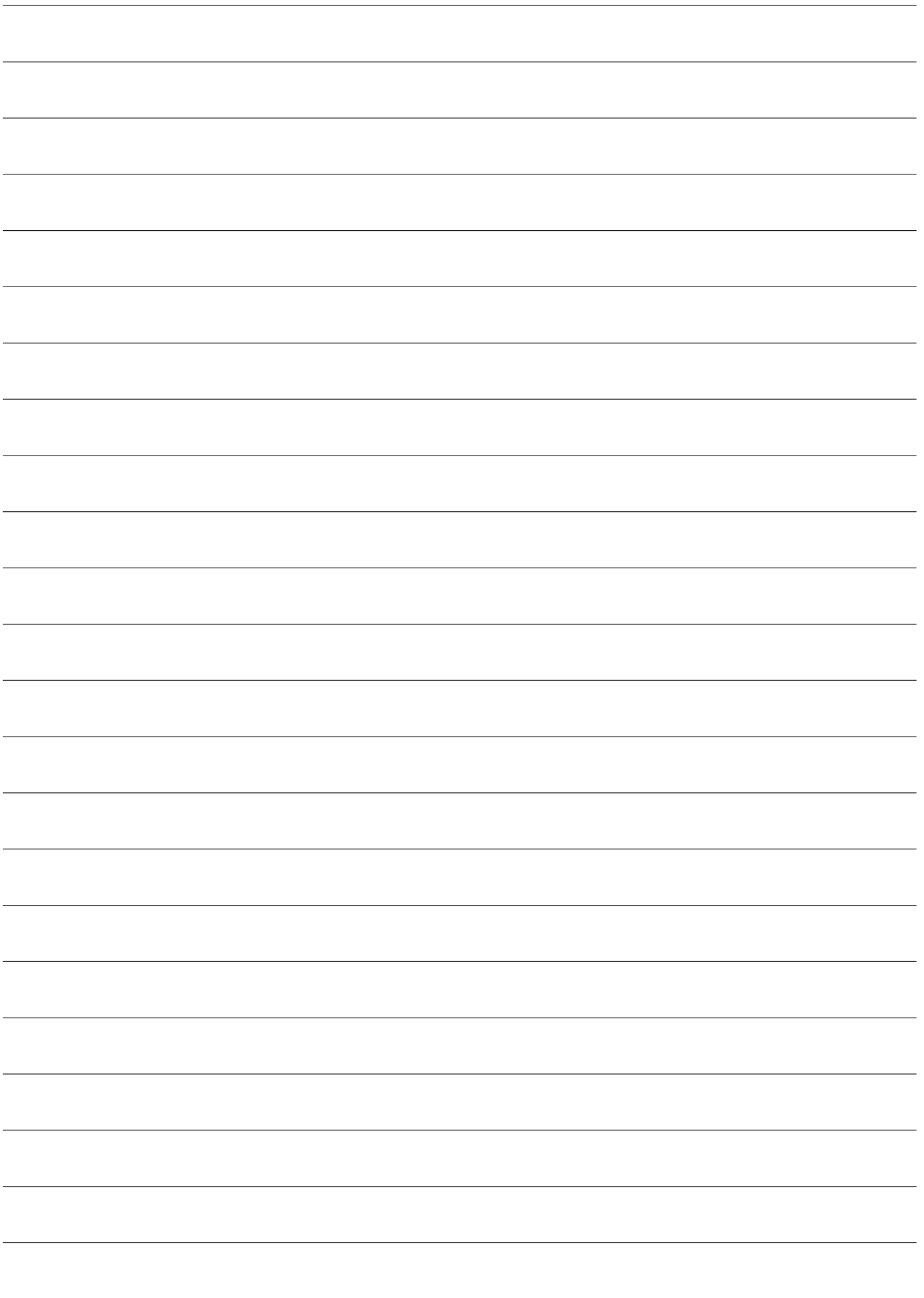
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