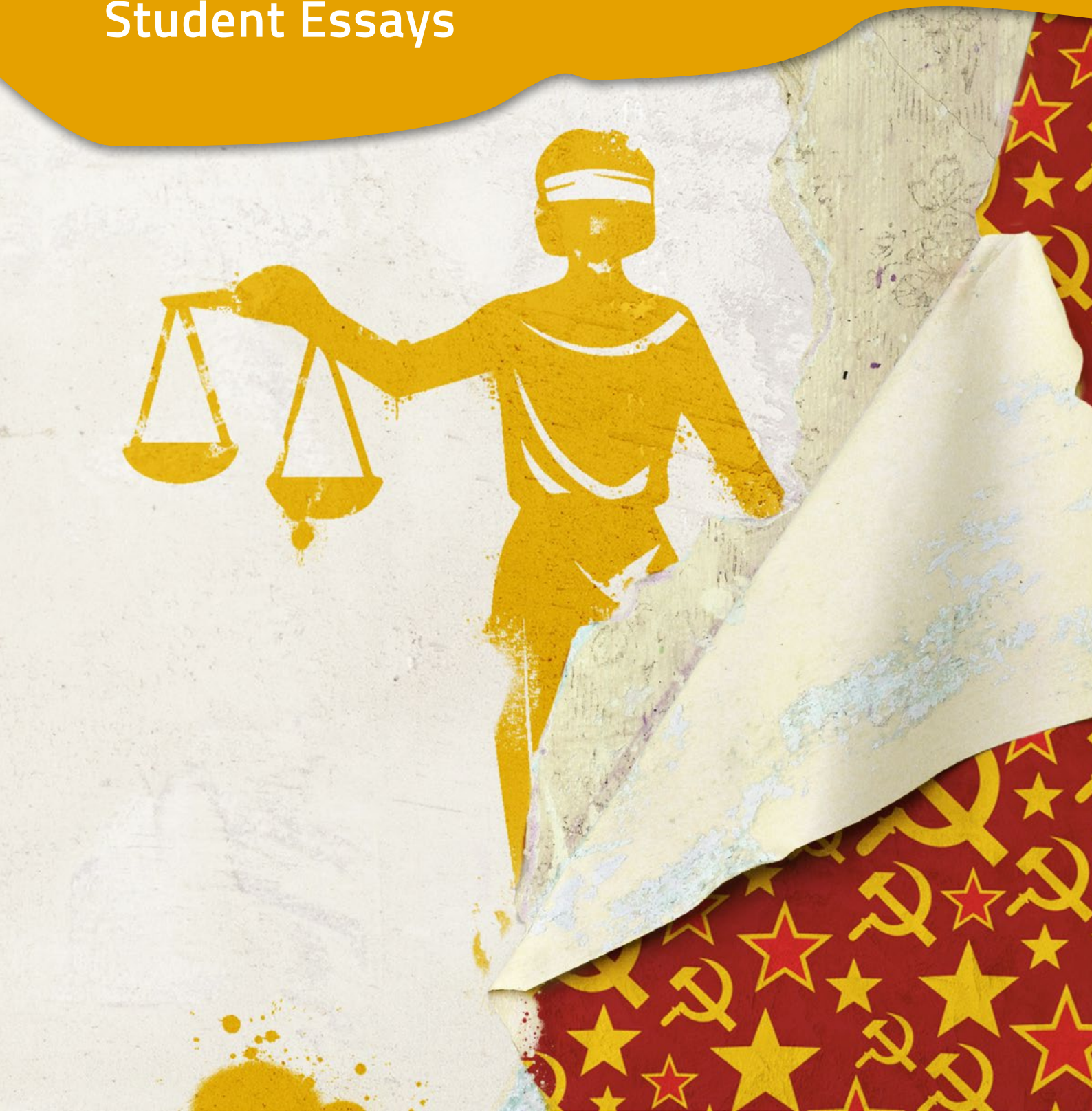
Digital Summer School 2021

Transitional Justice in Central and Eastern Europe

Coping with the Communist Past

Student Essays



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Funded by Federal Foundation for the Study of the Communist Dictatorship in Eastern Germany

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Introduction

With the collapse of the Soviet Union and the end of the Cold War, 1989 to 1991 represent an important historical caesura. As a result, the former communist states faced the challenge of dealing with the legacies of dictatorial regimes, advancing democratisation and strengthening the newfound, fragile rule of law. This rebuilding requires profound changes and is usually a complex and lengthy process, described as "transformation, or the regeneration, of a whole society" which "[...] involves political, economic, cultural, sociological and psychological actions."[1] In addition to these areas, legal measures are a crucial instrument of transformation, as they are significantly involved in establishing the truth and coming to terms with the past. Through lustration laws, rehabilitation measures and institutional reforms, the judiciary has an important influence on the democratisation of post-dictatorial nations.

In the recent past, the academic term, *transitional justice,* has been established to describe political and social upheavals on a legal basis. It describes "a changeover from regimes that had been marked by widespread violations of human rights, to regimes that would embrace the liberal democratic conceptions of rule of law and protection of core human rights, presenting transitional societies with a range of complex political questions."[2] Today, these issues continue to preoccupy young scholars from the affected regions, as this transformation of society and politics directly affects the environment and community in which they live.

Funded by the Bundesstiftung zur Aufarbeitung der SED-Diktatur *(Federal Foundation for the Study of the Communist Dictatorship in Eastern Germany*), the Deutsche Gesellschaft e. V.*,* the first all-German association for the coalescence of Germany and Europe, established in order to promote political and cultural exchange, organised and conducted a summer academy, which took place as a digital event in August 2021 with around 20 international students. Under the title "Transitional Justice in Central and Eastern Europe - Coping with the Communist past", the participants dealt intensively with the legal reappraisal of the communist dictatorships.

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1 Buckley-Zistel, S., Koloma Beck, T., Braun, C., Mieth F. (2014). *Transitional Justice Theories*, p.1.

2 Brown, B. (2015). *Transitional Justice in Eastern Europe: Present Dilemmas of the Communist Past*. Retrieved 23 November, 2021, from https://www.e-ir.info/pdf/55171.

Most of the participants are law students who have both a personal and professional connection to the topic and who were highly engaged in the one-week programme. The focal points of the summer academy made it possible to consider different perspectives, to make comparisons and to promote the transnational exchange of young people. Collectively, the students approached the past and discussed opportunities for the present and future. In addition to the participants' presentations, the lectures and discussions by international experts and academics ensured an inspiring and varied programme.

After the summer academy, the students wrote up their research findings on the topic of transitional justice and coming to terms with the communist past in their own academic essays. Fourteen of these texts, written by participants from Bulgaria, Georgia, Germany, Moldova, Poland, Russia, Serbia and Ukraine, can be found in this publication and present different approaches, as well as a broad thematic spectrum.

The collection of contributions demonstrates that transformation processes, and the field of transitional justice, are not only highly multifaceted, but also have a significant influence on different political, social and legal areas. In their articles, Marica Mišić and Ana Nizharadze deal with the legal frameworks that are central to the success of democratisation. Both authors emphasise the importance of human rights and the rule of law, and their observance, as the basis for a successful transformation. As an important legal instrument of transformation, Saba Chitidze highlights the function of lustration, which aims to remove politically-incriminated individuals from the civil service. In his text, he describes the potentials, challenges and dangers of lustration and its role in transition.

Some students illustrate the progress and obstacles of coming to terms with the past using examples from various post-Soviet countries. Rusudan Janjalashvili describes the lagging transformation process in Georgia, while emphasising the importance of civil society engagement and the young generation in overcoming history. Tamari Vardiashvili and Mariam Tinikashvili also provide insights into Georgia's transition; they examine the achievements and failures of the turbulent transition process in their home country, and its influence on current developments in politics and society. In addition, Veronika Pfeilschifter compares the Georgian transitional justice measures with the transformation process in Armenia. For this comparison, the author introduces different criteria to analyse and evaluate the progress in both countries.

To what extent the shadows of the Soviet past impact upon today's decisions and developments in post-communist states is shown by three texts which deal with the challenges of

current politics. Iuliia Iashchenko links the politically-controlled reappraisal of the Soviet past in Russia with the anti-democratic developments of the present. For Ukraine, too, the challenges and difficulties to be confronted when processing the past are identified. In her essay, Corina Dodi explains that the country is currently at a crossroads and that the future of dealing with the past depends heavily on today's political developments. With a special focus on the role of judges, Mateusz Grabarczyk examines the impact of transitional justice measures on the current political and legal situation in Poland, and explores to what extent today's constitutional crises are linked to the failures of the past.

Using the example of Soviet forced-labour camps in Bulgaria, Zhanin Al-Shargabi illustrates that the communist dictatorship in her home country has hardly been dealt with in terms of criminal law, and that coping with the past is primarily the result of civil society engagement. Likewise, Tamar Giorgobiani takes a critical look at the treatment of Soviet symbols and remnants in the public space. Arsenii Kustov, who compares the way the legacies of communist systems and governments are dealt with in different countries, emphasises the importance of archives as an important tool in coming to terms with the past. Using the example of international exchange programmes, Florian Eichblatt illustrates that personal contact with victims and witnesses can have a considerable influence on coping with former communist dictatorships. The authors highlight the role of education and enlightenment for the success of the transformation.

The students' research shows that transitional justice is not limited to the political-legal sphere and the judiciary: the summer academy also aimed to promote an international exchange, enable discussions and the taking of a multi-perspective look at this topic. We would like to thank all the students, as well as academics and experts, who contributed to the success of the programme and ensured a lively exchange. We would also like to express our sincere thanks to all the participants who provided us with their texts for the publication and to wish all the readers pleasant and insightful reading.

Many thanks to the *Bundesstiftung zur Aufarbeitung der SED-Diktatur* for enabling the organisation and implementation of the summer academy.

STEPHANIE WINTERHAGER

Berlin, December 2021

Content

Zhanin Al-Shargabi

From punitive measures to the pursuit of truth – Transitional justice in the case of forced labour camps in Communist Bulgaria

Introduction

Transitional justice as a term has a relatively modern history and continues to evolve. Some authors link its development to the 1990s with regard to the democratic reforms and transitions in Latin America.[1] It could be argued that while the term emerged later; measures seeking to bring transitional justice have been known for longer and have helped numerous countries make transitions towards free societies, whilst reconciling their turbulent pasts. To understand this in perspective a clear definition of transitional justice must be given.

Transitional justice is a dynamic term; it can change based on the perceptions of those that describe it and to the needs of those that seek to achieve it. The International Center for Transitional Justice defines it as "the ways countries emerging from periods of conflict and repression address large-scale or systematic human rights violations so numerous and so serious that the normal justice system will not be able to provide an adequate response."[2] According to the Guidance Note of the Secretary-General known as the *United Nations Approach to Transitional Justice*, the term covers "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."[3] Some authors focus on the political shift from an authoritative regime to a democratic one as part of the transition process; others put emphasis on the human rights abuses and how the transitional measures address them.

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1 Paige, A. (2009). How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice. *Human Rights Quarterly,* 31(2). pp. 321-367. Baltimore: Johns Hopkins University Press.

2 International Center for Transitional Justice. *What is Transitional Justice?* Retrieved 30 September, 2021, from https://www.ictj.org/about/transitional-justice.

3 Secretary-General of United Nations (2010). *Guidance Note of the Secretary-General. United Nations Approach to Transitional Justice, Guidance Material.*

In all circumstances, transitional justice encompasses a wide range of actions: punitive measures, truth commissions, reconciliation, etc. All of these aim towards different but closely connected goals: punishing the perpetrators of past atrocities, compensating victims, alleviating societal tensions, and building a consolidated civil society with a similar view of the past and a unified view of the future.

A line can nonetheless be drawn between two types of transitional justice measures.[4] Punitive ones aim to punish those found guilty of crimes from the past regime. One of the central parts of such an approach are judicial trials. Another approach is restorative in nature: it may include truth commissions, reparation, memorisation and other non-punitive measures.

The countries from the Eastern Bloc took different approaches to transitional justice. In Bulgaria, the process of transitional justice was in particular a hard and ultimately unfulfilling one. Many communist party members managed to keep their influence; others arose after the fall of the regime. This political atmosphere blocked most attempts at implementing effective measures of transitional justice. Most measures were sporadic and achieved only partial results.

This paper will discuss the approach that was taken in regard to transitional justice in the Republic of Bulgaria after the fall of the Soviet Union and the democratisation of the country. The focus will be on the approach taken towards the forced labour camps that became notoriously well-known after they were hidden for decades from the knowledge of citizens by the communist regime.

These forced labour camps – the ones in Lovech, Belene, and dozens more around the country – can be seen as the pinnacle of all communist crimes, a testament to the regime's belief that it was above all law and rules of humanity. If the new democratic government could not effectively address the atrocities that took place in these camps and bring peace to their victims, would it really be able to achieve any justice at all?

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4 Olsen, T. D., Payne, L. A., & Reiter, A. G. (2010). The justice balance: When transitional justice improves human rights and democracy. *Human Rights Quarterly,* 32(4), pp. 980–1007.

The reality of forced labour camps in Communist Bulgaria

Lawlessness was rampant during the communist regime in Bulgaria; party officials felt free to pursue any measures they saw fit to strengthen their power and accommodate their own lifestyle and pursuits.[5] Some of the measures included the operation of a detailed net of spies that sought to test the faithfulness of individuals to the party, repression towards all opposition, taking away rights and opportunities for education, jobs, etc. from people that did not support the party. On the other hand, compliance was rewarded: This included supplying many privileges to those close to the party officials ranging from western goods, trips abroad, job opportunities based on connections and not merit, etc. Overall, it could be seen that there was a clear line between different groups of people, and while some were greatly benefited by the regime based on their loyalty, other ordinary citizens could face lawless and extreme spurs of oppression due to the smallest hints of opposition or non-compliance with the party line. One of the most disturbing components of the communist regime of oppression were the forced labour camps.

Forced labour camps are not a unique creation of the communist regime. The thought of Nazi concentration camps still brings terror to this day, and even now there are debates whether labour camps are still in use by some governments as a means of oppressing vocal minorities and opposition.[6] Forced labour camps were also present in Bulgaria even before its affiliation with the Eastern Bloc. After 1941, the government which was aligned with the Axis Powers began operating forced labour camps, where it sent members of the opposition.[7] These camps were in poor condition; there were accounts of abuse and violence against the prisoners, and those that managed to survive were often left with physical and emotional trauma.[8]

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5 Much of the life of Bulgarians during this time and the actions of the regime were described in the work of the Bulgarian writer Georgi Markov. He had fled abroad where he had the freedom to write and depict many of the hardships his nation faced under Communist rule. He was later killed by agents of the regime on a covert mission in London.

6 There are many accounts of modern concentration camps in China in the province of Xinjiang.
Graham-Harrison, E. (24 September 2020). China has built 380 internment camps in Xinjiang, study finds. The Guardian. Retrieved 24 September, 2021, from https://www.theguardian.com/world/2020/sep/24/china-has-built-380-internment-camps-in-xinjiang-study-finds.
BBC News, Xinjiang (24 September 2020). *Large numbers of new detention camps uncovered in report.* Retrieved 30 September, 2021, from https://www.bbc.com/news/world-asia-china-54277430.

7 Marinova-Christidi, R. (2016). Лагерите за *„политически опасни лица"* в комунистическа България (Eng: *Camps for "politically dangerous individuals" in Communist Bulgaria* [pp. 1–21]). Текстове за комунизма в България (Eng: Texts about Communism in Bulgaria). Electronic Edition of Foundation Konrad Adenauer, Sofia. Retrieved 30 September, 2021, from http://www.kas.de/wf/doc/kas_43431-1522-11-30.pdf?151126121215.

8 Ibid.

The Communist regime had its own approach to the operation of forced labour camps. During this period this form of a repressive mechanism grew in use and in severity. On 11 January 1945 the government sanctioned the creation of forced labour camps[9], called "*Трудово-Възпитателни общежития"* or Work-Education Camps. In the beginning, some pimps, prostitutes, blackmailers, beggars and idlers were also sent to these camps, in order to protect society from such "degenerates".[10] Most of the victims of these camps were the government's political opponents, people from different political ideologies and individuals the regime felt were against communist ideals.[11]

What connected all these people was the arbitrariness that led them to the camps –something that would characterise these camps. There was no trial or sentencing; the communist regime had the power to pick and choose those it deemed a threat and send them to a camp where they could be trapped for years and even condemned to death due to the horrible conditions or violence by the guards.

There were dozens of camps all around the country, including Belene, Lovetch, Skravena, Bobov Dol, which all rose to notoriety due to the atrocities that took place there. An inquiry commission found that between 1944 and 1962 there were approximately 100 forced labour camps with around 17, 000 prisoners passing through them.[12] Other accounts state even higher numbers, such as 23,517 for the same period[13], while unofficial sources often cite much more.

Belene is cited as one of the camps with the most severe conditions. The camp worked from 1949 to 1989, with a few periods where it was temporarily closed.[14] There was a wide range of people that were imprisoned there[15]: people linked to the previous political regime; priests, many of whom Catholic[16], that were regarded as "Western spies"; people that opposed the collectivisation of their property; people with different political views: anarchists, democrats,

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9 Ibid.

10 Ibid.

11 Ibid.

12 Todorov, T. (1999). *Voices from the Gulag: Life and Death in Communist Bulgaria. Robert Zaretsky (trans.)* pp. 38–42. University Park, PA: Penn State Press.

13 Marinova-Christidi, Ibid.

14 Skochev, B. (2017) *Концлагерът Белене* (Eng: *The Concentration Camp Belene*), Sofia: Ciela.

15 Ibid.

16 A large number of priests were repressed by the Communist regime in Bulgaria. Belene itself had a large Catholic community which was at times targeted by the regime. One of the Catholic priests that was killed by the communists – Eugene Bossilkov, was beatified by Pope John Paul II in 1998.

communists with views dissimilar to the main ideology[17]; young people who liked Western culture apprehended by police for wearing Western clothes and listening to Western music. During the 1980s, most prisoners were of Turkish descent. These were mainly individuals that opposed the forced assimilation of Bulgarian Turks during the *Revival Process*.[18]

There are many accounts of the cruelty that took place at Belene: gruelling and pointless labour, lack of hygiene and food, constant humiliation at the hands of guards, emotional and physical abuse and punishments.[19] Survivors recount how for misbehaviour they were stripped naked and left at night in the cold to get eaten by mosquitos, which often could lead to infections and large emotional stress.[20] This was regarded as one of the less severe punishments. Others included starvation, being left in the river in sub-zero weather, being left overnight in large trenches that were often also filled with cold water.[21] The arbitrary killings of prisoners were also a widespread practise. One survivor recounted how starved inmates would reach out for the fruits on trees on the island and immediately get shot by one of the guards.[22]

The prisoners were humiliated and dehumanised even after their death: Many of the bodies of the victims that died due to a lack of food and medical aid or at the hands of the guards were later disposed of in the river or buried somewhere on the islands where the camp was situated.[23] There are accounts of some bodies being eaten by pigs raised on the island by the prisoners.[24]

Those that survived and managed to return to society found it incredibly hard to reintegrate because of the trauma they faced during their time in the camps and the existing social stigma.[25] Hundreds of lives were irreparably damaged by these camps.

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17 One of the oldest survivors of camp Belene – Tsveta Dzhermanova, recalls mass arrests of anarchists and Trotskyites, she herself was an anarchist and that lead to her imprisonment in the female camp at Belene, which was close to the male and juvenile facilities there.

18 The Revival Process refers to a policy of forced assimilation of Bulgarian Turks by the Communist government 1980s. The policy included limiting their rights to practice their religion and culture and a forceful renaming of all individuals with Turkish names to traditional Bulgarian names. This led to mass migration of Bulgarian Turks to Turkey which was encouraged by the state. Some of those that opposed the process were later sent to labour camps.

19 Skochev, Ibid. 7.

20 Ogoiski, P. (2000). *Записки за българските страдания* – 1944–1989 (Eng: *Memoirs of the Bulgarian Suffering*, 1944–1989). Sofia: Vulkan 4.

21 Skochev, Ibid. 7.

22 DW (03 March 2020). *Забравеното наследство на лагера Белене* (Eng: *The forgotten heritage of the camp Belene*). Retrieved 30 September, 2021, from https://p.dw.com/p/3XBdd.

23 Marinova-Christidi, Ibid.

24 Ibid.

25 Ibid.

The lack of transitional justice in Bulgaria

The transitional justice measures taken after the fall of the communist regime in Bulgaria are generally few and ineffective. Some basic measures were implemented, such as the privatisation of property and declaring the Communist regime as criminal.[26] Overall, however, there has not been enough political will for widespread transitional measures. The lustration measures taken by the government have not been widespread and thorough enough. While there have been some partial bans[27] on people with past communist affiliations taking certain positions[28], these are not enough to create political transparency. There has been a large political push-back against such measures; critics often would cite the need for unity and peace in the times of transition as opposed to looking back on the turbulent past.

It should be noted that a large portion of contemporary Bulgarian politicians have strong ties with the communist regime: the prime minister for the past 10 years, Boyko Borrissov, was the bodyguard of the communist dictator Todor Jivkov[29]; there are many ministers and MPs that were agents of the Secret Services[30]; the Bulgarian Communist Party renamed itself the Bulgarian Socialist Party and still gains wide political support, often finishing second in polls. With such strong connections it seems impossible to enact large measures of lustration.

Still, the Dossier Commission checks the affiliations of all political candidates. Then, political parties on their own can decide whether or not to remove them. While there is no obligation for such a removal, some parties have parted ways with people affiliated with the communist regime due to public pressure. At the same time, in other instances where the public cannot exert the same level of influence, transitional measures have yet again proven to be ineffective.

This is relevant with regards to any punitive measures of transitional justice. While there have been some attempts to achieve justice through trials, most of them have proven to be unfruitful.[31] This is due to a multitude of reasons: a weak judicial system during the transitional peri-

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26 Hristov, H., & Kashumov, A. (2013). Justice and accountability mechanisms in Bulgaria in the transition period (1989–2008). *In After Oppression* (pp. 273–297). United Nations.

27 Ibid.

28 Such positions have included managers of banks, members of the Executive Bodies of Scientific Organizations and the Higher Certifying Commission, members of the Council for Electronic Media, members of the Dossier Committee.

29 BBC Radio 4 (25 July 2009). *Meeting Bulgaria's New Mr Big*. Retrieved 30 September, 2021, from http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/8166893.stm.

30 This includes past and present politicians such as Ahmed Dogan, Krassimir Karakachanov, and many others.

31 Ibid.

od, a lack of documentation due to their purposeful destruction by the communist officials and their affiliates, statutes of limitations and other similar reasons. It is interesting to see how one of these cases could unfold. A good example concerned the forced labour camps.

Transitional justice in the context of communist forced labour camps in Bulgaria

Most accounts claim that many Bulgarians were unaware of what exactly took place in forced labour camps. Belene could be described as a symbol of the repression of the regime in that period; it was a word used to scare and remind individuals what waited for them if they did not comply with the regime, but still people did not know fully what was happening inside the camp. For one, it was far away in the small town of Belene on the Danube River in Northern Bulgaria. The camp itself was located on the islands on the river and was out of reach for ordinary citizens. Most of the town's citizens worked at the camp or at least were to some extent aware of its existence. At the same time, for the rest of Bulgaria's population the camp remained outside of the everyday discussions and was extremely elusive.

After the fall of the communist regime, there was a boom of information regarding the forced labour camps. In the 1990s, a commission was formed to gather information, and the journalist Hristo Hristov[32] published a report on what went on in the camps. [33] The report claimed that the camps did not comply with the Bulgarian constitution and legislation at the time; it also outlined many of the atrocities that took place there. Documents and testimony from people affiliated with the camp, such as its head, Mircho Spasov, show that members of the Ministry of Internal Affairs and other high-ranking government officials were aware of what took place in the forced labour camps.[34]

An investigation was launched against perpetrators from the Lovech and Skravena camps [35], since there was mostly documentation concerning forced labour in both. The Parliament raised the statute of limitations from 20 years to 35 years but did not give this new law a retroactive

32 Hristo Hristov is a Bulgarian investigative journalist. He has many works concerning the Bulgarian Secret Services during communism and the crimes of the regime. They can be found on the sites dese.bg, pametbg.com, and agentibg.com.

33 Marinova-Hristidi, Ibid.

34 Hristov, H. *Лагерите при комунизма* (Eng: *The Camps during Communism*). Retrieved 30 September, 2021, from http://pametbg.com/index.php/bg/prestuplenia/lageri/26-2015-11-21-17-20-56.

35 Marinova-Hristidi, Ibid.

effect. Thus, the cases regarding deaths in the forced labour camps were ultimately stopped due to the statute of limitations.[36]

In 1992, Attorney General Tatarchev started a new trial and claimed the statute of limitations did not apply to totalitarian crimes.[37] The new tribunal targeted some of the high-ranking officials connected to the forced labour camps. The former Deputy Minister of Internal Affairs, Mircho Spasov, and the head of the camp in Lovech, Petur Gogov, were accused of misuse of their positions, while guards such as Nikolay Gazdov and Julia Ruzhgeva were accused of murder, along with the deputy head of the camp, Tsvyatko Goranov.[38] The murder accusations concerned a handful of people whose deaths could be tracked to the accused. The past communist dictator, Todor Zhivkov, was also accused by the Prosecutor General, but this accusation was later dropped.[39] The case was prolonged; some of the accused died before its conclusion (e.g., Spasov and Goranov).[40] This case as well ended due to the statute of limitations.[41]

No punitive measures were taken against the atrocities that took place at the camps. There were mainly measures of retroactive justice. The law entitled *Political and Civil Rehabilitation of Repressed Persons* brought political rehabilitation to many of the groups that had been victims of these forced labour camps.[42] There were opportunities to gain compensation for victims, but this was almost impossible to achieve, as the courts sought documents and other evidence in order to rule in favour of the victims, most couldn't reach such a high burden of proof.[43]

These disorganised and ineffective measures led to an overall negative assessment of the democratic government's approach to transitional justice with regard to the victims of forced labour camps.

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36 Ibid.

37 Hristov & Kashumov, Ibid.

38 Marinova-Hristidi, Ibid.

39 Ibid.

40 Ibid.

41 Ibid.

42 Luleva, Ibid.

43 Ibid.

Staring into the abyss – How civil society reacted to the truth about Belene

The lack of political will creates difficulties in accepting the actions of the past communist regime and healing from its damages. Today, for example, there are no monuments commemorating the victims of the forced labour camps. At the same time, every year supporters of the Bulgarian Socialist Party gather in front of one of the largest communist monuments in the country in order to celebrate the anniversary of the party.[44] All around Bulgaria there are also monuments of communist thinkers, politicians and soldiers. In 2001, a monument to Todor Zhivkov was even erected in his hometown of Pravetz by his supporters and local residents.[45]

Every year, victims of the camp in Belene visit the islands where it once stood and commemorate those that perished there.[46] In the beginning, these meetings attracted political presence and large numbers of visitors, but today the numbers are falling as more of the victims pass away due to their old age and other people stop paying attention to the issues concerning these camps since time passes and no progress is achieved. There are still efforts to build some form of monument there, but it lacks support from the state. Presently, there is a working prison on the grounds of the islands and the premises are generally not open to visitors, making it extremely difficult to create any form of museum or memorial complex open to the public.

The memory of Belene camp lives on in film, books and research created throughout the years. There are many NGOs, such as *Sofia Platform*[47], that try to preserve Belene and the atrocities of the communist regime in the public conscience. Nevertheless, research shows that 40 % of people between 16 and 35 years old in Bulgaria have not heard of Belene.[48]

Many of the people that lived during those times do remember the camp but believe some of the communist propaganda that surrounded it. This propaganda depicted the victims as

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44 Bulgarian News Agency (3 July 2021). *Thousands on Mt Buzludja Mark 130th Anniversary of Organized Socialist Movement in Bulgaria*. Retrieved 30 September, 2021, from http://www.bta.bg/en/c/DF/id/2442222.

45 Kamusella, T. (7 September 2018). Bulgaria: an unlikely personality cult. *New Eastern Europe.* Retrieved 30 September, 2021, from https://neweasterneurope.eu/2018/09/07/bulgaria-unlikely-personality-cult/.

46 Luleva, Ibid.

47 Sofia Platform is a Bulgarian NGO that works in the field of civic education, it also seeks to raise awareness about the communist past and the forced labour camps of the regime in Bulgaria. Every year it organises the "Why we should remember" summer camp in Belene, where high school and university students can take part in educational activities and talk with leading experts in history, politics, sociology and other similar disciplines who have worked on the topic of camp Belene.

48 DW, Ibid.

criminals and hooligans and spoke of them in a negative manner.[49] While it is true that a portion of the detained were in fact criminals or had criminal pasts, this still could not justify the atrocities that took place there.

No human being could be deserving of such inhumane treatment, but it seems that slowly the details of what actually took place during communist times are being forgotten. There is a huge risk in a surge of communist nostalgia that could lead to the romanticisation of the past regime.

Conclusion

Due to the lack of political will, in post-soviet societies transitional justice and remembrance of past atrocities, the commemoration of the victims and the pursuit of a just future is often left in the hands of civil society and organisations. In the case of forced labour camps, remembrance is carried out through educational campaigns and media representation. Punitive justice could never be achieved due to difficulties often characterising such trials: lack of documents, statute of limitations, ineffective judiciary in the first years of transition, etc. Other state sanctioned restorative measures also do not always prove to be fully effective. What is left is the efforts of the public to rehabilitate the victims of the regime, to justify their feelings and experiences, and most importantly to give them the respect they deserve that was taken from them by the regime.

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49 Luleva, Ibid.

Saba Chitidze

Lustration challenges: Who is responsible for the totalitarian regimes?

Introduction

Building a democratic state through transitional justice mechanisms and strengthening the rule of law are still extremely vivid challenges for post-communist countries. On the one hand, these countries use transitional justice tools, including lustration, to address the past conflicts and the legacies of totalitarian regimes, and on the other to move forward through European-style democracy.

Lustration helps a newly created democracy establish public service without the persons who were involved in past human rights violations, creating the trust toward state authorities, coping with the past and changing ideological influence on the society. However, the success of the remedy is always firmly connected with the maturity of the society, and how wisely and properly they use it to deal with the past. The past experiences of almost every post-communist country demonstrate that they were not ready or developed enough to use this mechanism rigorously; instead, they tried to use this tool as a political weapon towards their opponents. To my mind, this is the main reason why the transitional justice process, including lustration, was not successful enough in most post-totalitarian regimes. The politicisation of lustration process undermines its values and represents lustrated people as victims of a new government. Misuse of the lustration mechanism may lead to questioning the whole process of transition and erasing boundaries between the past totalitarian regimes and newly created fragile democracy.

In this essay, I will review the main challenges of the lustration process, as well as its core and common shortcomings. In particular, I will focus on who is responsible for creating a totalitarian regime and who should be lustrated in a newly created democracy. I will refer to the opinions of international organisations as well as the decisions of national and international courts regarding lustration acts. Their approaches on how to balance and control vetting procedures is crucial in order to maintain the main lure of this remedy and ensure a genuine transition towards democracy.

1. Misuse of lustration

Lustration is one of the main tools of transitional justice used to protect newly democratic states from threats posed by those closely associated with the previous totalitarian regimes and to prevent a return of such a regime.[1] Usually, lustration acts define the list of public positions that directly or indirectly were involved in the creation of past communist-totalitarian regimes and prohibit those persons from occupying high public positions in newly created democratic governments. Therefore, lustration is necessary to make public institutions more transparent and trustworthy, as well as restore their moral credentials in society.

However, it should not be forgotten that operation of the lustration mechanism *per se* does not mean it leads to democracy. Lustration is a very complex tool, requiring people's will to ban unworthy servants from the public services, accompanied by transparent process and consideration of the contribution of the servants in the totalitarian regimes. Unfortunately, in many post-communist countries' lustrations were used as a weapon against political opponents. The governing parties often tried to adopt a cleansing act not to exclude communist regime creators from governing but to neutralise and remove their political opponent from participating in politics. Lustration cannot apply any means in order to eradicate the legacy of communism, since a violation of individual rights would then make the new regime no better than the totalitarian regime which is pretending to leave behind.[2]

On the other hand, there were some cases when the lustration processes were created in a far softer way that sidestepped real implementation. In these cases, the governments tried to pretend that they dealt with their communist-totalitarian past, but there was no real willpower. The main reason was that sometimes the members of the governing elites had a connection with abusive regimes and the real lustration process would be undesirable for them, as it would mean excluding themselves from public service. Practically, this way represents a mask in front of the wider public that certain steps have been taken in the fight against the communist past, thus avoiding the actual implementation of the lustration mechanism.[3] Therefore, such lustration laws had only pretentious nature, as if governments were addressing their past, but in fact it with no real legal implications.

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1 *Interim opinion on the law on government cleansing of Ukraine, CDL-AD(2014)044, 16/12/2014* (p. 15). European Commission for Democracy Through Law.

2 Szczerbowski, J. J., & Piotrowska, P. (2010). *Measures to dismantle the heritage of communism in Central and Eastern Europe. Human rights' context* (p. 4). University of Warmia and Mazury, Olsztyn, Poland.

3 Krtolica, M. *The misuse of the lustration process in the post-communist transitions in Europe* (p. 8).

Poland's first lustration law was a good example of such practice: Public servants were obliged to submit a declaration about their previous work experience during the communist period. However, such experience was not in itself a condition for dismissal from one's job; the law stipulated such negative effect only in case if a declaration was false and a person hid their collaboration with the communist regime. Hence, the lustration process only penalised the telling of a "lustration lie", rather than the actual act of collaboration. Also, the Hungary lustration act can be considered as a weak law, lustrating only ordinary members of the *Secret Service Division III*, while former agents and collaborators of all other secret service divisions were exempt from the lustration process.4

2. Creator vs follower

Who should be punished, only the ones who were creators of a totalitarian regime, or also others who followed it? This is one of the main dilemmas during the lustration process and both approaches have their justifications. It is obvious that the individuals who created the regime were responsible for human rights violations because they gave orders, were directly involved in the decision-making process and adopted the rules that strengthened the regime. However, what approach should be implemented toward followers – the persons who were at public service in middle or lower positions, ordinary members of the party, servants who enforced strict punishments, and so on?

Nonetheless, the question whether we also should punish followers of the regime, those who did not adopt the laws nor rule but merely followed the regime, promoted it and enforced illegal acts should be asked. On the one hand, followers deserved to be punished as they promoted the government; a regime without people to enforce its illegal acts is powerless. And if we do not punish the followers who enforced the rules, people will not try to resist human rights violations. Therefore, very often followers were a crucial part of regimes, and their contribution to maintaining the regimes was easily visible.

However, on the other hand, very often this was the only chance for them to be in public service, such as professors. Many people followed the laws or orders in the communist regimes because they were law-abiding citizens and told it was their duty to support the government. Police arrests were according to criminal laws. Teachers were educated according to the

4 Ibid.

national curriculum. Professors were required to be party members in order to practice.[5] It is tough to demand from people to be heroes or resign from their positions because the regime is totalitarian and they should resist it. Thus, this dilemma really has two equal sides, and it is hard to define which was responsible for maintaining a totalitarian regime.

In my opinion, a broad scope attitude has serious drawbacks, and it violates basic human rights. First of all, when we punish the followers of the system, it should not be forgotten that a totalitarian regime is characterised by a lack of pluralism, freedom of speech, an independent judiciary, and other democratic values. Therefore, it is almost impossible to cope with and resist the regime when you are a single civil servant and oblige to follow unfair regulations. Sometimes they had no other choice, rather than to fulfil the orders received from their heads, and it was the only option to maintain or start work in public office.

In addition, when servants have a feeling that they may be lustrated or punished in terms of newly created democracy, they always try to maintain the regime and promote it, and changes are regarded as personal threat to their career and future. On the contrary, when persons have an awareness that they are deemed as a neutral person and not affiliated with the regime, they may also become crucial part of the transformation.

2.1. Courts' assessments about broad scope attitude

A bright example of the broad scope attitude and its disadvantages is the judgement of the European Court of Human Rights (ECtHR) in the *Vogt vs Germany* case.[6] The plaintiff was a former member of the Communist Party and language teacher at a public secondary school, which itself meant that she was a public servant. She was suspended from teaching based on the professional disqualification act, due to violating the duty of loyalty.

The Grand Chamber of ECtHR claimed violation of freedom of speech and freedom of assembly. The court emphasised that Vogt was a teacher of German and French, which itself did not raise any security risks. Moreover, Vogt during her work at school or even outside she did not make any unconstitutional statements or adopted such positions. In addition, the German Communist Party was not banned by Constitutional Court, thus her activity was lawful.

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5 Brahm, E. (2004). *Lustration*. https://www.beyondintractability.org/essay/lustration.

6 *Vogt vs. Germany – European Court of Human Rights, N.17851/91, 26/09/1995.*

This example clearly demonstrates that merely the fact of being a member of a party without making any unlawful activity should not be the basis of the lustration. Moreover, if a person's work is not somehow connected with the decision-making process or does not raise any security risk, it is disproportional to dismiss a person from public office. It should be considered that Vogt's activity in school was different from teaching law, politics or history in which we may have a different attitude. These subjects themselves may include assessment and interpretation of background, person and events, and may lead to ideological influence on students.

A similar approach was taken by the constitutional court of Georgia in the case of *Mumlauri vs the Parliament of Georgia*[7]. According to a contested provision of Georgia's *Charter of Freedom*, those who held certain offices between 1921–1991 should not be appointed or elected to certain public positions.

The court struck down the contested provisions, as they violated human's dignity and mentioned the following:

> *"The disputed provisions establish blanket prohibition without considering the scope of the specific person's activities/rights/competencies and cause practically equal results to those people who were deciding internal/external/ideological policy at a time and those, who did not have legal or practical means to amend the mentioned, did not have the possibility to influence such decisions".*[8]

The Court took into consideration the issue that towards certain persons, who held leading party offices in the Communist Party, there might be high legitimate public interest in barring them from holding relevant state offices. However, the threats arising from specific persons cannot be the constitutional basis of blanket prohibition established by the disputed provisions.

A similar example of a broad scope attitude is Poland's 2006 lustration law. The law subjected 53 categories of workers, including teachers, academics, journalists, state company executives, school principals, diplomats, lawyers, police, and other broadly defined civil servants to lustration. Overall, the above-mentioned people totalled approximately 700,000 individuals. This law was challenged in the Polish Constitutional Court, which remarked as follows:

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7 *Nodar Mumlauri vs. The Parliament of Georgia. Judgment, Constitutional Court of Georgia, N2/5/560, 28/10/2015.*

8 Ibid., p. 18.

"Lustration has to include proportional instruments. The penalties provided by lustration law should be addressed only to the people who were in fact engaged in the activity which violated human rights and ordered such activity".[9]

Does this mean that followers should always be detached from past totalitarian regimes and maintain their positions? Definitely not: In the recent history there are numerous cases when followers have made direct contribution to illegal activities. The best example is that of the Berlin Wall, where police used the law to shoot people who tried to trespass into West Berlin. Furthermore, public officials falsified the results of elections, were involved in corruption, and so on. Therefore, lustration of followers is justified only in cases where the severity of regime and human rights violations were extremely intensive, and the officials' individual role is tangible in concrete cases.

2.2. Council of Europe and Venice Commission standards about lustration

The *Venice Commission* adopted opinions about lustration law three time, when it discusses the lustration law of Ukraine, Albania, and the former Yugoslav Republic of Macedonia. In these opinions, the commission distinguished several main principles that should be satisfied during the adoption of such laws.

The core principle of the commission is that the lustration needs to be based on the principle of individual (not collective) liability. In its opinion, the commission mentioned that lustration should only be directed against persons who played an important role in perpetuating serious human rights violations or who occupied a senior position in an organisation responsible for serious human rights violations; no one can be subject to lustration solely for personal opinions or beliefs, and conscious collaborators can be lustrated only if their actions harmed others and they knew – or should have known – that this would be the case.[10] Lustration should be limited to positions in which there is good reason to believe that the subject would pose a significant danger to human rights or democracy.[11] Party affiliation, political and ideological reasons should not be used as grounds for lustration measures, as stigmatisation and discrimination

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9 Safjan, M. *Transitional Justice: The Polish Example, The Case of Lustration* (p. 18).

10 *Interim opinion on the law on government cleansing of Ukraine, CDL-AD(2014)044,* 16/12/2014 (p. 62). European Commission for Democracy Through Law.

11 Ibid., p. 54.

of political opponents do not represent acceptable means of political struggle in a state governed by the rule of law.[12]

The application of lustration measures to positions in private or semi-private organisations goes beyond the aim of lustration, which is to exclude persons from exercising governmental power if they cannot be trusted to exercise it in compliance with democratic principles.[13]

In its *Resolution 1096: On Measures to Dismantle the Heritage of Former Communist Totalitarian Systems*, the Council of Europe's Parliamentary Assembly held the main principle that lustration acts should comply with.

The Assembly stresses that, in general, these measures can be compatible with a democratic state under the rule of law if several criteria are met. Firstly, guilt being individual rather than collective, must be proven in each individual case – this emphasises the need for an individual – and not collective – application of lustration laws. Secondly, the right of defence, 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.

The lack of protection mechanisms and individual liabilities were the main challenges emphasised in court decisions and commission opinions. However, if we analyse the whole process, a general, broad scope of lustration was not adopted because of eradication of past communist roots from its foundations, but simply due to its political nature. Governments try to use lustration as a tool for struggle and to neutralise political opponents, destroy political leaders and remove them from the political process. Therefore, this process generally is not approved by society and from the beginning it was viewed as political revenge. Unfortunately, the misuse of this remedy damages the whole process, the essence of transitional justice, and lustrated people are ultimately perceived as victim of newly created fragile regime.

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12 Ibid., p. 32.

13 *Amicus Curia brief, CDL-AD(2012)028, 17/12/2012* (p. 77). European Commission for Democracy Through Law.

3. Lustration and modern challenges

Lustration was created to struggle totalitarian, Nazi, and communist regimes that emerged in the 20th century. Its core idea was to prevent a repetition of these unfair regimes. However, it should be acknowledged that totalitarian regimes did not stay in the past, considering that in the modern world we also come across the regimes that are far from democratic. Such regimes are characterised by usurped authority, a politicised judiciary, violation of human rights, corruption, etc. Generally speaking, it is almost impossible to defeat such regimes through elections, due to their lack of fairness and competitiveness. Hence, such regimes often end with revolutions. As a result, after the formation of a new government the question emerges regarding how to deal with the previous regime to avoid repetition of the violent past. In such cases, lustration mechanism becomes one of the central tools to deal with the former regime.

Such case was in the Ukraine, where in 2014 the *Verkhovna Rada* adopted a law on government cleansing (lustration). The law stipulated prohibition of holding certain positions in the civil service for persons who worked for at least one year in the civil service in the period Viktor Yanukovych was president (2010–2014). This law was challenged in the ECtHR, which discuss the case and argued as follows.[14]

First of all, the Court noted that the period when former president Viktor Yanukovych was in power the Ukrainian civil service and democratic governance had indeed faced considerable challenges, justifying a need for reform.

However, the Court found in particular that the *Government Cleansing Act* was of very broad application and had led to the dismissal of applicants simply for having worked in the civil service for more than a year while Yanukovych was in power. The law, therefore, had no regard to the applicants' individual roles or whether they had been associated with any of the undemocratic acts that took place under the former president. In that context, Ukraine's Government Cleansing Act differed from more narrowly targeted lustration programs put in place in other Central and Eastern European States.

The Court found that the measures against the applicants had violated the right to respect in their private lives. In particular, they had been dismissed, banned from civil service positions for 10 years and had their names published in a publicly-accessible online *Lustration Register*.

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14 *Polyakh et al. vs. Ukraine. European Court of Human Rights, 5881215/15, 17/10/2019.*

Therefore, it can be concluded that the lustration tool can be also applied against modern regimes embodying systematic corruption, violation of human rights, and other illegal acts that threaten democracy. Nevertheless, it is complex issue, and it is not enough if the new government declare former one as a totalitarian regime, as they will always have a temptation to remove their political opponent from the political arena. There should be solid evidence that human rights violations, corruption and other crimes were so extensive that the government itself can be characterised as totalitarian. In my opinion, the views and conclusions of international organisations, local NGO's and other neutral bodies are crucial to ensure proper governance from a regime. Only after satisfaction of this criteria does the government have authority to operate transitional justice mechanism and the lustration process as well.

Conclusion

As a result of everything mentioned above, it can be concluded that almost every newly formed democracy after the communist regime is fragile. Therefore, it needs solid transitional justice mechanisms. Unfortunately, former communist regimes members' influence over newly formed government is so great that lustration mechanism in some cases have been misused, delayed, symbolic, not directed at real problems, or unfocussed.

In some cases, there was the second wave of lustration acts, which were mostly a political revenge instrument than a remedy to fight the totalitarian past. The governing elite tried to neutralise their opponents and they adopted broad scope lustration acts. In order to define who should be lustrated, first the severity of the regime and the level of violation human rights should be assessed. Afterwards, it should define the contribution of every public servant, their role in the decision-making process, their participation of enforcement of strict punishment, and personal guilt of corruption and fraud. There should be reasonable connection between servants working formal/informal authorities and their importance in maintaining the totalitarian regime. Otherwise, if a newly emerged democracy violates individual rights and the rule of law through broad-based lustration acts, then the new regime would be no better than the totalitarian one they replaced.

And finally, lustration process should be transparent, accompanied with due process, involving a wide spectrum of society, international organisations and the civil sector, accompanied by a truth commission and historical facts which strengthen the necessity of the lustration and

outline proportional measures. If not, instead of progress they will be walking around in a circle, where one anti-democratic regime is replaced by another.

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Corina Dodi

Transitional justice in Ukraine: A building block towards sustaining peace

Ukraine is a country currently undergoing both a post-conflict and an on-going conflict period, which is also complicated by unique characteristics. It inherited a lot from the Soviet Union, namely some of the legislation, in particular the *Housing Code of Ukraine*[1], enacted in 1983 prior to Ukraine's independence. The country's sociocultural life was severely affected by the Soviet ideology and imagery, which led to decommunisation.

Since the early 1990s, streets have been gradually renamed, Soviet symbols removed from public places, and countless monuments dismantled. This was initially most evident in western Ukraine, before gathering momentum in central Ukraine and the east of the country during the 2000s. The 2004 *Orange Revolution* was a particularly important landmark in the evolution of Ukraine's post-Soviet identity, leading to re-evaluations of the country's past and greater awareness of Soviet crimes against humanity. Pro-Kremlin forces fought back by rallying around the memory of the USSR's WWII experience and the Red Army's lead role in the defeat of Nazi Germany.[2]

Also, Euromaidan demonstrations[3] exposed certain individuals involved in politics as corrupt, an issue which Ukraine's current government tried to eliminate by enacting lustration laws, which were later criticised and challenged before the Constitutional Court of Ukraine. The country has a lot to reconcile since two revolutions and the pre-independence period.

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1 ЖИТЛОВИЙ КОДЕКС УКРАЇНСЬКОЇ РСР Кодекс введено в дію з 1 січня 1984 року Постановою Верховної Ради Української РСР від 30 червня 1983 року N 5465-X. http://search.ligazakon.ua/l_doc2.nsf/link1/KD0003.html.

2 *Toppling Lenin: The lessons of Ukraine's memory wars.* https://www.atlanticcouncil.org/blogs/ukrainealert/toppling-lenin-the-lessons-of-ukraines-memory-wars.

3 This was a wave of demonstrations and civil unrests in Ukraine, which began on the night of 21 November 2013 with public protests in Maidan Nezalezhnosti (Independence Square) in Kyiv. The protests were sparked by the Ukrainian government's decision to suspend the signing of an association agreement with the European Union, instead choosing closer ties to Russia and the Eurasian Economic Union. The scope of the protests soon widened, with calls for the resignation of President Viktor Yanukovich and his government.

One cannot forget to mention the importance of declarations lodged before the International Court of Justice and the International Criminal Court, against the Russian Federation and some of its citizens. Although many of these measures are already in place, a number of them, such as lustration and decommunisation, are still in progress and government bodies often struggle to implement them effectively.[4]

Ukraine's Maidan Revolution in winter 2014 culminated in the ouster of Russia-backed President Viktor Yanukovych, after his refusal to sign a European Union association agreement in November 2013 sparked mass protests in Kiev. Ukrainians demanded greater collaboration with Europe and adherence to democratic values, protesting against widespread corruption, nepotism, and increasing authoritarian tendencies they associated with the Yanukovych regime and the Soviet era. During the revolution, thousands of statues of Vladimir Lenin, the founder of Soviet communism, were toppled during spontaneous popular actions, marking the revival of Ukraine's forestalled process of decommunisation.

Among numerous reforms adopted in the ensuing transition, the reconstituted parliament in Kiev passed a lustration bill[5] purging Ukraine's government and institutions of former members of the Yanukovych regime, corrupt judges, and former KGB agents[6]. On 15 May 2015, the new President, Petro Poroshenko, signed into law a package of four decommunisation measures designed to dismantle Ukraine's totalitarian heritage.[7]

The *Decommunisation Laws* regulate Ukraine's collective memory of the Second World War, considering them in the context of the ongoing crisis, and argues that these "memory laws" are to

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4 *Transitional Justice Mechanisms: Experience of Foreign Countries and Prospects in Ukraine.* https://er.ucu.edu.ua/bitstream/handle/1/1394/Korol_Transitional%20Justice%20Mechanisms.pdf?sequence=1&isAllowed=y.

5 ЗАКОН УКРАЇНИ Про очищення влади (Відомості Верховної Ради (ВВР), 2014, № 44, ст. 2041). https://zakon.rada.gov.ua/laws/show/1682-18#Text.

6 In particular, the *Venice Commission* drew attention to a number of shortcomings of the *Law On Government Cleansing*: 1) the exclusion based of the Law on Government Cleansing must not be disproportionate to the sanction of the deprivation of the right to occupy certain positions that may be imposed under the Criminal Code; 2) the ban on access to public positions does not prevent individuals from standing as candidates to any position; 3) the administrative review must not serve as a substitute to judicial review, which shall be made operative as soon as possible.

7 *On condemning the Communist and the National-Socialist (Nazi) totalitarian regimes in Ukraine and banning the propaganda of their symbols, On access to archives of repressive bodies of the Communist totalitarian regime of 1917–1991, On commemorating the victory over Nazism in the 2nd World War of 1939-1945,* and *On legal status and commemoration of fighters of Ukraine's independence in the 20th century.*

a significant extent an instrument of political manipulation of history that will continue to fuel division and mistrust among Ukrainians, and between Ukraine and Russia.[8]

In 2001, the ruling of the Constitutional Court of Ukraine allowed for the full restoration of the Communist Party of Ukraine. It was found that the party was established in 1991 in accordance with the existing legislation. The ruling stated that the newly established Communist Party of Ukraine was not a successor to the initially prohibited communist party.[9] The legal *lacuna* and short-sighted approach prolonged the existence of the party until 2014–2016, when the court of the first instance confirmed the prohibition of the party. The party was supporting the prohibited communist regime, and arguably separatist activities in Crimea, Donetsk and Luhansk regions as well as terrorist activities within those territories.[10]

This shows that reactionary transitional justice in Ukraine did not succeed as it succeeded in other countries. Namely, the significance of communist symbols to the survival of the ideology was disregarded in Ukraine until decommunisation laws were passed in 2015.

The subject of transitional justice gained special importance for the country amid the ongoing foreign aggression – for post-war Europe almost eight years of unprecedented violations of the basic norms and principles of international law and order, including the occupation of the Autonomous Republic of Crimea and the city of Sevastopol and certain parts of Donetsk and Lugansk regions of Ukraine.

At the beginning of the war, non-governmental organisations became a driving force in the process of documenting serious violations of international humanitarian law during the armed conflict in eastern Ukraine and the occupied territory of the Autonomous Republic of Crimea. This was since the law enforcement system, like the justice system, was not fully prepared for the challenges they faced during the armed conflict. In these circumstances, civil society set itself the goal of assisting the authorities in the fight against impunity and strengthening their institutional capacity in this area.

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8 Nuzov, I. *Transitional Justice in Ukraine: National Reconciliation or Reconsolidation of Post-Communist Trauma?* https://www.ictj.org/news/ukraine-reconciliation-communist-memory.

9 *Judgement of the Constitutional Court of Ukraine 20-pn/2001 as of 27 December 2001, para. 7–8.*

10 *Judgement of the District Administrative Court of Kyiv as of 16 December 2015 in the case 826/15408/15.* Retrieved 17 November, 2018, from http://reyestr.court.gov.ua/Review/54392066.

In 2019, the *Commission on Legal Reform* was established in Ukraine by a Presidential Decree. The commission acts as a consultative and advisory organ for the head of state. This body includes a working group on reintegration of temporary occupied territories tasked with the following: drafting the national transitional justice model for Ukraine (for both Crimea and Donbas), amending the so-called "discriminatory" provisions in the Ukrainian legislation regarding residents of temporary occupied territories, and drafting the de-occupation and reintegration strategy for Crimea and Donbas.

At present, the working group jointly with human rights NGOs and international experts developed the draft concept of a state policy for the protection of human rights in the context of overcoming consequences of international armed conflict on the territory of Ukraine.

The concept is a framework document and represents an embodiment of the idea of transitional justice for Ukraine. It sets out, in particular, the purpose and objectives of state policy, its international legal basis, and ensures the participation of civil society organisations in the implementation of the policy.

The pillars of the concept of transitional justice are related to access to justice and fair treatment, redress for victims of armed conflict, restoration of violated rights, ensuring the right to truth, prosecution of perpetrators of serious crimes, and measures on non-repetition.[11]

The list of challenges, unfulfilled by the previous government, includes an abstract on "the national model of transitional justice". A rather new concept in Ukraine, transitional justice is a set of judicial and non-judicial mechanisms to redress human rights abuses in a post-conflict society. It includes prosecution of the guilty, truth-seeking, reparations for victims, and institutional reforms. Although the Russia-provoked war in the Donbas is on-going, human rights experts assure that it is high time to address conflict-related problems that have arisen in Ukraine.

Professor Bassiouni lays down seven principles of post-conflict justice: prosecution of perpetrators for gross violations of human rights; formal investigations of past violations; development of remedies and reparations for victims; introduction of vetting policies and administrative measures; provision of support for memorialization of victims, education on past violence and

11 Statement by the delegation of Ukraine at the UNSC Ministerial-level Open Debate. *Transitional justice: a building block towards sustaining peace.* http://ukraineun.org/en/press-center/410-statement-by-the-delegation-of-ukraine-at-the-un-sc-ministerial-level-open-debate-transitional-justice-a-building-block-towards-sustaining-peace/.

preservation of historical memory; support of traditional, religious, and indigenous approaches to justice and healing; and support for the rule of law and good governance[12].

In January 2018, a bill was introduced[13] entitled *On the Principles of State Policy on Human Rights Protection in the Context of Overcoming the Effects of the Armed Conflict*. The draft law, prepared by UHHR jointly with Ukraine's officials and partner NGOs on the initiative of Ukraine's then human rights commissioner Valeria Lutkovska, was revised and approved in December 2018.[14]

In light of the fact that in September 2019 the so-called *Steinmeier Formula* was signed by the *Tripartite Contact Group* in Minsk, the political processes have been intensified in Ukraine to deescalate the armed conflict and reintegrate certain areas of Donetsk and Luhansk regions. Therefore, the issue of returning these territories to the legal field of Ukraine remains relevant. In this regard, the issue of introducing the concept of transitional justice in certain areas of Donetsk and Luhansk regions is actively discussed both in Ukraine and in the international arena. This concept (approach) envisages simultaneous activity of the State in four directions: effective activity of criminal justice, compensation of losses to victims, institutional reforms that make it impossible to repeat the past and official acknowledgment of historical truth (e.g., *Mozer vs. the Republic of Moldova and Russia*). Among these directions, in my opinion, the most difficult is the restoration of criminal justice in the reintegrated territories, which have been outside the legal system of Ukraine for a long time.[15]

Compared to Poland, Estonia and the Czech Republic, where the process of decommunisation was closely tied to political and economic reforms and the fight against corruption, the Ukrainian case looks very specific. Unfortunately, we have so far not been able to connect a clear cultural policy with institutional reforms. The whole process of decommunisation finds itself at the crossroads. It can no longer be rolled back, since much has already been done and, on the other hand, it is not clear which direction it will be taken by the new government, or whether it will take place at all.

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12 Bassiouni, M. C. (2007). *The Chicago Principles on Post-Conflict Justice*, pp. 16–17. International Human Rights Institute.

13 УГСПЛ та Український інститут прав людини презентували законопроект щодо держполітики захисту прав людини в умовах подолання наслідків збройного конфлікту. https://helsinki.org.ua/articles/uhspl-ta-ukrajinskyj-instytut-prav-lyudyny-prezentuvaly-zakonoproekt-schodo-derzhpolityky-zahystu-prav-lyudyny-v-umovah-podolannya-naslidkiv-zbrojnoho-konfliktu/.

14 Matviyishyn, I. *Transitional justice in Ukraine: What if the war was over?* https://neweasterneurope.eu/2019/09/11/transitional-justice-in-ukraine-what-if-the-war-is-over/.

15 *Restoration of criminal justice and introduction of transitional justice in the conditions of restoration of territorial integrity of Ukraine and reintegration of Donbas.* https://amazoniainvestiga.info/index.php/amazonia/article/view/1248/1121.

Criminal prosecutions

The implementation of transitional justice in the area of criminal justice should focus primarily on the protection of rights, freedoms and legitimate interests of an individual, society and state against criminal offences; ensure prompt, full and impartial investigation and trial, so that anyone who commits a criminal offence will be held responsible; and no innocent will be charged or convicted, while every party to criminal proceedings will be subject to due process of law. The system of Ukrainian criminal justice includes the activities of agencies and institutions dealing with criminal cases, and the institute of state prosecutors (Prosecutor's Office), agencies empowered to conduct pre-trial investigations, agencies and institutions for the execution of penal sanctions, and the bar association.[16]

In April 2014, the Government of Ukraine lodged a declaration under Article 12(3) of the Rome Statute accepting the jurisdiction of the International Criminal Court (ICC) over alleged crimes committed on its territory from 21 November 2013 to 22 February 2014. The aim of this move was to prevent impunity of perpetrators and accomplices of systematic violations of human rights, which had occurred during the Revolution of Dignity.

At the same time, the prosecutor of the ICC opened a preliminary examination of the situation in Ukraine, but the perspective of this preliminary examination is uncertain. In its *Report on Preliminary Examination Activities in 2015*, ICC prosecutors provided its preliminary analysis of the crimes allegedly committed during the Euromaidan protest events.

They found that while the acts of violence allegedly committed by the Ukrainian authorities between 30 November 2013 and 20 February 2014 could constitute an "attack directed against a civilian population" under Article 7(2)(a) of the Rome Statute, the information available did not provide a reasonable basis to believe that the attack was systematic or widespread under the article's terms. However, the prosecutors noted that serious human rights abuses had occurred in the context of the Euromaidan demonstrations and expressed its willingness to reassess its preliminary analysis in light of any new information.[17]

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16 *Restoration...,* Ibid.

17 Zadoya, K. *Transitional Justice in the Ukraine: Challenges and Opportunities.* http://www.legeasiviata.in.ua/archive/2018/9-2/13.pdf.

Reparations for victims

On 21 February 2014, *Verkhovna Rada* of Ukraine adopted the Ukrainian law called *On state assistance to victims of mass protest actions and their families*. Thus, appropriate legislative measures have been taken by Ukrainian government in this sphere. However, Ukrainian human rights activists maintained that its practical implementation leaves much to be desired, such as, for example, *truth-telling.* This aspect of transitional justice seems like a *terra incognita* for Ukrainian government. The issue of establishing truth commissions for "documenting violation facts; documentary events recovery; declassification of archives; investigation on disappeared and missing persons; establishment of victims and perpetrators; ensuring the availability and security of documents on rights violations" was not even discussed at a governmental level.

Institutional reforms

The aims of the transitional justice institutional reforms are to prevent future human rights violations. It should be recognised that the Ukrainian government initiated such reforms.

Firstly, after the *Revolution of Dignity* – largely instigated by endemic corruption – Ukraine adopted a comprehensive anti-corruption package of laws and established new specialised institutions: NABU[18], SAPO[19], NACP[20] and ARMA[21].

Ukraine also achieved unprecedented level of transparency, inter alia, by introducing the electronic asset disclosure, e-procurement, opening up the public registries and making a number of datasets publicly available in open data format. Nevertheless, despite the achievements the level of corruption remains very high. Anti-corruption enforcement, particularly against the high-level officials, is stalling and meets enormous resistance and the public trust to the Government has further decreased in recent years.

18 The National Anti-Corruption Bureau

19 Specialised Anti-Corruption Prosecution Office

20 National Agency for Corruption Prevention

21 Asset Recovery and Management Agency

Eastern Ukraine and Crimea

The main challenge to the implementation of transitional justice with regards to these regions of Ukraine is lack of control over some Ukrainian territories, which occupied be Russian Federation. Consequently, at the moment Ukrainian government is objectively limited in its ability to provide measures of post-conflict justice.

Criminal prosecutions – On 8 September 2015, the Government of Ukraine lodged a second declaration under Article 12(3) of the Rome Statute accepting the exercise of jurisdiction by the ICC in relation to alleged crimes committed on its territory from 20 February 2014 onwards, with no end date. Consequently, the ICC prosecutors decided to extend the temporal scope of the existing preliminary examination to include any alleged crimes committed on the territory of Ukraine from 20 February 2014 onwards. The perspective of prosecution of crimes committed in Eastern Ukraine and Crimea seems realistic but at the same time long-term.

National practice of war crimes prosecutions committed in above-mentioned regions is limited and hampered by shortcomings in Ukrainian criminal legislation.[22] It is necessary "to ensure comprehensive implementation of international law provisions on war crimes (key reference point – Article 8 of the Rome Statute)"[23].

Reparations for victims – Unfortunately, Ukraine is not applying sufficient effort to implement paragraph 24 of the UN General Assembly Resolution entitled *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* (A/RES/60/147, adopted on 16 December 2005) regarding the development of means of informing the general public and, in particular, "victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines"[24].

One of the four main elements of transitional justice is the issue of redress for victims of conflict. However, it is a matter of concern that the Ukrainian *On the State Policy of the Transition*

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22 Задоя К. Кримінальна відповідальність за воєнні злочини, вчинені на території Донбасу. Юри- дичний вісник України. 2017. № 33. С. 12–13; [продовження] № 34. С. 12–13; [закінчення] № 35. С. 11.

23 Research report: *Capacity of the Judiciary System to Ensure Justice in the Armed Conflict in Eastern Ukraine. Executive summary.* 2016–2017. https://jfp.org.ua/system/reports/ files/114/en/Pravosud_eng_summary.pdf.

24 Ibid.

Period[25] draft law provides for legal norms under which Ukraine's obligations to establish a mechanism for compensation for damage caused by the conflict can be nullified.

Thus, Article 9(2) of the draft stipulates that "state policy of the transition period is aimed at protecting people and citizens – their lives, health and dignity, constitutional rights and freedoms, safe living conditions", while Article 2 of the draft law stipulates that "responsibility for violations of human and civil rights and freedoms in the temporarily occupied territories guaranteed by the Constitution and laws of Ukraine, international treaties, approved by the Verkhovna Rada of Ukraine, rests with the Russian Federation as an occupying power in accordance with the principles and norms of international law."

Following this wording, all responsibility for any damage rests with the Russian Federation, herewith the responsibility for redress is removed from the state of Ukraine. This wording is identical to the provision of Article 2(4) of the Law of Ukraine 2268-VIII, *On Peculiarities of State Policy to Ensure State Sovereignty of Ukraine in Temporarily Occupied Territories in Donetsk and Luhansk Oblast*[26], which the authors of the Draft propose to exclude from the text of Law 2268-VIII.

However, the transfer of this legal norm to the new law is not a positive practice, due to the fact that one state imposes in its national legislation the obligation to pay compensation to another state (in this case, the Russian Federation), which violates the principle of sovereign equality of states and has no legal consequences for the aggressor state.

Thus, in its *Opinion on the Law on the Occupied Territories of Georgia* (CDL-AD (2009) 015, 17 March 2009), the *Venice Commission* stated the following: "... Article 7 of the Law on the Occupied Territories of Georgia explicitly fixes the responsibility of the Russian Federation for human rights violations, moral and material damage and destruction of cultural heritage in Abkhazia (Georgia) and South Ossetia (Georgia).

As a rule, questions of international responsibility cannot be regulated on the basis of national law but are solved on the basis of international law. Concerning human rights violations, according to the jurisprudence of the European Court of Human Rights (ECHR), an extraterritorial

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25 The Draft Law of Ukraine *On the State Policy of the Transition Period* is available at https://www.minre.gov.ua/sites/default/files/1._zakonoproyekt_pro_zasady_dppp.pdf.

26 More information about this Law at http://search.ligazakon.ua/l_doc2.nsf/link1/T182268.html.

application of international conventions is possible if the state exerts "effective overall control" over a certain territory.

This seems to be the case for the Russian Federation both in Abkhazia (Georgia) and in South Ossetia (Georgia). Nonetheless, it has also to be realised that the responsibility of the occupying power based on the extraterritorial application of human rights conventions does not completely exonerate the other state from any responsibility.

It may be noted, for example, that the Georgian law is an indication of the country's concern for said territory, and taking into account the case law of the ECtHR (*Ilascu et al. vs. Russian Federation and the Republic of Moldova*[27]), the intention of the state to regulate the legal relations within the occupied territory may represent an indication of its responsibility for the respective territory.

The reimbursement of "moral and material damages inflicted on the Occupied Territories" regulated in Article 7, para. 3 of the *Law on the Occupied Territories of Georgia,* will also have to be fixed on the basis of international law. Georgian courts would not be competent to adjudicate on claims against the Russian Federation according to the principles of state immunity..." Thus, the imposition of liability for the damage caused and, as a consequence, compensation for this damage exclusively on the aggressor state does not mean that the state of Ukraine is not liable to persons under its jurisdiction.

In this context, it is worth recalling the concept of the state's "positive obligations", developed in the judgments of the ECHR on the application of the *Convention for the Protection of Human Rights and Fundamental Freedoms* – in particular, Article 1 of Protocol no. 1 to the Convention. The case law of the court contains many judgments under which, even if a state does not control part of its territory, it is not exonerated from its obligations under the convention and protocols thereto.

The right of a person affected by an armed conflict, for example, to claim compensation for destroyed or damaged property derives from the protection of a person's property rights. In addition, it is also clear from the case law of the court that in the event of an armed conflict, the state has an obligation to put in place appropriate mechanisms to compensate for the value of

27 *The Case of Ilascu et al. vs. Moldova and Russia* (Application no. 48787/99) http://www.rulac.org/assets/downloads/Ilascu_v_Moldova_and_Russia.pdf.

the property, housing and land in case of failure to ensure the possibility to return there or if the property was destroyed. In this context, it is worth recalling Article 17 of the Law of Ukraine entitled *On Enforcement of Judgments and Application of the Case Law of the European Court of Human Rights*"[28], according to which courts use the provisions of the Convention and the case law of the ECtHR as a source of law[29].

Truth-telling and institutional reforms – These aspects of transitional justice are way off appropriate implementation – on the one hand, because of lack of governmental activity, on the other, due to political reasons. Truth-telling and institutional reforms are closely connected to the Minsk Protocol, which is far from over, and to the end of the occupation of Crimea.[30]

Another urgent issue of the restoration of criminal justice is to carry out cause-of-death certification of people who died in temporarily uncontrolled territories of Ukraine. Special commissions or investigative teams should be established in the process of reintegration of Donbas to check the circumstances of the violent deaths of persons who died during the occupation. In this regard, the key aspect is the resolution of the validity of forensic findings conducted by the persons who, in accordance with the *Procedure for Issuing the Certificate of Qualification of Forensic Expert*, were entitled to carry out expert studies and were listed in the State Register of certified forensic experts, but in fact conducted research in the uncontrolled territory and their conclusions were drawn up on the blanks of the occupational authorities.

At present, all the documents of a person's death and expert opinions issued by specialists in the territory that are temporarily not under the control of Ukrainian authorities cannot be considered as evidence in criminal proceedings. They can only be recognised as such if there is an appropriate court order. The fact that such persons are not excluded from the *Unified Register of Experts of Ukraine*, their licenses are not revoked, and they conducted the autopsy and forensic examination in accordance with the current *Order of the Ministry of Health of Ukraine of January 17 1995, No. 6* compounds the problem.

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28 Art 17: "The courts use the Convention and the case-law of the Court as a source of law in their proceedings. https://ips.ligazakon.net/document/T063477?an=117.

29 Analysis of the Draft Law of Ukraine *On the State Policy of the Transition Period.* https://zmina.ua/content/uploads/sites/2/2021/02/analysis-draft-law-transitional-justice-eng.pdf.

30 Zadoya, K. *Transitional Justice in the Ukraine: Challenges and Opportunities.* Law and Life, September 2018. https://journals.indexcopernicus.com/api/file/viewByFileId/755985.pdf.

One of the ways to solve this problem is to appoint a forensic examiner based on the materials of criminal proceedings. The opinion of a forensic expert who worked in temporarily uncontrolled territories is provided without the object of the study in this situation. All the facts of death that occurred during the occupation period, including disappearances of citizens previously unknown to the Ukrainian law enforcement agencies should be recorded in the journals of a unified account of statements and reports on criminal offenses and other events. In the event that the causes of death are not accurately identified, and sufficient evidence is not obtained pointing to non-violent nature of death, all measures provided for by the *Criminal Procedural Code of Ukraine* should be taken to investigate the circumstances of death comprehensively, fully and impartially.[31]

Conclusion

The renaming of streets and settlements is the most characteristic feature of decommunisation in Ukraine. The results are clearly visible to the naked eye. In a purely visual sense, decommunisation in Ukraine has been achieved. The voice of sceptics in Ukraine and abroad is very audible, but in the process of renaming, there is more than just redesignation of objects. By naming the streets of our cities, government and society create a cultural space, a space of memory (lieu de mémoire). We capture our existence and differentiate our ideas, principles and goals. The names of our topographic objects tell us who we are and where we are heading. According to George Steiner, "Europe is a place of memory, it is a network of memories". The space around us, as well as its designation, is an echo chamber of historical, artistic and scientific achievements and, at the same time, a reminder of terrible and dark times.

An important element of the Ukrainian decommunisation process, often omitted in the debates around it, is that it allowed the opening of NKVD-KGB archives that had been previously classified. Accordingly, every Ukrainian will now be able to access the documents of Soviet special services documenting the crimes and activities of the Soviet repressive machine. In Russia, instead, the archives of the Soviet special services are being kept under lock and key and will probably not be open to the public anytime soon.

31 *Restoration...,* Ibid.

Renaming streets and cities or opening archives is only the beginning of the path, given that the structure of the human mentality changes very slowly. The Soviet Union collapsed, but continues to live in our heads, while renewal takes time and effort.

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Florian Eichblatt

International Exchange Programs as a Transitional Justice Instrument

Transitional justice, as the "full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation"[1], has since the 1990s traditionally been conceived as a "tool kit"[2] comprising the five instruments of prosecutions, amnesties, truth and reconciliation commissions, reparations and the vetting of the public service. However, in the last two decades this modest tool kit quickly left its legal core and expanded into what can be called a transitional justice *warehouse* containing an abundant array of transitional mechanisms like art, architecture, affirmative action, memorials, institutional reforms and guarantees of non-repetition.[3]

In this vein, the role of education for transitions has been increasingly studied.[4] In particular, studies examined how truth and reconciliation commissions address the education sector of the

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1 Guidance Note of the Secretary-General, *United Nations Approach to Transitional Justice,* March 2010, p. 2; Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, 23 August 2004, UN Doc. S/2004/616, marg. note. 8.

2 Werle, G., & Vormbaum, M. *Transitional Justice: The Legal Framework, Berlin 2022* (forthcoming), Chapter 1. Similar descriptions speak of a transitional justice "template" or "menu".

3 Waldorf, L. (2021). Expanding transitional justice. In Simić, O. (Ed.) *An Introduction to Transitional Justice*, 2nd edition (p. 311). Abingdon; Werle, G., & Vormbaum, M. (2018), Transitional Justice: Vergangenheitsbewältigung durch Recht, Berlin, p. 9. Note that many of these "newer" mechanisms can also be covered by the original tool kit, mainly as facets of reparations. However, they are also often treated as distinct instruments. See only the title of the *United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence* which differentiates between reparations and guarantees of non-recurrence. See also *African Union*, Transitional Justice Policy, February 2019, marg. notes 42–100.

4 Concurrently, peacebuilding and education scholars focused more and more on the connection between education and conflict. See only Bush, K. D, & Saltarelli, D. (Eds.), The Two Faces of Education in Ethnic Conflict: Towards a Peacebuilding Education for Children, Siena 2000 and the articles of the special issue "Revisiting Peace Education: Bridging Theory and Practice" (2017). Research in Comparative & International Education, 12, pp. 3–139.

old regime[5], how states revise their (history) curricula to contend with their past[6] and which significance teachers and pedagogical culture reforms have for the outcome of a transition.[7]

This article builds on this educational current by analysing the relationship between transitional justice and international exchange programs. After delineating the multifaceted concept of exchange (I.), it presents two notable instances of transition-tailored exchange programs (II.) and ends with some theoretical thoughts on the linkage between transitional justice and exchange programs (III.).

I. The many faces of exchange programs

The term "exchange programs" encompasses a plethora of concepts that generally have in common that a person (individual exchange; high school student, university student, volunteer, professional) or a group of people (group exchange) from a certain place (international vs. intranational exchange) physically[8] spend a certain period of time (long-term vs. short-term exchange[9]) in a different environment for non-touristic purposes. Some exchanges take their name literally by organising simultaneous or subsequent reciprocal swaps of people. Both government and private institutions arrange exchange programs.

In general, educational exchanges dominate the discussion on exchange programs. Within that subgroup, the international student mobility in tertiary education outweighs the high

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5 Paulson, J. (2006).The Educational Recommendations of Truth and Reconciliation Commissions: Potential and Practice in Sierra Leone. *Research in Comparative and International Education*, 1 (pp. 335–350); Paulson, J., & Bellino, M. J. (2017). Truth commissions, education, and positive peace: An analysis of truth commission final reports (1980–2015). *Comparative Education*, 53, pp. 351–378.

6 Cole, E. A. (2007). Transitional Justice and the Reform of History Education. *International Journal of Transitional Justice*, 1, pp. 115–137; Haider, H. (2013). Rewriting History Textbooks. In Stan, L., & Nedelsky, N. (Eds.), *Encyclopedia of Transitional Justice, Volume 1*, (pp. 93–98). Cambridge; Keynes, M. (2019). History Education for Transitional Justice? Challenges, Limitations and Possibilities for Settler Colonial Australia. *International Journal of Transitional Justice*, 13, pp. 113–133.

7 Tibbitts, F. L., & Weldon, G. (2017). History curriculum and teacher training: shaping a democratic future in post-apartheid South Africa? *Comparative Education*, 53, pp. 442–461; Davies, L. (2017) Justice-sensitive education: the implications of transitional justice mechanisms for teaching and learning. *Comparative Education*, 53, pp. 333–350; Worden, E. A., & Smith, A. (2017). Teaching for democracy in the absence of transitional justice: the case of Northern Ireland. *Comparative Education*, 5, pp. 379–395.

8 The phenomena of letter or virtual exchanges are excluded from the scope of this article.

9 Short-term exchanges are generally defined as lasting one to eight weeks. See, e.g., Gaia, A. C. (2017). Short-term faculty-led study abroad programs enhance cultural exchange and self-awareness. *The International Education Journal: Comparative Perspectives*, 14, pp. 21–31.

school exchanges in absolute numbers and in academic attention.[10] Study abroad has precedents from ancient, medieval and early modern times, developed its nascent institutionalised forms in the 19th century, and witnessed significant growth spurts following the two world wars and since the 1990s.[11]

The research on educational exchanges probes both the individual and societal aspects of the programs. On the individual level, the motivations for going abroad, the process of acculturation in the new environment, the acquisition of intercultural and language competences and the impact on the participant´s identity are among the key research topics.[12] On the societal level, the relevance of these exchange programs for public diplomacy, economic, development and national security goals is – also critically[13] – studied.[14] However, it appears that exchange programs have not yet been studied through a transitional justice lens.

II. Exchanges in times of transition

Empirically, exchange programs have frequently been initiated following a transition from war to peace[15] or from authoritarianism to democracy.

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10 Gümüş, S., Gök, E., & Esen, M. (2020). A Review of Research on International Student Mobility: Science Mapping the Existing Knowledge Base. *Journal of Studies in International Education*, 24, pp. 495–517; Sustarsic, M. (2020). The Impact of Intercultural Exchange on Secondary School Exchange Students and Their Host Families. *Journal of International Students*, 10, pp. 912–933.

11 On the history of educational exchange programmes, see Hoffa, W. W. (2007). *A History of US Study Abroad: Beginnings to 1965*. Carlisle; Krüger-Potratz, M. (1996). Zwischen Weltfrieden und Stammesversöhnung. Ein Kapitel aus der Geschichte des internationalen Schüleraustausches. *Bildung und Erziehung, 49*, pp. 27–43.

12 Gümüş, Gök, & Esen, Ibid., (footnote 10); Streitwieser, B. T., Le, E, & Rust, V. (2012). Research on Study Abroad, Mobility, and Student Exchange. In *Comparative Education Scholarship, Research in Comparative and International Education*, 7, pp. 5–19.

13 The unequal social access to international exchange programmes, suspected post-colonial structures and potential negative economic effects (e.g., brain drain) are central points of criticism. See Yang, P. (2020). Toward a Framework for (Re)Thinking the Ethics and Politics of International Student Mobility. *Journal of Studies in International Education* (24), pp. 518–534.

14 Gümüş, Gök, & Esen, Ibid. (footnote 10); Streitwieser, Le, & Rust, Ibid., (footnote 12).

15 Arguably, the first transition-related exchange programme dates back to the Boxer Rebellion in China at the beginning of the 20th century. Following the military defeat of the Boxers, the Chinese government was forced to pay indemnities to the victorious Western nations. When it was later discovered that the U.S. government had accidentally received a sum that was too large, the surplus was not simply returned but instead used to fund the exchange of Chinese students to the U.S. Before their departure, the Chinese students attended a preparatory school in Beijing, which subsequently became Tsinghua University. On this "Boxer Indemnity Scholarship Program", see Dubois, D. R. (1995). Responding to the Needs of Our Nation: A Look at the Fulbright and NSEP Education Acts. Frontiers: *The Interdisciplinary Journal of Study Abroad*, 1, pp. 54–80 (55); Hoffa, W. W., Ibid., p. 51 (footnote 11).

1. Exchanges to "re-educate" Germany

Following the victory over Nazi Germany, the Potsdam Agreement acknowledged the role of education for the denazification and democratisation of Germany.[16] Within their respective zones of occupation, the Allies applied different instruments to "re-educate" or "reorientate" the German people.[17] As part of these efforts, the U.S. Office of Military Government began preparing the *Exchange of Persons Program*, which became fully operational in 1949 under the U.S. High Commissioner for Germany (HICOG).[18] The programme financed mostly long-term exchanges of German professionals, university and high school students. People from the British and French zones were also able to apply. Its legal basis was the U.S. Information and Educational Exchange Act of 1948.[19] In the wake of the end of the Allied occupation of West Germany, the programme was terminated in 1955/56.

Until 1956, the high school program, known as the *Urban and Rural Teen-Age Exchange*, enabled 2,259 German and 139 Austrian students to live for one year in an U.S.-American host family and to attend a local secondary school.[20] Through panels consisting of Germans without a Nazi background, HICOG selected the students in Germany while their placement and assistance in the U.S. was entrusted to private organisations.[21] The exchange of the 15 to 18-year-olds was particularly promising for the U.S.'s democratisation goals. By the 1950s, these were the

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16 Potsdam Agreement: Protocol of the Proceedings of the Berlin Conference, 1 August 1945, II. A No. 7: "German education shall be so controlled as completely to eliminate Nazi and militarist doctrines and to make possible the successful development of democratic ideas." See also already the U.S. Directive to Commander-in-Chief of United States Forces of Occupation Regarding the Military Government of Germany, April 1945, JCS 1067, No. 14.

17 Heinemann, M. (Ed.) (1981). *Umerziehung und Wiederaufbau: Die Bildungspolitik der Besatzungsmächte in Deutschland und Österreich*. Stuttgart.

18 Pilgert, H. P. (1951). *The Exchange of Persons Program in Western Germany, Office of the U.S. High Commissioner for Germany*; Kellermann, H. J. (1978). *Cultural Relations as an Instrument of U.S. Foreign Policy: The Education Exchange Program between the U.S. and Germany 1945–1954*. Washington D.C. Also the other Allies organised exchange programmes, see, e.g., Naumann, C. (2007). The Rebirth of Educational Exchange: Anglo-German University Level Youth Exchange Programmes after the Second World War. *Research in Comparative and International Education, 2*, pp. 355–368.

19 Public Law 80-402. Representative *Karl E. Mundt and Senator Alexander Smith* sponsored the bill. The law is therefore also known as the "Smith-Mundt Act" and the exchanges as the "Smith-Mundt Exchanges". See Sirois, H. (2015). Reeducation im Zeichen des US Information and Educational Exchange Act of 1948. In Gerund, K., & Paul, He (Eds.), *Die Amerikanische Reeducation-Politik nach 1945* (pp. 19–33). Bielefeld.

20 *Congressional Record*, 102 (1956), U.S. Senate, pp. 9004–9008; Florack, M., & Plessow, O. (2007). Die Wurzeln des Jugendaustauschs in der amerikanischen Besatzungspolitik: Das "Exchange of Persons Program" bis 1955. In *Deutsches Youth For Understanding Komitee e.V. (ed), Verständigung und Verständnis: Internationaler Jugendaustausch 1957–2007* (pp. 19–28). Nordersted.

21 Among these private actors were the American Field Service (AFS), the Michigan Council of Churches which later founded Youth For Understanding (YFU) and the Church of the Brethren which later founded the International Cultural Youth Exchange (ICYE). AFS, YFU and ICYE still operate as youth exchange organisations.

oldest cohort which had not been part of the Hitler Youth for a considerable amount of time[22] and their age and the long-term integration in a host family made them especially receptive to sustainable personality development in the U.S. In short, the high school exchanges could lead to a desired "Americanisation of young elites"[23], which could upon their return function as multipliers for the U.S. policy goals.

2. Exchanges as a sign of atonement

The *Exchange of Persons Program* was a top-down exchange initiative for post-war West Germany. Two years after its expiry, a bottom-up[24] exchange endeavour followed suit. In 1958, at the synod of the Protestant Church in Germany, *Lothar Kreyssig*[25] called for Germans to volunteer to spend a year in Poland, Russia and Israel to build houses, churches or hospitals as a "sign of atonement".[26] Two-thirds of the members of the synod signed the call and founded the *Aktion Sühnezeichen Friedensdienste/Action Reconciliation Service for Peace (ARSP)*.[27] Since then, ARSP volunteers have participated in building projects[28], social services and memory work in over a dozen countries.[29]

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22 Florack, & Plessow, Ibid., p. 21 (footnote 20).

23 *Sirois*, Ibid., p. 24 (footnote 19), translated by Florian Eichblatt. For a contemporary assessment, see also Pilgert, Ibid., p. 52, (footnote 18). "The real fruits of the current student exchange program will be borne one or two decades hence when the German students now in classrooms on American campuses, studying and observing a way of life which is freer and more democratic than they have seen before, will be leaders in the German state and social order. It is worth noting that a considerable number of men and women holding positions of influence in the present German society were exchange students during the 1920s.".

24 On the role of non-state actors in the field of transitional justice, see McEvoy, K. (2007). Beyond Legalism: Towards a Thicker Understanding of Transitional Justice. *Journal of Law and Society*, 34, pp. 411–440.

25 Lothar Kreyssig (1898–1986) was a judge from 1928 until 1940, when he lost his position because he fought against the euthanasia mass murder known as "Action T4". In 2016, Yad Vashem posthumously named him and his wife "Righteous Among the Nations" for hiding and saving two Jewish citizens in the last years of the Nazi regime. On Kreyssig, see Müller, I. (1991). *Hitler´s Justice: The Courts of the Third Reich*, pp. 193-196. Cambridge; Gruchmann, L. (1984). Ein unbequemer Amtsrichter im Dritten Reich: Aus den Personalakten des Dr. Lothar Kreyßig. *Vierteljahrshefte für Zeitgeschichte,32*, pp. 463–488.

26 An excerpt of the German original of Kreyssig´s speech is available at <https://www.asf-ev.de/ueber-uns/geschichte/>, last accessed on 30 September 2021; the full speech is reprinted in the annex to Legerer, A. (2011). *Tatort: Versöhnung. Aktion Sühnezeichen in der BRD und in der DDR und Gedenkdienst in Österreich.* Leipzig.

27 Kammerer, G. (2008). *Aktion Sühnezeichen Friedensdienste: Aber man kann es einfach tun*, pp. 11–54. Göttingen.

28 A noteworthy example is the Reconciliation Church in the Taizé Community in France which was built with the help of ARSP volunteers in 1961.

29 While Kreyssig´s call had originally singled out Poland, Russia and Israel, the first ARSP projects happened in the Netherlands and Norway. On ARSP´s history in Israel which precedes the exchange of ambassadors between West Germany and Israel, see Wienand, C. (2012). From Atonement to Peace? Aktion Sühnezeichen, German-Israeli Relations and the Role of Youth in Reconciliation Discourse and Practice. In Schwelling, B. (Ed.), *Reconciliation, Civil Society, and the Politics of Memory* (pp. 201–235). Bielefeld.

The synod of 1958 still represented the Protestant churches of West and East Germany, and the ARSP was also set up in both states. However, in East Germany, the authorities, which deemed the German Democratic Republic to be an anti-Fascist state that had no reasons to offer signs of atonement, regularly obstructed the organisation´s work by, inter alia, refusing to issue travel permits.[30] Consequently, the East German volunteers focussed on organising short-term summer working camps, while the West German colleagues generally spend a year abroad. The first chairman of the organisation in West Germany became *Erich Müller Gangloff*, who had coined the influential term *Vergangenheitsbewältigung* (contending with the past) in 1955.[31]

III. Transitional justice through exchanges

These two, non-exhaustive[32] examples from Germany highlight how exchange programmes can be dove-tailed with various transitional justice goals.[33]

1. Reparations

Reparations *through* exchange participants and reparations *for* exchange participants are conceivable.

In his founding call, Kreyssig emphasised that the volunteer exchanges should not be perceived as "reparations, but as a plea for forgiveness and peace". Nonetheless, conceptually,

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30 Wüstenberg, J. (2017). *Civil Society and Memory in Post-war Germany*, pp. 43, 55 et seq. Cambridge; Legerer, Ibid., pp. 255–313, 358–403 (footnote 26).

31 Legerer, Ibid., pp. 82–92 (footnote 26). On the origins of the term "Vergangensheitsbewältigung", see Werle, & Vormbaum, Ibid, Chapter 1 (footnote 2).

32 Other exchange programmes that may warrant an analysis from a transitional justice perspective include the "Japan-Korea Youth Friendship Exchange Program" *(1984/87), see Kwon, Y. (2020). Vergangenheitsbewältigung in den südkoreanisch-japanischen Beziehungen: Ein Vergleich zu Deutschland und Polen*, pp. 127–130. Wiesbaden; the youth offices between Germany and France (1963), Poland (1991) and Greece (2018), which are international organisations established by bilateral treaties; the Future Leaders Exchange Program between the U.S. and many Eurasian countries (1993).

33 On the goals of transitional justice in general, see Werle, & Vormbaum, Ibid., pp. 33–39 (footnote 3). Further research might also explore how exchange programmes relate to the transitional justice goal of "truth" and if and how they can function as a "guarantee of non-recurrence" or be used in a "pre-transitional" setting to "to promote an alternative elite to prepare the eventual post-transition". See Dezalay, S. (2017). The role of international NGOs in the emergence of transitional justice: A case study of the International Center for Transitional Justice. In Lawther, C., Moffett, L., & Jacobs, D. (Eds.), *Research Handbook on Transitional Justice* (p. 206). Cheltenham.

the volunteer services of the ARSP offered to victims of the Nazi crimes can be considered reparations in the form of satisfaction.[34]

Moreover, the ARSP did not confine itself to these symbolic reparations. During their exchanges, many of the volunteers had worked with former forced labourers and other "forgotten victims"[35] that never received compensation from a German government. This prompted the returned volunteers to use the ARSP as a platform to press for renewed and enlarged reparation mechanisms.[36] For example, the ARSP pursued strategic litigation – ultimately unsuccessfully – by organising legal action for a former forced labourer against the company Siemens in the early 1990s.[37] The exchange of people can thus help to identify blind spots in a society´s transitional justice process.

Regarding reparations *for* exchange participants, scholarships for educational exchanges suggest themselves. They could be introduced by specific reparation programmes[38] or victims could receive preferential treatment within already existing exchange programmes.[39]

A common obstacle for reparations programmes is the lack of financial resources of the transitioning state, requiring external backing, clear prioritisations or innovative funding schemes.[40] In this vein, the original "guns versus butter" financing of the Fulbright exchanges might serve as a role model for transitions from war to peace. Following World War 2, U.S. Senator *James*

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34 United Nations (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*, UN Doc. A/RES/60/147, 16 December 2005, no. 22, lit. (e), (g), (h).

35 On the forgotten victims within the German reparations history, see Goschler, C. (2005). Schuld und Schulden: Die Politik der Wiedergutmachung für NS-Verfolgte seit 1945, pp. 300 et seq, 345–356, 452. Göttingen.

36 Kux, U. (2008). A matter of implicitness: Engagement for the recognition of survivors of Nazi persecution. In Action Reconciliation Service for Peace (Ed.), *Zeichen: 50 Years Action Reconciliation Service for Peace* (pp. 20–23). Berlin.

37 Gerlant, U., & Staffa, C. (2008). Die Geschichte von NS-Zwangsarbeit, Entschädigung und Begegnung. Erfahrungen der Aktion Sühnezeichen Friedensdienste. *Jahrbuch Menschenrechte 2008* (pp. 47–55). In 2000, prompted mainly by litigation under the U.S. Alien Tort Statute, Germany established the "Remembrance, Responsibility and Future Foundation", which until 2007 paid compensation to former forced labourers and was coequally funded by the German Federal Government and over 600 German companies which had exploited forced labourers during the Nazi regime. See Goschler, Ibid., pp. 450–476 (footnote 35).

38 For instance, the Remembrance, Responsibility and Future Foundation did not only compensate former forced labourers but is also equipped with a "future fund" out of which it, among other things, finances student and youth exchange programmes between Eastern European countries and Germany. Retrieved 30 September, 2021, from https://www.stiftung-evz.de/eng/funding.html.

39 Joshi, Y. (2020). Affirmative Action as Transitional Justice. *Wisconsin Law Review*, pp. 1–48.

40 Werle, & Vormbaum, Ibid., Chapter 7 (footnote 2).

W. Fulbright proposed that proceeds of the overseas sale of military equipment no longer required should be used to bankroll academic exchanges.[41]

2. Reconciliation

The name ARSP already highlights the potential and limits of exchanges for this transitional justice goal. *Action Reconciliation Service for Peace* is a loose translation of *Aktion Sühnezeichen Friedensdienste* which literally translates to "Action Sign of Atonement Service for Peace".[42] While a person might atone unilaterally, reconciliation is a complex and vague[43] process between multiple people or groups. Critics even see exchange programmes as part of an inflationary use of the concept reconciliation which they label as "reconciliation-kitsch": "Student exchange leads to reconciliation between people who were never enemies."[44]

In fact, one can also question whether the mostly young volunteers of the ARSP in the 1960s who had been small children at the end of World War 2 could legitimately offer a sign of atonement. However, this pure individual perspective ignores the collective, ambassador-like[45] role which exchange participants assume abroad. In this vein, their signs of atonement parallel the famous Warsaw genuflection of *Willy Brandt*, who also bore no personal guilt for the crimes of the Nazis.

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41 The formal title of the so-called 1946 "Fulbright Act" was tellingly "Amendment to the Surplus Property Act of 1944". See Dubois, Ibid., p. 56 (footnote 15).

42 Wienand, Ibid., p. 228 (footnote 29).

43 Renner, J. (2012). A Discourse Theoretical Approach to Transitional Justice Ideals: Conceptualising 'Reconciliation' as an Empty Universal in Times of Political Transition. In Palmer, N., Clark, P., & Granville, D. (Eds.), *Critical Perspectives on Transitional Justice* (pp. 51–72). Mortsel; Girelli, G. (2017). *Understanding Transitional Justice: A Struggle for Peace, Reconciliation and Rebuilding*, p. 65 ("most slippery concept of all"). Cham.

44 Bachmann, K. (2008). Die Versöhnung muß von Polen ausgehen: Wenn jeder Kredit, jeder Schüleraustausch, jede politische Handlung zwischen Polen und Deutschland von den Deutschen dem Schlagwort von der Versöhnung untergeordnet wird, wird diese zum Versöhnungskitsch. In die tageszeitung 05 August 1994. Reprinted in Hahn, H. H., Hein-Kircher, H., & Kochanowska-Nieborak, A. Anna (Eds.), *Erinnerungskultur und Versöhnungskitsch, 18* (pp. 17–20). Marburg. The programmatic subtitle of Bachmann´s article loosely translates to "When every loan, every student exchange, every political action between Poland and Germany is perceived as reconciliation by the Germans, then reconciliation becomes reconciliation-kitsch.".

45 Exchanges are often described as a form of citizens` people-to-people diplomacy. See Sustarsic, Ibid., p. 913 et seq. (footnote 10).

Actually, especially long-term exchange programmes promise to be a uniquely apt tool for "thick"[46] international reconciliation.[47] The exchange participants become an active part of the community, chiefly in the case of host family stays. The prosecution of perpetrators following a transition is credited with individualising guilt.[48] The exchange of people humanises nations and thereby similarly avoids that an entire people is vilified. These "micro-processes of transitional justice"[49] might even reach more people in their everyday lives than abstract and distant court trials.[50]

IV. Conclusion

As seen, exchange programmes can foster transitional justice goals. However, is it justifiable to consider them transitional justice instruments alongside prosecutions, amnesties, truth and reconciliation commissions, reparations and the vetting of the public service? The aforementioned continuous expansion of the transitional justice tool kit into a transitional justice warehouse risks diluting the original core.[51] However, this centre should contrarily be consolidated to create a *Vergangenheitsbewältigungsunrecht*, a legal framework for coping with the past that is not subject to the political whim of the transitioning state.[52] Consequently, a bifurcated conception of transitional justice ensues: Transitional justice in a narrow, legal sense contains the original tool kit, while the warehouse of transitional justice in a broad sense includes all instruments that advance a society´s process to contend with its unjust past.[53]

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46 While "thin" reconciliation only provides for the non-lethal coexistence of former enemies, "thick" reconciliation leads to a renewed cooperative community. See Werle, & Vormbaum, Ibid., p. 36 (footnote 3).

47 This thought is far from new, see, e.g., Großmann, K. (1930) Völkerversöhnung und deutsch-französischer Schüleraustausch, Die Friedens-Warte 30 (pp. 42–44). Wang, Z. (2018). *Memory Politics, Identity and Conflict: Historical Memory as a Variable*. Cham. Page 66 notes that the pervasiveness of exchange programmes between former enemy countries can be both a means and a measure for high reconciliation.

48 Werle & Vormbaum,Ibid., Chapter 4 (footnote 2). They cite the International Military Tribunal at Nuremberg: "Crimes against international law are committed by men, not by abstract entities".

49 Tibbitts, & Weldon, Ibid. (footnote 7).

50 Cole, Ibid., p. 121, (footnote 6); Davies, Ibid., p. 335 (footnote 7).

51 Logan, T., & Murphy, K. (2017). Reflections on education and transitional justice: Notes from the field. *Comparative Education*, 53, p. 490 ("[risk to] stretch transitional justice as a field beyond recognition"); *Dixon, P. J.* (2017).Transitional justice and development. In Lawther, C., Moffett, L., & Jacobs, D. (Eds.), *Research Handbook on Transitional Justice* (p. 159 – "if transitional justice starts to mean too much it will in effect come to mean nothing at all"). Cheltenham.

52 Werle, & Vormbaum, Ibid., Chapter 10 (footnote 2).

53 Werle, & Vormbaum, Ibid., p. 12f (footnote 3).

Exchange programmes can therefore belong to transitional justice in the latter, broad sense. Nonetheless, the transitional justice goals are such vast, vague concepts that virtually anything that incidentally touches on peace, democracy, truth, restoration or reconciliation could be deemed transitional justice. This would in turn dilute transitional justice in a broad sense. Hence, not all exchange programmes per se, but only those that – like the ARSP or the Exchange of Persons Program – profess a specific link to an abusive past through their timing, composition or participants should be considered transitional justice instruments. This way, one can identify exchange programmes which deserve a "place at the [TJ] table"[54] in research and practice while avoiding *transitional justice kitsch*.

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54 Cole, Ibid., p. 120 (footnote 6).

Tamar Giorgobiani

Back to the Drawing Board: Symbolic Transitional Justice in Georgia

Some time ago during my travels in Kakheti (Eastern Georgia) I found myself standing in front of a sign with an unusual name: "Street of Joseph Stalin". I discovered that the sign was old; however, the people living in the building were not eager to remove and replace it with the current one. Instead, the old and new signs were hanging next to each other –maybe as a historical symbol, maybe out of sentiments toward the Soviet Union, or maybe because of some other obscure reasons. This fact made me look for more visible remnants from the past regime scattered in the public space as a *lieu de mémoire* or as a visual representation of an unfinished process of transition from the communist rule to a democratic state. Hammer and sickle, Stalin's statues, bas-reliefs, mosaics – the list goes on as we see these symbols still remaining in a few of Georgia's public spaces.

The change did not occur out of the blue: there was a period of the nationalist movement trying to break out of the Soviet Union. Nevertheless, when the political reality of Georgia changed, the visible, tangible, material symbols from the past regime were creating incompatibility with the decommunisation process of the country while at the same time they represented the immediate past, becoming part of Georgia's recent historical memory. Transitional Justice (TJ) processes make sure victims of the violent regime obtain justice and reparations, the truth gets uncovered, and that reforms ensure the path to peace and democracy.[1] However, rethinking, reshaping, and re-evaluating public space, which is often neglected in TJ literature, is also an important factor in healing the wounds and learning the lessons from the past regime.

Overall, Georgia has a belated and an extremely slow-paced TJ process – after 30 years of independence lustration is almost not moving forward, partially due to the destruction of 80 % of

1 *What Is Transitional Justice?: ICTJ*. International Center for Transitional Justice (2021, 22 September). https://www.ictj.org/about/transitional-justice.

the KGB files during the civil war in the 1990s.[2] Little has been done for institutional change and finding a comprehensive approach towards the crimes of the communist regime. However, the toponymic change and removal of the symbols from the public space seem to be more visible and more successful at first glance, therefore, it might play a significant role in symbolic TJ.

Despite the talks about the necessity of TJ measures in the political and professional circles, its legal base came only in 2011 when the *Freedom Charter* was adopted. Besides the emphasis on the lustration process, the Freedom Charter contradicts communist and Nazi propaganda by banishing the symbolic representations of both.[3] However, there are conflicting opinions around this issue – should the symbols of the communist rule be erased or left alone? Inconsistent erasure of communist symbols from Georgia's public space can make one wonder: How effective is the implementation of the Freedom Charter in the process of symbolic TJ in Georgia?

My essay will refer to the symbolic TJ and collective memory frameworks and examine the mechanism of the Freedom Charter and its use by the Georgian state. Moreover, I will address the opinions and the role of civil society in this process with the help of interviews conducted with the representatives of two organisations that are actively taking part in this discussion.

Symbols in Public Spaces and Transitional Justice

The most visible elements – material symbols of the recent past – are not usually in the spotlight of the TJ scholarship, which revolves around high-level issues such as lustration, truth commissions, prosecutions, recognition, and restitution for the victims[4]. Furthermore, the visual symbols of the former regimes are argued not to be a part of the TJ at all, as the understanding and policy toward these symbols are also covered by the collective memory scholarship. These symbols are a part of remembrance or forgetting of the mnemonic communities

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2 *The Overview of the Memory Politics of Georgia* (p. 6). Institute For Development of Freedom of Information, Tbilisi, Georgia (2020, 10 November). https://idfi.ge/public/upload/OSI/ENG%20-%20The%20Overview%20of%20the%20Memory%20Politics%20of%20Georgia.pdf.

3 In this case Georgia seems to resemble other Eastern European countries that are trying to equalise Communist and Nazi experiences on the European level in order to strengthen their belongingness to the European family.
Malksöö, M. (2009). The Memory Politics of Becoming European: The East European Subalterns and the Collective Memory of Europe (pp. 653–680). *European Journal of International Relations*, 15(4) (2009). https://doi.org/10.1177/1354066109345049.

4 Light, D., & Young, C. (2015). Public Memory, Commemoration, and Transitional Justice: Reconfiguring the Past in Public Space. Essay (pp. 233–51). In *Post-Communist Transitional Justice Lessons from Twenty-Five Years of Experience* (L. Stan & N. Nedelsky, Eds.). New York: Cambridge University Press.

and apply to the society as a whole. However, the way of dealing with the material symbols of the past in the public space is also a way to address the victims of the regime and give them justice; it can be a symbolic way of reparation and encouragement of reconciliation.[5] Moreover, the symbolic TJ educates society about the past wrongdoings, contributes to the non-repetition of these crimes, and can serve as a source for an easier transition from dictatorship to democracy. Especially when we are talking about public spaces, they are the main visual stage for systemic transformation, rethinking, and critical assessment of the past regime.

Changing the visual appearance of the public space after a regime change is nothing new. The newly established Soviet Union itself substituted the pre-existing appearance of the public spaces with the variety of symbols associated with communism, with the goal of spreading the propaganda of the regime.[6] With symbolic TJ in the post-communist space, the objective is to treat these symbols in a way that will condemn the Soviet crimes, reclaim and decommunise the public space, as well as bring justice to the ones who suffered from the regime.

However, as mentioned before, the line between the symbolic TJ and collective memory realm is vague, therefore in these endeavours, the post-communist states sometimes try to forget their communist past, but remember the repression and honour the victims[7], which as Light and Young note, can refer to the process of *landscape cleansing*[8]. The term landscape cleansing from the cultural geography scholarship was outlined by Mariusz Czepczynski, who saw public spaces during the times of political transformations as "a battlefield, where buildings and arrangements representing opposing ideas become enemies and rivals, as well as victims and winners".[9] He emphasises the importance of a "cultural landscape" as a product that is engrained in the minds of people, hence the importance of rearranging this space along with the regime changes.[10] Czepczynski named the strategy of landscape cleansing which consists of removal (purging, elimination of the emblems, monuments, etc.), renaming, rededication and

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5 Ibid., p. 236.

6 მახარაძე, ნიკა. "საბჭოური ვიზუალიზაცია ისტორიულ ქალაქში (66–95). ტერორის ტოპოგრაფია საბჭოთა თბილისი,. თბილისი: SovLab, 2017. (Eng: Makharadze, N. [2017]. Soviet visualization in the historical city. (pp. 66–95). Essay in: *Topography of Terror in Soviet Tbilisi*. Tbilisi: SovLab.].

7 Light, D., & Young, C. (2015). Public Memory, Commemoration, and Transitional Justice: Reconfiguring the Past in Public Space. Essay (pp. 233–51). In *Post-Communist Transitional Justice Lessons from Twenty-Five Years of Experience* (L. Stan & N. Nedelsky, Eds.). New York: Cambridge University Press.

8 Ibid., p. 236.

9 Czepczyński, M. (2016). *Cultural Landscapes of Post-Socialist Cities: Representation of Powers and Needs* (p. 109). London: Routledge.

10 Ibid., p. 110.

reuse[11] (such as changing the purpose of or unifying the symbols under an altered narrative). I argue that in the case of Georgia the communist symbols in the public space were mostly dealt with by utilising the first strategy while sometimes even ignoring some of the symbolic occurrences commemorating the Soviet Union. Due to the eradication of the visuals from the public space without a deeper strategy of reusing or rethinking there is not much room left for critical reassessment and healing, which is important for the symbolic TJ.

Freedom Charter and its Implementation

After the fall of the Soviet Union there were talks of Transitional Justice in Georgia. One of Saakashvili's electoral promises was to implement a program "10 steps to freedom" that would de-Sovietise the country and free it from communist propaganda. However, the programme was not implemented and the intensified talks around the legal framework for TJ were only re-activated after the 2008 Georgia-Russia war.[12] One of the main events regarding the symbolic representations of the communist regime occurred shortly before the adoption of the Freedom Charter, when the statue of Stalin was removed from his birthplace in Gori in the middle of the night. The secrecy in which this occurrence took place showcases the existing controversy regarding the Soviet symbols, especially in light of the cult of Stalin in Georgia, which as the essay will show, resurfaced later with the return of Stalin's statues and images in public spaces.

Finally, in 2011, the Freedom Charter was adopted, which besides the lustration process and addressing the symbols, places these issues in the broader state security element. Article 1 outlines that the law intends to:

> *"Eliminate the threat of crimes against the state, and terrorism and violation of the principles of state security; ensure the effective exercise of the legislative norms of Georgia and strengthen national security in accordance with modern practices; provide preventive measures against the principles of communist totalitarian and national socialist (Nazi) ideologies; remove the symbols and names of cult buildings, memorials, monuments, bas-reliefs, inscriptions, streets, squares, villages and settlements*

11 Ibid., p. 115.

12 Vacharadze, A. (2018). *Regime Archives in Georgia.* IDFI. http://www.idfi.ge/archive/?cat=read_topic&lang=en&topic=141.

> *of the communist totalitarian regime, as well as prohibit the propaganda instruments and other means of communist totalitarian and national socialist (Nazi) ideologies".*[13]

For the implementation of these purposes a special commission was created within the State Security Service of Georgia, members of which should have also been from factions of the Parliament of Georgia. With regard to symbols in public space, the commission was obliged to collect the information on the use of communist totalitarian (as well as Nazi[14]) symbols on the state or local government property and gather the information about the above-mentioned typology of the symbols and toponyms in public spaces. In case of use of the symbols, the commission would have to address a competent person in order to eliminate the symbols, memorials, bas-reliefs, inscriptions and names of communist totalitarian and national-socialist ideologies.[15] If the competent person fails to eliminate these symbols, they will be given a warning and afterward a GEL 1000 fine.[16]

One of the elements by which the effectiveness of the Freedom Charter can be assessed is the *activity* and *visibility* of the commission's work. It is to be noted that the first meeting of the Freedom Charter Commission took place only in 2014, three years after the adoption of the law.[17] Moreover, at the beginning it was obligated to meet once in three months, yet in 2015 this order was annulled. According to *Order №115 of the State Security Service* issued on 21 December 2015, a new commission was created without a need for the minimal number of commission gatherings.[18] However, according to the public information from the State Security Service collected by the Institute for Development of Freedom of Information (IDFI) during the years 2016–2019, not a single meeting of the commission was held.[19] Moreover,

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13 *Freedom Charter, Law of Georgia No 1867 of 25 December 2013*. https://matsne.gov.ge/ru/document/download/1381526/8/en/pdf.

14 For the purposes of this essay, considering Georgia's transition from the communist regime, I will only focus on the communist symbols.

15 *Freedom Charter, Law of Georgia No 1867 of 25 December 2013*. https://matsne.gov.ge/ru/document/download/1381526/8/en/pdf.

16 *The Overview of the Memory Politics of Georgia* (p. 6). Institute For Development of Freedom of Information, Tbilisi, Georgia (2020, 10 November). https://idfi.ge/public/upload/OSI/ENG%20-%20The%20Overview%20of%20the%20Memory%20Politics%20of%20Georgia.pdf.

17 "შსს-ში „თავისუფლების ქარტიის' კანონით განსაზღვრული კომისიის პირველი სხდომა გაიმართა." საქართველოს შინაგან საქმეთა სამინისტრო. (Eng: *The first meeting of the Freedom Charter took place in the Ministry of Internal Affairs*) Ministry of Internal Affairs (2014, 28 May). Retrieved 30 September, 2021, from https://police.ge/ge/shss-shi-/6660.

18 *Failed Lustration Process in Georgia*. IDFI (2016, 25 January). Retrieved 30 September, 2021, from https://idfi.ge/en/failed-lustration-in-georgia.

19 *Evaluation of the Work of the Freedom Charter Committee in 2017–2019*. IDFI (2020, 25 December). Retrieved 30 September, 2021 from https://idfi.ge/en/the_assessment_of_the_work_of_the_freedom_charter_commission_in_2017–2019.

the content-related problem has to be highlighted. During the interview with the head of the Memory and Disinformation Studies Direction at IDFI, Anton Vacharadze, he underscored the ambiguities of the commission's approach of dealing with the communist symbols. According to him, among other things, it is not clear how the commission determines which toponyms to change: Do they record only the most infamous people from the communist regime, or also anyone or anything that had to do with the Soviet Union? Overall, the *methodologies* by which the commission operates are extremely vague.[20] The *work intensity* is also significantly low, which is not a surprise considering the record of the meetings held by the commission. However, before the pandemic in 2020 it intensified its work and in 2017–2019 issued 37 orders addressing competent people to eliminate communist symbols.[21] Nevertheless, according to Vacharadze, they did not answer the letter of IDFI asking about the exact symbols and places on which the commission had been working. It seems that their work only exists on paper and there is no concrete information about the how the commission fulfils its duties.

Another evaluation element, which plays a key role in the effectivity of the Freedom Charter and its commission can be tied with the above-mentioned theoretical concept of *landscape cleansing,* namely their *strategy* towards addressing the communist symbols in public spaces. As the Freedom Charter states, it aims to *eliminate* the communist totalitarian symbols[22], which is the first strategy of addressing the symbols of the past regime. However, it needs to be asked how effective symbolic TJ can be when the symbols of the past crimes are being solely removed. To what extent does it bring justice and symbolic rehabilitation for the victims of the totalitarian regime? Is it an attempt to completely erase the communist trace in the public space, or just a superficial approach to the rethinking of public space? Irakli Khvadagiani, researcher and chairman of the Board of the Soviet Past Research Laboratory (SovLab) mentioned during our interview, that only physically eliminating these symbols would not erase the trauma that still lingers in the subconsciousness of the generation that lived through the Soviet rule. Therefore, by simply removing them, society could not fully grasp why the state was fighting these symbols. He highlights the experiences of other post-Soviet countries that found alternative ways of cleansing the public space from the communist symbols, such as giving these places and

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20 Interview with Anton Vacharadze, Head of Memory and Disinformation Studies Direction at the Institute for Development of Freedom of Information. https://idfi.ge/en/team/view/66.

21 The increased number of the warnings toward the competent persons: 0 cases in 2017, 5 cases in 2018 and 32 cases in 2019. From: *Evaluation of the Work of the Freedom Charter Committee in 2017–2019*. IDFI (2020, 25 December). Retrieved 30 September, 2021, from https://idfi.ge/en/the_assessment_of_the_work_of_the_freedom_charter_commission_in_2017–2019.

22 *Freedom Charter, Law of Georgia No 1867 of 25 December 2013.* https://matsne.gov.ge/ru/document/download/1381526/8/en/pdf.

symbols an educational role in teaching about the inhumanity of the Soviet regime and achieving TJ goals.[23] Anton Vacharadze shared a similar view regarding *landscape cleansing*, and underlined the importance of maintaining a balance between the eradication of Soviet symbols and maintaining the historic and cultural objects. According to Vacharadze, the removal and destruction of the monuments, statues, bas-reliefs caused even more controversy (in the light of destruction of cultural artifacts). Solely erasing symbols without a discussion with the society brought about the countermeasures from some people with the erection of illegal monuments of Stalin, officially demanding the return of Stalin's central monument in Gori, etc.[24] Between 2012 and 2019, these individuals resurrected Stalin monuments in public spaces in several locations. Every now and then there is a disagreement between the people who share Soviet sentiments and the ones who condemn the communist regime, like in 2013, when a campaign of "vandalising" Stalin statues in Georgia with paints (image 1) took place.[25] However, the state sometimes ignores the Freedom Charter and lets a communist monument – such as Stalin's monument in the East Georgian village of Upper Alvani – stand without any critical intervention, reusing or reshaping, leaving less space for the reconciliation of society.

Image 1: Stalin's statue in Chokhatauri

With regard to the inaction of the state and the inefficiency of the Freedom Charter and its Commission, the issue of the Soviet symbols sometimes gets activated among the broad society in relation to a certain event, often assisted by actions from the NGO sector. An example is the commemoration of Victory Day on the 9th of May: In the past few years, pro-communist

23 Interview with Irakli Khvadagiani , Researcher and chairman of the Board of the Soviet Past Research Laboratory. http://sovlab.ge/en/about.

24 Interview with Anton Vacharadze.

25 წულაძე, ზაზა „სტალინის 50 ძეგლი, რომელიც უნდა შეღებო, სანამ ცოცხალი ხარ. სტალინის 50 ძეგლი, რომელიც უნდა შეღებო, სანამ ცოცხალი ხარ (Eng: Tsuladze, Z. [2017, June 2]. *50 statues of Stalin that you must paint while you are alive*). Retrieved 30 September, 2021, from https://www.amerikiskhma.com/a/georgia-stalin-vandalism/1600958.html. Source of Image 1: Ibid.

groups along with people with Soviet sentiments gather and depict the communist symbols heroically – pictures of Stalin, red flag, etc. in public spaces, despite these being prohibited by the Freedom Charter (image 2[26]). However, other than a few warnings, the State Security Office has not interfered with these temporary visual revivals of Soviet memory. Nevertheless, there is another layer to this story: The representation of communist symbols is regarded as a creation of common Soviet collective memory, which serves as a part of Russian soft power. Given that most of the organisers of such events are also openly pro-Russian, some civil society organisations and activists are contradicting the public use of Soviet symbols as a measure against Russian domination. Mostly these confrontations play out in the Russia vs. West discourse, when one side depicts the symbols associated with the Soviet Union while other displays European ones.

Image 2: Victory Day commemoration

Irakli Khvadagiani also sees the active role of the civil society organisations in rethinking the Soviet regime and addressing the trauma of the society as a whole. Civil society actors try to raise awareness about these issues among the society; some of them also try to assist the state with the research in order to better address TJ processes. During the interview, Anton Vacharadze mentioned IDFI's research about the still remaining Soviet toponyms in Georgia, which they sent for the Freedom Charter Commission – without receiving any feedback.

Conclusion

The totalitarian regime has left scars on the architectural and symbolic appearance of the public space that must be remade to support political renewal while avoiding nostalgic and

26 Source of Image 2: ხერხეულიძე, ლევან. "ფოტო: 9 მაისი - პუტინის უკვდავი პოლკი' თბილისში და ანტისაოკუპაციო მოძრაობა. ლიბერალი (Eng: Kherkheulidze, L. (2019, 9 May) Photo: Putin's Immortal Regiment in Tbilisi and the anti-occupation movement. Liberali. Retrieved 30 September, 2021, from http://liberali.ge/photos/view/1185/foto-9-maisi--putinis-ukvdavi-polki-tbilisshi-da-antisaokupatsio-modzraoba.

tabula raza approaches.27 In Georgia, there are some steps taken in the memorialisation process, such as opening the Museum of Soviet Occupation in Tbilisi, which aims to "restore the memory" of the Soviet/Russian occupation.28 However, in the framework of the Freedom Charter, public spaces are still left with invisible or visible scars that have not been addressed and reshaped in order to make the proper transition from a totalitarian to democratic public space. The Freedom Charter seems to be on paper only – it failed to create a functioning commission until now, which would have to focus on the TJ process in Georgia. Regarding the communist symbols, it failed to do more than just a partial cleansing of the visuals from the totalitarian past and did not try to suggest reshaping these symbols in a way that would achieve symbolic TJ – symbolic rehabilitation for the victims, confrontation with and separation from the past crimes while achieving the revamping of the public space in the collective memory of the traumatised society through learning more about the recent past. The state neither tried to work alongside the civil society and professional circles nor initiated any discussion in society around the topic of the communist symbols. It also did not consider various successful practices from Eastern Europe regarding critical and educational reclaiming of public space. To also add the concerns of both of my respondents – the Freedom Charter was supposed to be central in the lustration process, which almost did not take place in Georgia due to a handful of reasons.29 Therefore, "the Charter of Freedom is a law with broken wings"30 since it does not move forward the process of TJ in Georgia. The law has become almost exclusively focussed on the symbolic realm (yet as discussed with serious flaws) and completely lost sight of the "elephant in the room"– failed lustration, victim reparation, etc., which impedes the democratic transition of society. However, symbolic TJ cannot be very effective without addressing these problems.

The street sign named after Stalin is probably still hanging on that building, but the main point is whether or not it will be used as a source of public education and rethinking. The Freedom Charter is an example of visuals really garnering the most attention (with the help of the political will), overshadowing other gravely important areas of TJ, while simultaneously shedding light on its current failure to take root in Georgia.

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27 Mihai, M. (2018). Architectural Transitional Justice? Political Renewal within the Scars of a Violent Past. *International Journal of Transitional Justice*,12(3), pp. 515–536. https://doi.org/10.1093/ijtj/ijy019.

28 *Narrative of Soviet Occupation: Politics, Memory, Identity* (2021, 10 March). IDFI. Retrieved 30 September, 2021, from https://idfi.ge/ge/narrative_of_soviet_occupation_politics_memory_identity.

29 Destructed documents of secret collaborators, lack of political will, etc.

30 Interview with Irakli Khvadagiani.

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Mateusz Grabarczyk

Reform of the judiciary and judges' responsibility after 1989 in Poland

Introduction

The situation in Poland has been discussed by the global legal community and been the subject of widespread public opinion, after having undergone several legislative changes since 2015, especially reforms related to shifts in the relations among the three branches of the government considering the separation of powers principle. Undermining the balance of powers at the expense of the judiciary has become the basis for the claim that Poland is dealing with a constitutional crisis[1] or anti-constitutional populist backsliding[2].

At a time of constitutional crisis, many legislative changes (which raise fundamental doubts from a legal perspective) have been argued on the grounds of transitional justice.[3] The current constitutional crisis in Poland is partly attributable to the leniency with which Poland has dealt with such issues in the past.[4] This was a pretext for the fundamental shift in the relations among the powers within the *trias politica* model. The changes introduced by the government significantly altered the personal composition of the Constitutional Tribunal (CT), the Supreme Court (SC), and the National Council of Judiciary (Polish: *Krajowa Rada Sądownictwa,* hereinafter: KRS), and expanded the powers of the Ministry of Justice concerning ordinary courts. According to the official statement of purpose accompanying the bills implementing these

1 Krotoszyński, M. (2019). Transitional Justice and the Constitutional Crisis: The Case of Poland (2015–2019). *Archiwum Filozofii Prawa i Filozofii Społeczne* (Eng: *Journal of the Polish Section of IVR*), 3, pp. 22–39.

2 Sadurski, W. (2019). *Poland's Constitutional Breakdown* (pp. 14–34). It should be noticed, that as Holesch & Kyriazi indicated, there are different fields of research examine advancing dangers to democratic systems worldwide, referring to this process also as "democratic backsliding", "democratic deconsolidation", "de-democratisation" or "autocratisation". See Holesch, A. & Kyriazi, A. (2021) Democratic backsliding in the EU: the role of the Hungarian-Polish coalition. *East European Politics.*

3 Poselski projekt ustawy o Sądzie Najwyższym. Druk nr 1727, VIII kadencja Sejmu (Eng: SC Act MPs' Bill. Form No. 1727, 8th Term of Sejm). Retrieved on 15 September, 2021, from http://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=1727.

4 Matczak, M. (2018). *Poland: From Paradigm to Pariah? Facts and Interpretations of Polish Constitutional Crisis*, pp. 9–12. https://ssrn.com/abstract=3138541.

changes, SC judgments "are formally legally appropriate, but are far from being just".[5] The lack of retribution relative to the judges was indicated as the main reason for this "injustice".[6]

This has reignited discussions about the transitional justice model that was used in the past. This essay aims to analyse and reconstruct a descriptive model of transitional justice measures applied to the judiciary in Poland after the fall of communism and its impact on the country's current legal and political situation. It also aims to answer whether there was indeed a lack of transitional justice measures implemented concerning judges. It examines the legal steps that Poland has taken by 2015 in the areas of judiciary reform and the liability of judges, considering judges and their level of importance in the social and political transition of the country.

Models

To preface this article by talking about the elements of a model, I would first like to refer to a general typology of models. A model can be defined as an intentionally simplified image of a fragment of reality[7]. Models can be divided into descriptive models, which capture the essential features of the characterised reality in a simplified way, and normative models, which indicate how a reality should look like through a certain outline[8]. In this paper, I seek to capture the elements of a descriptive transitional justice model[9] regarding judges in Poland after 1989; hence, normative models will not be explored in depth in this article. Descriptive models can reproduce the presented reality in various ways. In this paper, the basis for distinguishing particular elements of the model is the historical material presenting past dealings concerning the judiciary in Poland after 1989, especially the shaping of the legal regulation. Therefore, the basis for its determination will be a specifically applicable law.

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5 Poselski, Ibid., p. 84.

6 The statement of purpose provided a list of eleven judgments that the MPs deemed especially unfair: seven concerning transitional justice, including five regarding lustration.

7 Nowak, L. (1974). O jednorodności pojęcia modelu (Eng: *On the homogeneity of the model concept*), *Neodidagmata*, 6, p. 61.

8 See, e.g.: Wróblewski, J. (1988). *Sądowe stosowanie prawa* (Eng: *Judicial application of the law*) (p. 37). Warsaw; I. Dąmbska (Ed.) (1962). *Dwa studia z teorii naukowego poznania* (Eng: *Two studies in the theory of scientific cognition*) (pp. 21–25. Toruń; Krotoszyński, M. (2017). *Modele sprawiedliwości tranzycyjnej* (Eng: *Models of Transitional Justice*) (pp. 14–19). Poznań.

9 For more about transitional justice models, see, e.g.: Krotoszyński, M., Ibid.; Krotoszyński, M. (2013). The Transitional Justice Models and the Justifications of Means of Dealing with the Past. *Oñati Socio-legal Series* 3, pp. 584–606 (and literature indicated there).

Elements of the Polish model

The analysis of legislation, literature and jurisprudence indicates that we can observe seven essential layers within the model of judiciary reform and judges' accountability in Poland after the fall of communism: 1) the establishment of the KRS, 2) the SC reform, 3) setting a retirement age of 65, 4) reviewing judges' state of retirement, 5) lustration, 6) disciplinary sanctions, and 7) criminal sanctions. The activation of each depended on the judicial community itself. Each of these will be discussed in detail.

The KRS

One of the main elements of the "Round Table talks"[10] and subsequent judiciary reforms was creating the KRS. The KRS was established in 1989[11] as a body that guards the independence of judges and the courts[12]. The tasks of the KRS included: examining candidates for the positions of judges, including the SC; determining the overall number of members of disciplinary courts; reviewing retired judges and those who wished to continue ruling after reaching the age of 65; expressing opinions on certain matters, such as the principles of judicial ethics, or changes to the courts system.[13] Thus, the establishment of the KRS was crucial to the other layers.

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10 The transfer of power from communist regimes, which started with Poland's first (semi-free) election on 4 June 1989 and ushered in Europe's first post-communist government, had a snowball effect in other countries. With the exception of Romania, the transfer of power was peaceful and based on agreements usually called "round table talks." See, e.g.: Elster, J. (ed.) (2006). *Round Table Talks and the Breakdown of Communism*. Chicago.

11 By the Act of 20 December 1989 on the National Council of the Judiciary (Polish title: ustawa z dnia 20 grudnia 1989 r. o Krajowej Radzie Sądownictwa, Dz.U. 1989 nr 73 poz. 435).

12 Going back to the arrangements of 1989, it can hardly be said that the constitutional position of the KRS was well thought out and finally shaped. There were criticisms, for example, of the way the law was passed, which omitted consultations with judges, and there was also a danger that the KRS could become a body guided exclusively by professional solidarity. However, neither the position of the KRS was not questioned in essence (not until 2015), nor was its deconstitutionalisation postulated, which is confirmed by the extensive scope of regulations concerning this body contained in the Constitution currently in force. See, e.g.: Tuleja, P. *Konstytucyjny status KRS* (Eng: *Constitutional status of the KRS*), (pp. 61–62); Stych, M. KRS (Eng: The KRS), (pp.18–19).

13 Article 2(4) of the Act of 20 December 1989 on the National Council of the Judiciary.

The SC reforms

The most significant changes that were introduced concerning the SC in 1989[14] were the elimination of the five-year term of office and the introduction of non-removability of SC judges, supposedly aimed at strengthening their independence. The five-year terms for incumbent SC judges were shortened and ended on 30 June 1990. The new composition of the Court was appointed by the President of the Republic of Poland on 4 June 1990 on the motion of the KRS, which, as previously mentioned, was tasked to consider candidates for judicial posts. It was thus a reappointing process, in that the existing judges were removed, and a competition was held in which both existing judges and new candidates could apply. Those who entered were subjected to a detailed analysis of their behaviour, attitude, and their previously written jurisprudence in the People's Republic of Poland.

According to official data, a total of 57 judges were appointed to the four chambers of the SC, including 22 judges from the previous tenure-track composition of the Court[15]. This fact (despite their positive vetting), as well as the word of the First President of the SC, Adam Strzembosz, that the judges would "purify" themselves[16], which did not happen on a global scale, was later used in the populist narrative to support changes in the judiciary[17].

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14 Act of 20 December 1989 amending the Acts – Law on the System of Common Courts, on the SC, on the Supreme Administrative Court, on the CT, on the System of Military Courts and on the Law on Notaries. (Polish: ustawa z dnia 20 grudnia 1989 r. o zmianie ustaw – Prawo o ustroju sądów powszechnych, o Sądzie Najwyższym, o Naczelnym Sądzie Administracyjnym, o Trybunale Konstytucyjnym, o ustroju sądów wojskowych i Prawo o notariacie, Dz.U. 1989 nr 73 poz. 436).

15 Retrieved on 14 September, 2021, from https://www.sn.pl/osadzienajwyzszym/SitePages/Historia.aspx.

16 Rigamonti, M. (28 July 2017). Interview with Strzembosz, A (Czy ja też jestem komunistycznym złogiem (Eng: Am I also a communist scrap?). *Dziennik Gazeta Prawna* (Eng: *Daily Legal Newspaper*). Retrieved on 14 September, 2021, from https://tinyurl.com/Strzebosz.

17 In many interviews, Minister of Justice Zbigniew Ziobro, who signs the post-2015 changes in the justice system in Poland, has repeatedly indicated that the need for change is due to the lack of accountability of judges, for which Adam Strzembosz is primarily responsible: "I will remind that Prof. Strzembosz was responsible for the Polish justice system in the early 1990s. (...) and then he made a solemn commitment, a promise to all Poles that the judiciary would purify itself. (...) So I ask Prof. Strzembosz whether you have accounted for this commitment that the justice system will account for itself? Because one can say that these words put Polish democracy to sleep. Since Prof. Strzembosz has not fulfilled his honorary obligations, has not answered for his words, since the judiciary has not solved its problems which are growing, it is the task of the democratic authorities, which obtain a democratic mandate, to fulfil their electoral obligations and carry out a reform". See Ziobro: Strzembosz nie wywiązał się z obietnicy samooczyszczenia *środowiska sędziowskiego* (Eng: Ziobro: Strzembosz did not fulfil his promise of self-purification of the judiciary) (18 September 2019). *TVP Info*. Retrieved on 14 September, 2021 from https://tinyurl.com/6stav3da.

Applications by judges over 65 to continue adjudication

As an element of judges' "self-purification," the KRS rejected applications from judges to whom it had some reservations about being allowed to continue serving after reaching the retirement age (65). From 1990–2000 alone, it refused 511 judges[18] for this reason.

Judges' state of retirement

The next stage concerned judges who were already retired and no longer adjudicating. A law was introduced authorising the KRS to deprive certain judges of retired status (certain pension privileges).[19] This covered judges who served during the Stalinist era in specific courts and departments, which under the amendment were deemed to be organs of repression. Thus, the mechanism of collective responsibility was applied; judges were not verified individually but sanctioned based on their organisational affiliation. Until the KRS dealt with this matter in 2009, 63 persons were deprived of their pension benefits, including 42 judges and 21 family members of deceased judges.[20]

Lustration

In general, *lustration* means "the screening of persons seeking to occupy (or actually occupying) certain public positions for evidence of involvement with the communist regime".[21] It

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18 *Odpowiedź na kompendium Białej Księgi ws. reform polskiego wymiaru sprawiedliwości* (Eng: *Answer to White Paper on the Reform of the Polish Judiciary*). Polish Judges Association (Iustitia), Warsaw 2018, p. 3. Retrieved on 15 September, 2021, from https://tinyurl.com/6drxt6p2.

19 Article 7 and 8 of the Act of 17 December 1997 amending the Act – Law on the System of Common Courts and Certain Other Acts (Polish title: Ustawa z dnia 17 grudnia 1997 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw; Dz. U. 1998 nr 98 poz. 607).

20 See: *Answer to White Paper on the Reform …*, p. 3. See also: Siedlecka, S. (26 Sept 2016). Jak to sędziowie się samooczyszczali (Eng: How the judges self-purified). *Gazeta Wyborcza* (Accessed on 14 September 2021).

21 Sadurski, W. (2005). *Rights before Courts. A Study of Constitutional Courts in Post-Communist States of Central and Eastern Europe* (p. 245). Dodrecht. Adam Czarnota distinguishes three possible understandings of the concept of lustration: "1) a procedure conducted by authorised institutions, consisting of checking the candidates for some position in the state, from the point of view of their security credentials broadly conceived (classical vetting); 2) a process of making public the names of people who consciously and secretly collaborated with the organs of the secret services; and 3) a procedure making possible the elimination from public life, for some time, of groups of people who in the past occupied some position in the state and/or communist party apparatus." See: Czarnota, A. (2016) Decommunisation and Democracy: Transitional Justice in Post-Communist CEE. In. S. Eliaeson et al. (Eds.) *After the Soviet Empire: Legacies and Pathways* (pp. 167–168). Leiden.

is impossible to reconstruct a universal meaning of the term lustration, as it depends on the specific problems of the country concerned.[22] Thus, it is necessary to indicate the key elements of the Polish model of lustration. To determine the specifics of lustration in a given country, it is crucial to establish a criterion for lustration that determines the nature of the sanction that can be applied.

Until the 1997 lustration law was passed, the criterion for lustration was the fact of association with the regime. Under the 1997 lustration law, the criterion became the truthfulness of the lustration declaration. In terms of sanctions, before 1997 the only sanction was disclosure of information regarding the fact of collaboration with the regime's services. Since the entry into force of the lustration law on 11 April 1997, the consequence of a false lustration declaration was the loss of office or position, the publication of information about the negative lustration, and the loss of the attribute of impeccable character for 10 years, which is needed to hold numerous positions and practice certain professions.[23]

Thus, in Poland, lustration was based on the fact of punishing false lustration declarations and not work or cooperation. The dominant sanction in Polish lustration is the penalty of loss of office and a ban on holding public office, supplemented by disclosure of information about work in the security organs.

Therefore, judges have been submitting lustration declarations for over a dozen years (since 1998). In these documents, they must disclose whether they were collaborators with the secret services during the communist era. Submitting a false lustration declaration can lead to disciplinary proceedings and result in the dismissal of a judge. Article 180(2) of the Constitution[24] introduces certain exceptions from the principle of non-removability of judges. According to the case law of the SC[25], a ruling of the lustration court declaring a judge as having made an untruthful lustration declaration is tantamount to the judge losing their integrity, which also

22 Czarnota, Ibid., p. 167.

23 Krotoszyński, M. (2014). *Lustracja w Polsce w świetle modeli sprawiedliwości okresu tranzycji* (Eng: *Lustration in Poland in the light of transitional justice models*) (pp. 127–131). Warsaw.

24 The Constitution of the Republic of Poland of 2 April 1997 (Polish title: Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997; Dz.U. 1997 Nr 78, poz. 483 ze zm.).

25 See, e.g., judgment of the SC of 17 May 2005 (SNO 22/05).

means losing the qualifications required of a person serving as a judge[26]. In view of this, the SC held that the only disciplinary penalty that should be imposed by the Disciplinary Court in such cases is the removal of a judge from office.

Disciplinary sanctions

Another element of the model was the introduction of an additional (to regular one[27]) premise of judges' disciplinary responsibility. New provisions were introduced and remained in force from 1998 to 2002[28]. These concerned the disciplinary liability of judges who had compromised judicial independence:

"...in the years 1945–89, by ruling in trials that were a form of repression for activities related to independence, politics, defence of human rights, or exercise of fundamental human rights, betrayed judicial independence or for other reasons made manifestly unjust rulings, restricted the rights of the parties, or groundlessly excluded the public of the trials" or "while performing managerial functions in judicial administration or political organizations, violated judicial independence by influencing other judges in individual cases".[29]

The injured parties, Minister of Justice, KRS, and presidents or colleges of courts at each level could file motions against the concerned judges before the disciplinary court. After 31 December 2002, the period of the statute of limitations in disciplinary proceedings concerning judges who had adjudicated in the above-mentioned trials had lapsed. The only punishment provided then was expulsion from judicial service, to be decided by the disciplinary court.

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26 Article 61(1) of the Act of 27 July 2001 – Law on the Common Court System (Polish title: Ustawa z dnia 27 lipca 2001 r. - Prawo o ustroju sądów powszechnych, Dz. U. Nr 98, poz. 1070 ze zm.); former Article 53 of the Act 20 June 1985 on Law on the Common Court System (Polish title: Ustawa z dnia 20 czerwca 1985 r. Prawo o ustroju sądów powszechnych, Dz.U. 1985 nr 31 poz. 137).

27 Article 80 et seq. of the Act 20 June 1985 on Law on the Common Court System.

28 Act of 3 December 1998 on disciplinary responsibility of the judges who disobeyed judicial independence in the years 1944–1989 (Polish title: Ustawa z dnia 3 grudnia 1998 r. o odpowiedzialności dyscyplinarnej sędziów, którzy w latach 1944-1989 sprzeniewierzyli się niezawisłości sędziowskiej, Dz. U. 1999, Nr 1, poz. 1). The act was the third such attempt at dealing with the perceived problem of functioning in the new systemic reality of judges, who during the communist era were regarded as "dispositive" to the authorities of the day. The previous two were repealed by CT. The first was deemed to be inconsistent with constitutional guarantees of independence and stability of the judicial office. See: Judgement of the CT of 9 November 1993 (K 11/93). In the second attempt, the CT overturned the provisions relating to disciplinary proceedings for formal reasons (failure to consult the KRS). See: Judgment of the CT of 24 June 1998 (K 3/98).

29 Article 1(1) and 1(3) of the Act of 3 December 1998.

Several hundred applications were filed. Thirty cases involving 48 judges were submitted to the disciplinary court at the SC.[30] Four judges were tried, only one of whom was found guilty and ordered to be expelled from the profession by revoking his pension rights as a judge.[31]

Criminal sanctions

Another layer was criminal liability for judicial crimes, meaning deliberate and unlawful prosecution and punishment. This issue is the most politically charged and most often used in the context of criticism and to support the need for reforms, which contributed to the democratic backsliding.

In this regard, the matter centred around two categories of judges: 1) those who made political judgments during the Stalinist period, and 2) those who applied retroactive criminal law during martial law. No judge in the first group has been held accountable[32]. However, especially because of the inexorable passage of time, the issues of the second group continue to be a controversial element of public debate in Poland.

The issue of prosecutions was dealt with by *The Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation* (in Polish: *Instytut Pamięci Narodowej – Komisja* Ścigania *Zbrodni przeciwko Narodowi Polskiemu*; hereinafter IPN), established in 1998. It was mainly concerned with those who applied the decree of martial law[33] to acts prior to the date of its publication in the official journal (18 December 1981); in other words, prior to coming into force. The decree itself stated that it was effective retroactively from 13 December.

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30 Kozielewicz, W. (2012). *Odpowiedzialność dyscyplinarna sędziów, prokuratorów, adwokatów, radców prawnych i notariuszy* (Eng: *Disciplinary responsibility of judges, prosecutors, advocates, attorneys at law and notaries public*) (pp. 156–167). Warsaw.

31 *Judgment of the SC – Disciplinary Court of 17 May 2005 (SNO 10/07).*

32 Kulesza, W. (2013). *Crimen laesae iustitiae. Odpowiedzialność karna sędziów i prokuratorów za zbrodnie sądowe według prawa norymberskiego. niemieckiego. austriackiego i polskiego* (Eng: *Crimen laesae iustitiae. Criminal responsibility of judges and prosecutors for judicial crimes under Nuremberg. German. Austrian and Polish law*) (pp. 505–506). Łódź. In this book, the author discusses inter alia the attempts to hold criminally accountable the judges responsible for convictions in political trials during the Stalinist period and during martial law in Poland.

33 The Decree of 12 December 1981 on martial law (Polish title: Dekret z dnia 12 grudnia 1981 r. o stanie wojennym, Dz.U. 1981 nr 29 poz. 154).

In this context, the SC's resolution is crucial.[34] In this famous resolution[35], the SC stated that in the absence of a prohibition in the Constitution of the People's Republic of Poland to create penal provisions with retroactive effect and the non-existence of a mechanism to control the compliance of statutory provisions with the Constitution or international law (...), courts adjudicating criminal cases for crimes under the martial law decree (...) were not exempt from the obligation to apply retroactive penal provisions of statutory rank. Following the issuance of this resolution, the SC has rejected the IPN's motions to waive the immunity of judges.

In 2010, at the request of the Ombudsman, the CT held[36] that the provision underlying the rejection of such requests and the adoption of the resolution by the SC could not be the basis for an abstract ruling but added that each case must be considered individually (*in casu*). However, the CT noted that it did not serve to derogate the SC resolution because there is no legal basis for doing so. As a result, the resolution continues to operate and de facto prevents attempts to hold judges accountable, which *nota bene* does not even occur for various reasons.

In response to this ruling, the SC, in another resolution[37], stated that the CT judgment could not lead to a derogation of the SC resolution (I KZP 37/07).

In turn, the CT held[38] that the decrees were incompatible with the principle of legalism under Article 7 of the Constitution of the Republic of Poland, in conjunction with Article 31(1) of the Constitution of the People's Republic of Poland[39], and the *lex retro non agit* principle under Article 15(1) of the ICCPR[40]. However, the *Constitutional Tribunal* stressed that the judgment (...) does not retroactively undermine their binding force in the period when these acts were in force and applied. The ruling does, however, allow the resumption of criminal proceedings in which the repressive law provisions contained in the challenged decrees were applied. However, in the SN resolution (SND 1/15) already indicated, it was found that there was no (...) indication that the above ruling would have had any impact on the possibility of holding responsible

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34 Judgment of the SC of 20 December 2007 (I KZP 37/07).

35 Famous for the number of critical glosses; see, among others, Zajadło, J. (2008). *Pięć minut antyfilozofii antyprawa*. Glosa do *uchwały SN* z *dnia 20 grudnia 2007, r*. I *KZP* 37/07 (Eng: *Five minutes of anti-philosophy of anti-law. Resolution of the SC of 20 December 2007, I KZP 37/07*), Gdańsk.

36 Judgement of the CT of 27 October 2010 (K 10/08).

37 Resolution of the SC 7 July 2015 (SND 1/15).

38 Judgement of the CT of 16 March 2011 (K 35/08).

39 Constitution of the Polish People's Republic of 22 July 1952 (Dz.U. z 1976 r. Nr 7, poz. 36).

40 International Covenant on Civil and Political Rights (Polish title: Międzynarodowy Pakt Praw Obywatelskich i Politycznych), New York, 16 December 1966 (Dz. U. z 1977 r. nr 38, poz. 167).

(...) the judges who applied, during the period in which they were in force, the provisions of normative acts declared *ex post* to be unconstitutional.

Voluntary resignation

It is hard to characterise judges' voluntary resignations as an element of the model. However, because of the direct impact on the whole model and its evaluation, I have decided to extract this element, as I believe that it should not be disregarded that many judges voluntarily left the profession from fear of receiving a negative assessment during the vetting process. There is no official data on how many of them left, but it is probable that many disgraced judges did.[41] For obvious reasons, elements of the model such as vetting, review after turning 65, and disciplinary sanctions could not be applied to them. However, criminal sanctions and an administrative sanction in the form of review of their retirement status are still possible.

Model considerations

Merely presenting the specific elements of the model would be of little cognitive value. Hence, it is necessary to summarise synthetically the information presented above.

It should be stated with full conviction that the thesis that there was no transitional justice measure that dealt with the difficult communist past in the judiciary of Poland after 1989 is false.[42] In fact, from the very beginning, legislative action after 1989 indicated a desire to reform the judiciary in the context of the requirements of the rule of law and in relation to the responsibility of judges about the application of the retribution model, subjected to punitive measures (sanctions) with elements of the historical clarification model (disclosure of the connections between the individuals and the past government).[43] Judicial review was conducted, but had numerous imperfections, having been carried out in various ways with varying results.

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41 Similarly to another reappointment process conducted in Poland after 1989, namely the vetting of security services, see: Grabarczyk, M. (2021). Pasikowski's Pigs as an Illustration of Vetting in a Transitional Society (p. 109) *Archiwum Filozofii Prawa i Filozofii Społecznej* (Eng: *Journal of the Polish Section of IVR*), 1; Kozłowski, K. (2010). Rewolucja po polsku (Eng: Revolution in Polish) (p. 14). *Przegląd Bezpieczeństwa Wewnętrznego* (Eng: *International Security Review*).

42 This is the official position of the Polish government. See: *White Paper on the Reform of the Polish Judiciary* – 2018 (pp. 13 et seq.). The Chancellery of the Prime Minister. Warsaw.

43 Krotoszyński, M., *The Transitional ...*, p. 589.

Certainly, the activities of the KRS, the SC's reform, and lustration should be assessed positively due to their relative effectiveness. However, it seems that the positive aspects of the implemented measures have not reached the public conscience; only the negative ones are known to them.

The greatest doubt is cast upon the disciplinary proceedings, especially with such a small number of judges having been subjected to this measure. It seems that these cases were poorly prepared. As Adam Strzembosz points out, one should examine all political cases from a given judicial district, check which judges adjudicated most frequently in them, compare such judgments with those handed down by judges who were occasionally assigned to such cases, and draw conclusions from that.[44] This would make it possible to grasp the specific situations of judges at the time, as well as to spot the "black sheep". Nevertheless, they certainly had some value. One has to agree with Strzembosz in remembering that imponderables are never without significance. Learning about reality is also important – the reality of yesterday and today's judiciary.[45]

In addition, another significant drawback of these proceedings is the transparency of the trials and their "working through" the public debate. The details of specific cases are not known to the public because the disciplinary hearings of judges were kept secret at the time. This gives rise to a wide range of doubts and finds fertile ground, especially among those citizens who have not quite found themselves accepting of the new democratic reality. This, combined with dissatisfaction with the functioning of the judiciary (due to the length of proceedings, their outcome, etc.) leads to a type of dispersed sanction[46] in the form of disapproval towards judges. These issues are the root of the constitutional crisis in Poland.

There also remains the question of timing, which in the case of punitive measures plays a crucial role insofar as it is an unequal battle against time. Leaving aside even the issue of limitation that is an element of the rule of law, such measures are applied *in personam*. Although it is not a simple relationship between the timing of measures and their benefits, some goals, especially political and social trust-building ones (institutional and interpersonal), were more time-sensitive.[47] This shows that the truth-seeking measures definitely lacked special attention

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44 Strzembosz, A., & Stanowska, M. (2005). *Sędziowie warszawscy w czasie próby 1981–1988* (Eng: *Warsaw judges on trial 1981–1988*) (pp. 285–286). Warsaw.

45 Strzembosz, A., *Odpowiedzialność..., p.* 286.

46 Horne, C. (2017). *Building Trust and Democracy: Transitional Justice in Post-Communist Countries.*

47 *White Paper ...,* p. 13.

towards how issues of complicity, trust-building, and nostalgia constitute unique challenges faced by former communist countries.

Therefore, despite several attempts, seeking accountability on a mass scale did not take place. While this does not prove that there was a large number of people in the judiciary that was involved in adjudicating in accordance with the expectations of the totalitarian power, it also does not mean "that all judges were freed from responsibility".[48] What is true is that judges have not been held accountable as society would have preferred, which remains an unhealed wound in Polish society.

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48 Ibid.

Iuliia Iashchenko

Hostages of the past. Russia's historical policy as a new round of ethnic repression in the post-Soviet space (2010 – 2020s)

Historical politics in Russia reflects the incompleteness of transition in the process of democratic transition, exposing the dramatic consequences of the shortcomings of the institution of transitional justice and civic initiatives for discussing the totalitarian past. As a corollary, the lack of transition becomes the basis for the proliferation of new discriminatory measures based on ethnic and political issues and rooted in historical battles over memory. Relying on a strategy of silence and denial, contemporary political elites in Russia seek to recreate a new image of the totalitarian past, emphasising those examples that can serve as a consolidating factor for the nation.

This political trend essentially solves, according to the current Russian government agenda, the problem of the deconsolidation of the nation, which has been observed on the historical grounds of the country since imperial times and remains outstanding even after the attempt to create the "Soviet identity". For example, David Brandenberger noted that there has never been a unified identity of Russians in historical retrospect, since racial and ethnic diversity, combined with regional affiliation, has a priori fragmented society into local communities.[1] Thus, today the political elite sees in the formation of a unified historical discourse a chance to build a mono-ethnic state.

It is important to emphasise that the main historical myth that unites Russians these days is the unwieldy complex of commemorating not the victims of the regime or World War II, but the victory in that war.[2] This subtle semantic allusion shifts the focus of public attention from

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1 Brandenberger, D. L. (2002). *National-Bolshevism. Stalin's mass culture and the formation of Russian national self-consciousness (1931–1956)*, pp. 18–22. Cambridge: Harvard University Press.

2 Onken, E. (2007). The Baltic States and Moscow's 9 May commemoration: Analysing memory politics in Europe. *Europe-Asia Studies*, 59(1). Retrieved 02 January, 2021, from https://www.tandfonline.com/doi/full/10.1080/09668130601072589.

the need for commemoration and critical reflection on historical experience to celebrating the greatness of the victorious country. Consequently, millions of untold stories of those who were victims of Stalinist repression and those for whom World War II took place under the shadow of tragedy and death remain behind the façade of pompous fireworks.

Instead of the expected condemnation of the crimes of the former regime, young Russia uses historical mythology as a tool to promote the pro-fascist values of National Communism in retrospect, relying on censorship backed by a whole set of historical laws. Note that the ethnic cleansing, which reached its peak in 1937–1950, came under the scrutiny of censorship. On the one hand, it is the coincidence of the time frame of the *Great Patriotic War* narrative and ethnic cleansing that creates additional motives for oblivion on the part of the contemporary regime in Russia, as it puts a mark of criminal brutality on the actions of the USSR during this period and exposes problems accompanying the achievement of the *Great Victory.* On the other hand, in the process of reinforcing the historical myth of this victory, not just the Soviet people and the Soviet soldier but also the Soviet regime is being glorified. Therefore, the results of this policy can already be seen today in the justification of Stalin's domestic policy directly, which is the main reason for the wave of justification of the regime in the mass repressions of the 1930s and 1940s.[3]

Drawing attention to the mismatch between the temporal conditions of transition and the lack of formation of transitional justice institutions, it becomes possible to shed light on the reasons for the processes which have been unfolding in historical and memory politics in Russia over the past eight years. The emergence of *Federal Law N128-FZ dated 5 May 2014*, amending *Article 354.1 of the Russian Criminal Code*[4] is a practical result of the lack of dialogue on the totalitarian past. This strengthens the extreme-right wing political elites who rely on the ideological foundations of the former national-communist regime. And all subsequent legal initiatives, bills and laws in the field of historical policy aim simultaneously to "preserve" the image of the USSR during World War II and to limit dialogue about the crimes. It is important to emphasise that the amendments to Article 354.1 approved a ban on "disseminating false information about the actions of the Soviet army". Thus, professional historians have been consistently denied the right to investigate the crimes committed by Soviet soldiers and KGB officers during

3 Iashchenko, I. (2020). *Evidence and Memory. Memories about the repressions of the 1940s against the Volga Germans on the materials of the Perm Region (Master's thesis)*, pp. 6–9. Perm: Perm State University.

4 Criminal Code of the Russian Federation, Article 354.1. Rehabilitation of Nazism (introduced by Federal Law of 05.05.2014 N 128-FZ). Retrieved 09 September, 2021, from http://www.consultant.ru/document/cons_doc_LAW_10699/be763c1b6a1402144cabfe17a0e2d602d4bb7598/.

World War II against their own population and against residents of the occupied territories. Journalists and any civilians were also restricted in their rights, as the amendments prohibited criticism of Russian practices of celebrating victory and discussing the results of the war under threat of fines and imprisonment.

Speaking of restrictive measures in the dialogue on history, it is necessary to emphasise that these are not individual bills or articles, but a whole complex of laws and presidential decrees aimed at blocking academic creativity and other forms of understanding of the communist past in the USSR. This complex also includes *Presidential Decree No. 549 dated 15 May 2009, On the Presidential Commission on Countering Attempts to Falsify History to the Detriment of Russia*[5], and the *Presidential Decree on Commemoration of the Victory of the Soviet People in the Great Patriotic War of 1941–1945*[6], which prohibits "the public identification of the role of the USSR and Nazi Germany in World War II". These laws effectively mark as a "criminal offence" the discussion of such issues as deportations to the USSR, ethnic cleansing, crimes by military personnel and officials, etc. Looking at the problem as a whole, it is possible to see a natural tendency for institutionalised censorship to develop precisely in the direction of dialogue on the "outcome of the Second World War". However, by prohibiting criticism or any revisionist research in the context of a reassessment of the actions and decisions of individual statesmen during that period, as well as all officials in the army, the Ministry of the Interior [KGB, NGB, MVD], and other institutions, an effective ban on any discussions that came into conflict with the official version of history in the USSR during the 1930s and 1940s was put in place. Since the most widespread and brutal repressions also took place during this period, historical scholarship is now effectively paralysed in initiating even civil discussion of the totalitarian past.

As a result, all the – incredibly clumsily – actions taken by Russia's political elites in relation to the discourse on the totalitarian past highlight the lack of dialogue with the victims of that regime. Moreover, the conflict of interests between political elites and victimised minorities in addressing family and community history is also becoming apparent. As field research aimed at collecting interviews with victims of repression among Russian Germans, conducted between 2018 and 2020, showed that there is a community demand for the publication of their

5 Decree No. 549 of the President of the Russian Federation of 15.05.2009. Retrieved 09 September, 2021, from http://kremlin.ru/acts/bank/29288.

6 Law on the decisive role of the USSR in the victory over Nazism passed on first reading. Retrieved 09 September, 2021, from https://www.dw.com/ru/zakon-o-reshajushhej-roli-sssr-v-pobede-nad-nacizmom-prinjat-v-pervom-chtenii/a-57663773.

experiences, justice, rehabilitation and commemoration of victims.[7] The most compelling argument is that the relevance of the idea of justice and rehabilitation has not diminished over the past 80 years, both for those who survived imprisonment in Soviet concentration camps or the Labour Army, but also for the children and grandchildren of these people.[8]

In looking at the semantic emphases of the respondents themselves, it is not difficult to consider the assessments that the ethnic community itself has made of both the actions of the Soviet Union in relation to them and contemporary national policy in Russia. Perhaps the appeal to oral sources in this case brings an entirely new perspective to the multi-layered discussions of Soviet responsibility for mass repression and ethnic cleansing, which have long been denied, both by Soviet and Russian scholars and by European scholars of Eastern European history, as well as by representatives of the Anglo-Saxon school of social history led by Sh. Fitzpatrick.[9] Above all, this bias in favour of explaining and justifying the actions of the Soviet government is due to the moral attitude about the responsibility of the Nazi regime in Germany for crimes against humanity, and the recognition of the USSR as one of the main victors in the Second World War. This kept Stalinism and National Communism in general safe from critical scrutiny for many years.

Another, yet no less obvious reason, was the inaccessibility of historical sources. Relying on archival documents makes it impossible to talk about historical reconstruction and interpretation of historical reality, as such documents reflect only an assessment of the regime. And speaking of contemporary research on Russia's totalitarian past, it is important to emphasise that the problem of the inaccessibility of historical sources remains outstanding. As such, the importance of oral sources on the history of the Soviet Union cannot be overemphasised today because these sources shed light on fundamentally new issues and problems, adding precise touches to the image of the USSR. And those sources are precisely what allow us to raise questions about ethnic cleansing and local genocides in the USSR in the 1930s and 1940s.

Returning to the sources gathered during the field research, it is important to note that the results of the analysis of the 150 interviews revealed several previously unarticulated issues

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7 Iashchenko, I. (2020). *Evidence and Memory. Memories about the repressions of the 1940s against the Volga Germans on the materials of the Perm Region (Master's thesis)*, pp. 57–61. Perm: Perm State University.

8 Iashchenko, I. (2019). *Remember How: The Place of Visualization in Preserving the Memory of Repressions of the USSR Against the Volga Germans*. Digital Humanities Conference (9 –12 July 2019, Utrecht). Utrecht University Press.

9 Chang, J.K. (2019) Ethnic Cleansing and Revisionist Russian and Soviet History. *Academic Questions, 32(2)*, pp. 263–270.

in the context of the history of repression against national minorities in the USSR[10]. Respondents noted that the victims of repression were not only adults and adolescents imprisoned in Soviet concentration camps or working in the Labour Army, but also those children who were forced to survive, born and grow up in camps and special settlements. And the question of the regime's responsibility for repression and purges resounded in a completely new way because the victims of the regime were "alive again" and not only prisoners but in reality also children born in camps or remote settlements in the northern regions of Russia suffered.[11] First and foremost, because even before they were born, they were already deprived of their right to equal socio-economic benefits. Respondents pointed out that the biggest problem for them was the lack of access to education, with many of them receiving only schooling or technical education only because university education was not available due to financial issues or poor education in the camp schools.[12]

In addition, the women respondents also drew attention to the different experiences of the prisoners based on their gender identity. Thus, an important revelation was the fact that in the Labour Army and concentration camps of the USSR, "extra maintenance for children and the elderly" was never given, meaning literally "who does not work, does not eat"[13]. However, the responsibility for feeding children and the elderly was shifted to family members who were working.[14]

Consequently, once in a camp or in the Labour Army, a woman was forced to exceed her daily quota to receive more rations and to feed her children, parents and/or other disabled relatives, among others. Of course, ethnic minority men may have found themselves in the same position. However, when talking about the enormity of this experience, attention must be paid to its gender specificity, as this underlines the fundamental importance of studying history in a more inclusive way, including through the lens of the gendered experience.

Before discussing whether Soviet ethnic cleansing can be equated with genocide, it is important to pause to illustrate the results of frequency and network analysis of the interviews, in

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10 Iashchenko, I. (2020). *Evidence and Memory. Memories about the repressions of the 1940s against the Volga Germans on the materials of the Perm Region (Master's thesis)*, pp. 67–76. Perm: Perm State University.

11 Iashchenko, I. (author's archive). Multiple interviews: Alexander N., v. Valai, Perm Krai, 2018; Alexandra Kristel, Perm, 2019; Lubov, N., Perm, 2020; Mikhail, N., v. Berkutovo, Perm Krai, 2019.

12 Iashchenko, I. (author's archive). Interview with Birutta Gorbunova, v. Lipovo, Perm Krai, 2019.

13 Iashchenko, I. (author's archive). Multiple interviews: Emilia Schaefer, Perm, 2020; Erma N., Nyrob, 2018; Irma N., Nyrob, 2018.

14 Iashchenko, I. (2020). *Evidence and Memory. Memories about the repressions of the 1940s against the Volga Germans on the materials of the Perm Region (Master's thesis)*, pp. 84–90. Perm: Perm State University.

order to demonstrate the extreme consistency of the deportation memory narrative that has developed within ethnic communities. Thus, through static analysis, it was possible to identify the thematic blocks that respondents mentioned most frequently in their narratives; such blocks were marked as "key themes" in the study.

A network analysis of the interview database was then used to determine the correlation between mentions of these themes and the respondents. This approach made it possible to determine the importance of the individual themes for each generation.

The main outcome was that the issues of mortality, inhumane conditions during transport to deportation sites remain highly relevant for each of the three generations interviewed [victims, their children, and grandchildren]. Thus, these themes are considered "mainstream" in the construction of the remembrance narrative of the ethnic cleansing experiences. There are specific themes which include the development of a discussion of the responsibility of the Soviet regime for the crimes committed against both ethnic minorities and other citizens of the USSR [most often these reflections are appealed to by representatives of the third generation]. Representatives of the second generation, on the other hand, are more likely to articulate the problem of racial and ethnic discrimination by the Stalinist regime, while those who survived this ethnic persecution emphasise the inhumanity of such measures in general.[15] Thus, the analysis of oral sources demonstrates at the same time the undiminished relevance of this past for members of ethnic communities, but also the growing criticism among young members of oppressed communities towards both the former regime and current national policies.[16]

Representatives of ethnic minorities are also consolidated by the need for rehabilitation and justice. The most frequent demands are as follows: public discussion of their history, commemoration of the victims and financial compensation. It should be noted that at the moment financial compensation is stipulated for victims of political repressions in the amount of EUR 20–25 per month; however, the availability of these measures is extremely limited by the fact that rehabilitation and compensation should be taken care of by the victim.[17] Thus, there remain many people who have never been officially rehabilitated and

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15 Iashchenko, I. (2020). *Evidence and Memory. Memories about the repressions of the 1940s against the Volga Germans on the materials of the Perm Region (Master's thesis)*, pp. 97–101. Perm: Perm State University.

16 Iashchenko, I. (2019). Discourse in the memory of the deportation of Volga Germans to the USSR in the 1940s in the context of modern museum technologies. In *Materials of the International Scientific Youth Forum "LOMONOSOV-2019"* (pp. 1–3). Moscow.

17 Law of the Russian Federation *On Rehabilitation of Victims of Political Repressions*. Retrieved 17 August, 2021, from http://pravo.gov.ru/proxy/ips/?docbody=&prevDoc=102024144&backlink=1&&nd=102015172.

have not received any moral or other compensation for the hardships they suffered during their imprisonment.

Although most of the survivors of the repression have received *Rehabilitation Certificates*, the measures taken are discriminatory. Since the basis of the rehabilitation procedure was the revocation of charges by the supreme court due to procedural violations during the investigation. Nevertheless, these people should not be rehabilitated due to procedural violations, but because of the anti-human measures taken against them.

Consequently, the apparent rehabilitation of victims of mass and political repression in the USSR did not really address any of the problems. And by basing itself only on criticism of violations of Soviet law rather than condemnation of generally inhumane crimes, such rehabilitation did not provide a foundation for the emergence of a civil institution of transitional justice, simply closing the conversation about an unpleasant past. However, meticulous attention to historiographical and accessible archival sources as well as to oral and written memoirs confirm the ethnic cleansing of the 1930s and 1940s.[18]

In both political and academic circles, the idea has long prevailed that the peoples condemned to deportation during the war were accused of collaborationism in favour of the armed forces of Nazi Germany. To be fair, it is worth mentioning that such a version is completely unfounded in light of the ethnic cleansing carried out on the territory of Ukraine and the national outskirts of the USSR in the early 1930s, long before the start of World War II, such as the Ukrainian operation in 1934, the Moscow operation in 1934, and the Crimean operation in 1935 conducted against Russian Germans. During these operations, several tens of thousands of Germans and Jews were deported to Siberia and the Urals, and 10,000 people were shot.[19] This thematic digression illustrates with extreme precision the nationalist tendencies of the Soviet regime as early as the pre-war period and nullifies any attempts to justify the ethnic cleansing of the later period as a “forced necessity” in order to maintain security in the war period.[20]

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18 Pohl, J. O. (1999). *Ethnic Cleansing in the USSR, 1937–1949*. Westport.

19 See Khlevniuk, O. V (2004). *The History of the Gulag: From Collectivization to the Great Terror*, p. 2 New Haven: Yale University Press; and Martin, T. (2001). *The Affirmative Action: Nations and Nationalism in the Soviet Union, 1923–1939*. Ithaca: Cornell University Press.

20 Gudkov, L., & Pipia, K. (2018). Parameters of xenophobia, racism and anti-Semitism in modern Russia. *Bulletin of Public Opinion: Data, Analysis, Discussions, 3-4* (127), pp. 33–35. Moscow.

Having established that the preconditions for mass ethnic cleansing can be traced back to the early 1930s, it becomes clear that ideologically the USSR was based on the concept of nationalism of the supremacy of one race and one nationality[21]. Accordingly, it is appropriate to voice the main conclusions here. Forced displacement, incarceration in concentration camps and other measures of mass discrimination based on ethnic grounds and supported by national ideology and legislation cannot be called anything other than ethnic cleansing[22]. However, an important part of the recognition of mass repression as ethnic cleansing and an example of localised genocide is the explicit request from representatives of oppressed communities in interviews.

Thus, faced with the policy of silencing certain episodes of the totalitarian past in contemporary Russia, ethnic minorities are consolidating stronger within themselves, no longer making any requests for commemoration, but including formalised political demands for the completion of rehabilitation, implementation of justice and the return of the right to recreate political sites within the Russian Federation. In turn, Russia's political elites, fearing the extreme fragmentation of Russian society amid struggles for historical justice, are moving towards repressive measures, banning the establishment of monuments, the use of the mother tongue in public and administrative events, and restricting the right to spread knowledge of the totalitarian past and the family history of victims of repression and ethnic cleansing in the USSR. This confrontation between the ideological course and the expectations of ethnic minorities leads to an extreme politicisation of all discussions about the victims of the Soviet regime. Therefore, the threat of a new wave of ethnic cleansing is looming, as Russia's contemporary political elite is already on the verge of an extreme-right regime sympathetic to totalitarianism.

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21 Valiavicharska, Z. V. (2011). *Marxism-Leninism and the Future of Marxist Thought in Post-Socialist Bulgaria. A dissertation of Ph.D. in Rhetoric*, pp. 42–44. Berkeley: University of California; Hirsch, F. (2005). *Empire of Nations: Ethnographic Knowledge and the Making of the Soviet Union (Culture and Society after Socialism*, pp. 100; 146–149; 294–295. Ithaca: Cornell University Press.

22 Weitz, E.D. (2002). Racial Politics without the Concept of Race: Reevaluating Soviet Ethnic and National Purge. *Slavic Review, 61*(1) (Spring), pp. 1–29.

Rusudan Janjalashvili

Transitional Justice in the First Democratic Republic of Georgia (1918 – 1921) and After Gaining Independence in 1991: Coping with the Communist Past

Dedicated to the 30-year anniversary after the collapse of the Soviet Union in 1991, this essay analyses the process of transitional justice in Georgia after gaining independence and declaring itself a democratic republic. It also demonstrates the significance of education in scope of transitional justice as well as the importance of society striving for democratic values – even when the near future does not seem as promising at bearing fruit as one would wish. Finally, it will attempt to answer the everlasting question about the relevance of addressing the past, including the complicated issue of removing Soviet symbols, whereas the collective memory – sensitive and intricate – is nostalgic towards the bygone days.

Review of the Political Situation in Georgia After 1991

According to the definition of transitional justice provided by ICTJ, it "seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy. [...] In some cases, these transformations happen suddenly; in others, they may take place over many decades".[1] The above-mentioned interpretation suggests that transitional justice is a process involving events regarding a nation making its way through hardships to achieve democracy. The latter is especially relevant for Georgia, the country which did not even have time to entirely shift its focus towards addressing the communist past right after emerging from a Soviet Republic into an independent country, as the 1990s were far from the peaceful: "Georgia is a country with overlapping legacies of Soviet totalitarianism, violent conflict in Abkhazia and South Ossetia

1 *What is Transitional Justice?* (2009) (p. 1). International Center for Transitional Justice.

during its early independence years and failing statehood in the 1990s".[2] This is the main reason why the country only started its journey towards finding its identity in the 2000s.

To briefly summarise the following events based on research by Magdalena Frichova entitled *Transitional Justice and Georgia's Conflicts*: Breaking the Silence: Since the *Rose Revolution* of 2003, even though some political and economic reforms were successful, the government undermined genuine democratisation, followed by further infringements and official impunity. The situation only became worse due to the 2008 Georgian-Ossetian-Russian conflict of August 2008, which left thousands of Georgians and Ossetians victimised and served as a reminder of the past traumas.[3] Therefore, it should be concluded that transitional justice in Georgia is far from crossing the finish line – proper mechanisms, such as forming "truth commissions", have not even been put into full practice yet, even though it has been three decades since the fall of the Soviet Union.

As suggested in the *Assessing the Prospects for Transitional Justice in Georgia* report by Howard Varney, "it would make sense for the proposed truth commission to be established as early as possible, as its findings and recommendations are intended to feed into institutional reforms across all sectors", emphasising the importance of remedying the failed rule of law in the last dozens of years. The issue of time is the reason why the task of identifying what to forget and what to remember from the communist past becomes the responsibility of more than one generation to tackle.

The Importance of Education in Transitional Justice: Do Not Teach Us Hate!

The conclusion above regarding the generational issue directly indicates the importance of the education as well as the informal, cultural and social aspects that are usually a part of a child's upbringing. The contribution of education to building peace depends not only on the "universal values of tolerance and social cohesion through school curricula, but also on the sensitivity of reforms and programs to the legacies of past injustices in both the education sector and

2 Frichova, M. (2009). *Transitional Justice and Georgia's Conflicts: Breaking the Silence* (p. 10). International Center for Transitional Justice.

3 Ibid.

the public culture of a country".[4] For instance, in case of Georgia, the younger generation is less likely to be aware of the very details of the civil war that took place there in the 1990s, whereas the older generation – especially refugees from Abkhazia – have deep wounds linked to the dark past yet to be healed. They share a collective memory that makes it understandably difficult for them to even be willing to step up and start discussions with the other party and revisit past confrontations at the negotiation table, even though the lack of communication is a significant problem in the conflicts: "Physical borders are not the only ones that need to be overcome. Different groups within both sides of the Georgian-Abkhaz divide are often isolated from each other".[5]

Such an attitude is rarely the case for a younger generation in Georgia – in fact, quite the opposite. They have either political apathy towards the issue, caused by the abovementioned lack of communication: "We cannot say that we are excluded from the peace process, because there is no process as such",[6] or they are willing to acknowledge the mistakes of the past and move forward, ready to communicate and break the ice with the other parties, as the series of interviews called *History Dialogue as basis for the normalisation of the Georgian-Abkhazian conflict,* facilitated by Berghoff Foundation Caucasus Programme[7], clearly demonstrate. Most disheartening of all is, according to the feedback to the abovementioned interviews on social media, that the youth willing to learn more about the current state of the conflict and hoping to search remedies to address the past by stating both sides made certain mistakes are often met with ridicule and a lack of trust from the older generation that insists the Georgian side did no wrong in the civil war.

Fortunately, however, there are exceptions. This is when the importance of education plays a huge role in building the peace, if not in helping the younger generation build relationships across the divide then at least teaching them not to loathe the other party due to wrongful acts of the past – a step forward, despite being reasonably burdensome to achieve. At the end of the day, this is exactly "the basic objective of education: to construct the meaning of communal living – that is, of living together".[8]

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4 *Transitional Justice and Education: Learning Peace, Advancing Transitional Justice Series* (2017) (p. 11). Social and Science Research Council. New York.

5 *Report: Youth perspectives on peace and security: the Georgian-Abkhaz* context (2018) (p. 9). Conciliation Resources: Working Together for Peace.

6 Ibid, p. 16.

7 https://berghof-foundation.org/work/projects/history-dialogue-in-georgia-and-abkhazia.

8 *Transitional Justice and Education: Learning Peace* (2017) (p. 32). Advancing Transitional Justice Series, Social and Science Research Council. New York.

In summary, as a hopeful statement, it should be stated that "young people see international support and experience as central. [...] International organisations should support both government and local non-governmental organisations"[9] in order to execute the projects that are capable of supporting the peace-building process: for instance, engaging interested individuals in school educational projects, dialogues, exchange programs. It does not have to be an instant, large step – small changes are better than no involvement at all.

It is also important to note that school textbooks are another issue which has to be taken into consideration when discussing education in connection with transitional justice, since they play a major role in shaping the minds of the younger generation. This is the reason why teaching about past lessons of dedication and a societal thrust towards the democratic values is likely to result in the democratic upheaval and the rule of law. In the case of Georgia, such a clear example is the first Democratic Republic of Georgia, which – despite lasting only 1,028 days (almost three years) – had an enormous influence on the future generations, nonetheless.

The influence of the Constitution of the First Democratic Republic of Georgia (1918–1921) on the Constitution of Georgia from 1995

First of all, it is important to emphasise that, as a term, transitional justice consists of several fields, institutions and mechanisms which may not be strictly political. The involvement of different fields is caused by the main purpose transitional justice serves – building peace. The United Nations has therefore defined transitional justice as "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation".[10] Even though it is often argued exactly what aspects should be considered under the topic of transitional justice – meaning there must be certain limitations to its mechanisms – "Transitional justice has, therefore, evolved in relative isolation from important developments in economic, social and cultural rights".[11] Undoubtedly, law is one of the most important aspects of transitional justice, simply due to the fact that injecting democratic merits into legislation as well as implementing effective mechanisms so that the country and society abides by the rule of law is

9 *Report: Youth perspectives on peace and security: the Georgian-Abkhaz* context (2018) (p. 22). Conciliation Resources: Working Together for Peace.

10 *The rule of law and transitional justice in conflict and post-conflict societies* (S/2004/616), para. 8.

11 *Transitional Justice and Economic, Social and Cultural Rights* (2014) (p. 6). New York and Geneva: United Nations Publications.

vital. This is the only way to avoid human rights being considered as illusory which, as a matter of fact, also creates enough grounds for abuse.

When discussing the importance of law in transitional justice, the Constitution is the document that plays a significant role in connection with the country's identity. What many might not be aware of is the fact that Georgia, utilising the temporary freedom from the Russian influence of 1918–1921, formed the First Democratic Republic of Georgia, adapting its first constitution on 21 February 1921. The process sped up due to the beginning of the 11th Red Army invasion. Although the existence of the first Georgian constitution was short-lived, this does not outweigh its importance in the history of law, serving as the cornerstone basis for Georgia's modern-day version, adapted in 1995. Consequently, it links today's transitional justice with the century-long heritage of legal history and democratic reformations, emphasising the importance of the process in transitional justice.

> *"A parliamentary governance system, the establishment of local self-governance, the abolition of the death penalty, freedom of speech and belief, universal suffrage (pressing at that time for an equal right to vote for men and women), the introduction of jury trials and guarantee of habeas corpus, as well as many other provisions, were some of the features of the 1921 Constitution that distinguished it among the constitutions of that time, and among the modern European ones too, for its progressiveness".*[12]

As Hans-Dietrich Genscher, the former Federal Foreign Affairs Minister of Germany commented, "At that time it [the 1921 Georgian Constitution] already advocated such values as liberty, democracy and rule of law, which the modern Europe is based on currently."[13] It was the result of a speedy work, performed by the Georgian statesmen educated in Europe. It is also noteworthy that "not a single member of the *Constitutional Commission* of that time, nor national democrats, had made a proposal on restoration of the Georgian monarchy, which was absent for more than a century"[14], highlighting the willingness of Georgian legislators to implement the distribution of power as one of the most important characteristics of the democratic regime.

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12 Papuashvili, G. (2012). *International & National Security Law: A Retrospective on the 1921 Constitution of the Democratic Republic of Georgia* (p. 1).

13 Genscher, H.D. (2002) *Introduction to Wolfgang Gaul, Adoption and Elaboration of the Constitution in Georgia (1993–1995), at 9*. IRIS Georgia.

14 Papuashvili, G. (2012). *The 1921 Constitution of the Democratic Republic of Georgia Looking Back After 90 Years* (p. 23). Batumi, a publication by the Constitutional Court of Georgia with the contribution of the Noe Jordania Institute.

To summarise the information above, one should assume that the period of the first Democratic Republic of Georgia is a clear example of transitional justice, showcasing hectic engagement with drastically changed democratic reforms, even though an emerging Soviet military threat created a doubtful political future. As one article succinctly stated: "The political elite of the country [First Democratic Republic of Georgia] realised that, without the support of Europe, it would be impossible to counter empowered Russia. The foreign service of Georgia worked hard to achieve these goals and, in most cases, succeeded".[15] Albeit the *perspiration* was sadly not enough, the very aim of this essay is to make it apparent how important it is to dedicate oneself to the restoration of the rule of law, since it never "goes in the rubbish bin"; sooner or later, it will prove its worthiness and virtue:

> *"It is not coincidental that the 1995 constitution in force states in the very preamble that it is based on the historical and legal bequest of the 1921 Constitution, and this is an acknowledgement of the political and legal hereditary link between the modern Georgia and the then independent republic of Georgia".*[16]

Those 1,028 days from 1918–1921 play a huge role behind why the youth in Georgia feels respectful, affectionate and appreciative towards ancestors: feeling responsible to carry on the legacy of "I am Georgian, and therefore, I am European"[17]. This showcases the above-mentioned importance of educating future generations with respect to objective past lessons about dedication and society's drive towards the democratic values.

Coping with the History Carved in Stone: Removing Soviet Symbols in Georgia

As far as the quest to answer complicated questions like what to do with monuments when the historical context changes and whether they should be removed, re-contextualised, or to the contrary, preserved as a painful reminder of events that took place decades or centuries

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15 Article by Institute for Development of Freedom and Education. *Diplomatic Relations between the Democratic Republic of Georgia and the Kingdom of Sweden According to the Documents Preserved at the Archives of the Ministry of Foreign Affairs of Sweden*. (6 June 2020). https://idfi.ge/en/diplomatic_relations_betweenthe_democratic_republic_of_georgia_and_the_kingdom_of_sweden.

16 Papuashvili, G. (2012). *The 1921 Constitution of the Democratic Republic of Georgia Looking Back After 90 Years* (p. 6). Batumi, a publication by the Constitutional Court of Georgia with the contribution of the Noe Jordania Institute.

17 A famous phrase from the speech by the Georgian Prime Minister at that time, Zurab Zhvania, in regards to Georgia becoming the 41st member state of the Council of Europe on 27 April 1999.

ago[18], it must be stated that in case of Georgia, this issue is also controversial. As mentioned above, collective memory, shared by the older generation of Georgia, holds certain nostalgia towards the "old times" in the Soviet Union, which is understandable – it was the time of their youth that is often reminisced.

Nevertheless, demolishing statues erected in honour of famous Soviet figures as well as removing other symbols has been discussed, placed into the memory politics agenda after gaining independence in 1991:

"Georgia is among those countries that, immediately after the fall of Communism, attempted to implement the regulations aimed at preventing the re-emergence of totalitarian ideologies similar to the Soviet Communist regime. [...] Although, since 1991, there have been several attempts to implement the Lustration law in Georgia, the Georgian law 'Freedom Charter' was only signed after 20 years on 31 May 2011".[19]

It is important to note that the *Freedom Charter* serves the purpose of implementing preventive measures not only against the principles of communist totalitarian but national socialist (Nazi) ideology as well. Therefore, "Removal of the symbols and names of cult buildings, memorials, monuments, bas-reliefs, inscriptions, streets, squares, villages and settlements of the communist totalitarian regime"[20] along with other depictions of communist totalitarian and national socialist (Nazi) ideologies is the means of achieving the aforementioned aim. However, there are definitely some drawbacks that need to be revised to make this legislative step more effective, since there are no specific measures identified in the Freedom Charter nor in the criminal code of Georgia should the order regarding the removal of symbols not be complied with. Furthermore, it is noteworthy that "the placement of Soviet symbolic on the private territory is not prohibited by the law"[21], which is the case in Georgia[22].

Another reason for such nostalgia, and why older citizens erect statues of Soviet figures like Joseph Stalin must be the fact that the latter himself was Georgian, born in the city of Gori, Georgia. This causes already complicated memory politics to be even more sensitive to cope

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18 Article by EUSTORY History Campus Blog. Europe, How Do You Deal With History Cast In Stone? (3 June 2021). https://historycampus.org/2021/europe-how-do-you-deal-with-history-cast-in-stone/.

19 *The Overview of the Memory Politics of Georgia* (p. 3). Institute for Development of Freedom and Education.

20 Ibid.

21 Ibid, p. 8.

22 Ibid.

with. As a matter of the fact, even though the biggest statue of Stalin in the centre of Gori was removed in 2010, there still are smaller ones present in different parts of Georgia. In the 1990s, the locals of the village Tkviavi, located in the municipality of Gori, erected a statue of Stalin that they paid for themselves.[23] This clearly demonstrates the difficulty of assisting those who reminisce about the past – mostly the representatives of older generation – to realise the importance of leaving the communist ideology to posterity and moving forward towards the main purpose of transitional justice. This is the main reason why, as far as I am concerned, that in a case as intricate and complicated as Georgia, time – along with the change of generational values that so often contradict each other– is the most important aspect when discussing transitional justice, and especially collective memory as well as its politics.

Conclusion

Taking everything mentioned above into account, it should be said that coping with the communist past for Georgia has been as far from a bed of roses as it could possibly be. The civil war in the 1990s, the war in August 2008, having been "blessed with" a particularly sensitive history in regard to the famous leader of Soviet Union and his ancestry, representatives of older generation with understandable nostalgia towards the Soviet past, a lack of trust between the generations and many more issues make following the steps of transitional justice even more arduous than usual. Consequently, I conclude that all of the reasons mentioned above leave time and patience as the most important aspects of transitional justice in Georgia.

Nevertheless, the hope is still there. As mentioned before, the younger generation is gradually becoming more involved with the memory politics, overcoming political apathy with the growing wish to start dialogue with the other parties involved, requiring international assistance as a vital step towards success. The latter also deals with the significance of education in transitional justice, due to the fact that its influence on the mindset of the younger generation – and thus the future of country – is undoubtable. Here, it should also be stated that teaching objectively about the country's past endeavours and dedication towards democratic values as well as the characteristics of peaceful coexistence is also likely to lead to development of the society.

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23 Article by EUSTORY History Campus Blog (3 June 2021). *Europe, How Do You Deal With History Cast In Stone?* https://historycampus.org/2021/europe-how-do-you-deal-with-history-cast-in-stone/.

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Arsenii (Ars) Kustov

Dictatorship and Documentation: Archives on Crimes of the Party and State Security in the GDR, the Ukrainian SSR and Soviet Russia in the Memory Policy of Post-Communist Transit Countries

Dedicated to my teacher from the MSSES, Boris Kagarlitsky. From April 1982 to April 1983, he was imprisoned in the KGB's Lubyanka prison, accused of anti-Soviet agitation. For a long time, he collaborated with the Rosa-Luxemburg-Stiftung, for which the research institute he founded was recognised as a "foreign agent". On the evening of 29 September 2021, the police detained Boris Kagarlitsky at the entrance to the university, where he was supposed to conduct classes for us.

I want to express my special gratitude to Irina Silina (RANEPA/RSUH, Moscow), Victoria Zhuravleva (RSUH, Moscow), Kost Bondarenko (Ukrainian Politics Foundation, Kiev) and Ekaterina Shishko (Österreich Institut Moskau) for their help and invaluable information about national archives systems, its specifics and limitations.

Since the collapse of the Eastern Bloc and the beginning of post-communist transformation in the countries of Central and Eastern Europe, the topic of open access to party archives and documents of secret state security services has become important not only for researchers and investigators but also for the entire society of these transforming countries. The discovery of information about the crimes of the past is part of a long process to overcome them effectively, seeking not to repeat the mistakes of the past on their journey to sustainable development in the future. This is a good signal from the government to society about renouncing the crimes of the regime and being ready to start a dialogue

from scratch, about the possibility of creating a society on a new basis of transparency and rejecting criminal practices.

The opening of the state security archives to the public had a direct impact on the formation of political elites and the renewal of their structure in post-communist countries, suspending the political career of not only "loyal dogs of the regime" but also active participants of anti-communist movements and the post-communist transition, including the leader of Polish *Solidarność* (Solidarity) and the first president of post-communist Poland, Lech Wałęsa, as well as the last German Democratic Republic (GDR) government leader and the premier of an independent East Germany, Lothar de Maizière.[1]

Germany: Transparency and Overcoming the Past

The strategies of memorialization and museumification, adopted in Germany, including the preservation and dissemination of the memory of the Holocaust and war crimes, seem to be exemplary both for Central Europe and throughout the world.

The documents collected and catalogued with truly German pedantry by the ruling SED and the German state security service Stasi (*Ministerium für Staatssicherheit* – Ministry for State Security) – which conducted political investigations and systematically repressed dissenters – are open to researchers, victims of repression and their relatives, and to all citizens. Archival affairs become the basis not only for scientific works interesting to the professional community of historians but also for interactive museum exhibitions[2] and publications in the local and national press, shedding light on the crimes of the past.

The Federal Stasi Archive was created at the moment immediately after the merger in 1990-91 according to the Stasi Records Act (*Stasi-Unterlagen-Gesetz, StuG*). Some of the records had to be saved during the revolution of 1989, when documents were destroyed in the territorial offices of the state security service throughout Germany amid protests.

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1 Müller-Enbergs, H., Wielgohs, J., Hoffmann, D., Herbst, A., & Kirschey-Feix,I. (Hrsg.) (2010) Wer war wer in der DDR? Ein Lexikon ostdeutscher Biographien Herausgegeben (Eng: *Who Was Who in the GDR? A Lexicon of Published East German Biographies*). Berlin: Ch. Links Verlag.

2 For example, the Stasi Records Agency (BStU) uses the former state security headquarters in Leipzig (the "Runden Ecke" building) both as an archival repository and as a Stasi Memorial Museum.

The enthusiasm of its creators was reinforced not only by the joy that gripped many from the reunification of Germany and the fall of the dictatorship of the party, but also by the personal motives of its leaders and employees. Thus, the first Federal Commissioner for the Stasi Records was in 1990 a former anti-communist civil rights activist and future federal president, Joachim Gauck (the Stasi described him in their special files as an" incorrigible anti-communist"[3]), who together with Roland Jahn, a German journalist and a former East German dissident, led the work on decoding the archive's audio recordings before the agency was formally disbanded in June 2021. In a sense, the fact that BStU absorbed into the German Federal Archives (Bundesarchiv) can be considered a successful completion of the research and public mission to investigate, publish and memorialise the crimes of the Stasi.

The active work of the archive specialists ensured free access of citizens to the materials of the secret services. This allowed many people to personally touch documents about the history of repression and the work of the state security service. Consequently, the Russian opposition, led by Alexei Navalny, used Vladimir Putin's personal Stasi file from the archives – where Putin carried out KGB work in the 1980's in Dresden and maintained close contact with Stasi colleagues – when preparing a video that received more than 119 million views (September 2021).

Ukraine: Fighting the Past

Unlike the former GDR and many Eastern Bloc countries, the division of the USSR was largely a "revolution from above" carried out by the Party and the state elites who hoped to benefit from it. The "Revolution on Granite" was only a convenient background used by the leaders of Soviet Ukraine in the struggle for control with the Union centre in Moscow. Hence, Leonid Kravchuk, previously Secretary for Ideology in the Central Committee of the Communist Party of Ukraine, became the first president of an independent Ukraine. So-called "formers" from the special services made a great political career in a new country. The deputy head of the KGB of the Ukrainian SSR, General Yevgen Marchuk, who worked in the Fifth Directorate of the KGB (to combat "ideological diversions"), became the first head of the SBU (Security Service of Ukraine), and in 1995 – the head of the Ukrainian government. The investigation of the former authorities' crimes was not profitable for the new ones either because it threatened their own careers, as in the case of political figures in Central and Eastern Europe. The refusal to open

3 Žižek, S., & Horvat, S. (2014), What Does Europe Want? The Union and Its Discontents (p. 13). New York: Columbia UP.

archives and the vetoing of investigation of the activities of the CPSU and the KGB did not allow for the renewal of the independent republics' political elites.

In the conditions of the difficult 1990s, accompanied by political turbulence and chaos, a decrease in the social standards of the majority, society and the government did not pay the necessary attention to the problem of investigating the regime's crimes, and it quickly faded into the background. The KGB archives of the Ukrainian SSR did not become public but were transferred to the departmental archive of the SBU, created from the personnel from the local KGB. The archive materials remained closed to both researchers and citizens. The laws adopted in 1991 in Ukraine, Russia and many other post-Soviet countries on the rehabilitation of victims of political repression not only restored all civil rights to former dissidents and their families, but also allowed limited access to personal files. For the rest of the citizens, the state security archives remained closed.

According to Kost Bondarenko (*Ukrainian Politics Foundation*), despite the initial enthusiasm of post-Soviet researchers about the opening of party archives and academic freedom, it quickly came to an impasse. Transformed in 1991 from an institution of the Republican Academy of Sciences, the Institute of Ukrainian Archaeography almost immediately found itself with a lack of funding and most of the open research areas curtailed, nearly resulting in the institute's closure.

When the "mainstream" historical science suffered from a lack of funding and the departure of qualified personnel, a large number of pseudo-historical activists and even falsified sources[4] – often with a pseudo-patriotic orientation[5] – appeared. Systematic research work almost ceased due to collapse of the Soviet scientific school and the well-established but outdated historical narrative.

De facto, the work of historians and archivists depended on a political order – only projects interesting to politicians from the ruling coalition (less often, to the regional parliaments) were

4 Rusina, E. (2009) Des problèmes de publication et d'interprétation des sources des XVIe-XVIIe siècles en Ukraine postsoviétique (Eng: *Publication of sixteenth- to eighteenth-century sources in Post-Soviet Ukraine). Cahiers du monde russe (EHESS), 50*(2-3), pp. 357–358.

5 Ibid, p. 359. "Selectivity seems quite natural for representatives of modern 'patriotic science'. It's no secret that there were many historians who succumbed to the temptation to present the past of Ukraine in a simplified and flattering form for national consciousness, discarding facts that don't fit into their schemes. Such ideas, such a tonality of historical thinking, are easily assimilated by the mass consciousness and picked up by journalists, writers, politicians" (Ibid., p. 352.).

normally and even generously funded. As Elena Rusina (*Institute of History of Ukraine, NASU*) notes, "The UPA Chronicle has become a much higher priority for the [Archeographic] Institute" than another archival research.[6] Historical science and the direction of archival research, according to a well-known Soviet anecdote, "fluctuated along with the party line", changing under the current political conjuncture influence.

The former "red director" Leonid Kuchma (the CPSU member in 1960–1991, a participant in the USSR rocket project and the Lenin Prize winner), who replaced Kravchuk flirted with nationalism, adhered to the "multi-vector" foreign policy. That is the reason why the state preferred not to support research projects that could harm relations with Russia, such were the investigations of the CPSU and the KGB crimes. Their results were limited to the professional community and remained non-public – just like many things in the Kuchma era[7].

At the same time, in the west of the country[8], nationalism as part of the regional political identity was supported by the Ukrainian National Movement (formerly the Movement for Perestroika), the Congress of Ukrainian Nationalists, and the "social nationalists" from the *Svoboda* (Freedom) Party, who stimulated the creation of a nationalist historical narrative that strengthened their electoral prospects in the region and at the national level.

Viktor Yushchenko's government, which arrived in the wake of the Orange Revolution of 2004–05, rapidly lost popularity and electoral support due to corruption and the failure of promised reforms. In this situation, the administration began to look for support in nationalist rhetoric. Towards the end of Yushchenko's rule, he lost most of his real power and electoral support, and actively engaged in historical politics, awarding the Hero of Ukraine title to the deputy head of

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6 Ibid., p. 358.

7 For example, the investigation of the murders of journalist Georgy Gongadze and oligarch Yevgen Shcherban, in which the SBU and the presidential administration are often considered to be involved. It is difficult not to associate this with the lack of investigation of the activities of the special services and their reform.

8 Three regions (Lviv, Ternopil and Ivano-Frankivsk), known as the historical region of Eastern Galicia/Halychyna, until 1918 were under the sceptre of the Habsburgs and became part of Ukraine in 1939 after the Red Army troops entered the Ukrainian and Belarusian regions in the east of the Rzeczpospolita, Kresy Wschodnie (Eng: *Eastern Borderlands*) in the Polish national narrative.

the *Nachtigall* Battalion[9] and the UPA leader Roman Shukhevych. Furthermore, many nationalist politicians entered the president's administration.

In 2006, the Ukrainian Institute of National Memory (UINM) was founded[10] in order to "consolidate (...) the Ukrainian nation"[11]. The government planned to provide the Party and the KGB archives to this historical and political project but for several years could not approve the institute's budget. In 2009, the President's wife, Elena Yushchenko, and the SBU head, Valentin Nalivaichenko[12], opened the *Tyurma na Lontskoho* (Prison at Łącki Street) Museum in Lviv, to whose staff the NKVD-KGB prison building and part of the state security archive were transferred.

Via the museum's activities, the memorialisation of victims of political repression and the systematisation of KGB archives[13] were often inextricably linked with the Holocaust denial[14] and the glorification of Nazi collaborators, SS legionnaires and participants of ethnic cleansings, including the Lviv pogrom, the Babi Yar shooting, the burning of the Belarusian Khatyn[15] village residents of and the massacre of Poles in Volhynia.

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9 The formal leader of the battalion was a German officer, an active Nazi, a participant in the Beer Hall Putsch and a theorist of anti-Semitism, Theodor Oberländer, who was responsible for the communication of the Ukrainian battalion with the Abwehr. In 1953–60, Oberländer served as the Minister for Refugees, Displaced Persons and War Victims (!), resigned after a lengthy public campaign (including the SPD's initiative to create a parliamentary commission for investigation) and international pressure (Oberländer: Baustein oder Dynamit (Eng: *Oberländer: Building Block or Dynamite). Der Spiegel*, 1954, No. 17 (21.04), p. 9; *Oberländer: Nachtigall in Lemberg (Eng: Oberländer: Nightingale in Lviv). Der Spiegel*, 1960, No. 9 (23.02), p. 23.).

10 Co-author of the project and deputy head of the IUNM, the MP from the Congress of Ukrainian Nationalists Roman Krutsik, historian and founder of the Museum of the Soviet Occupation of Ukraine.

11 Положення про Український інститут національної пам'яті (затверджено постановою Кабінету Міністрів України від 05.07.2006 р. №927). Урядовий портал (Eng: *Regulations on the Ukrainian Institute of National Memory (approved by Resolution No. 927 of the Cabinet of Ministers of Ukraine, dated 05.07.2006). Ukrainian Governmental e-Portal*). URL: https://www.kmu.gov.ua/npas/41103423.

12 Ex-student of the Yuri Andropov Red Banner Institute of Foreign Intelligence in Moscow (1991–94; now Academy of Foreign Intelligence (SVR), Russia). The statement of Nalivaichenko, who compared the Polish police with the Gestapo and the NKVD, at the opening of the Center caused an international scandal and protest of the Polish MFA (Bielecki, T. Szef ukraińskiej bezpieki porównuje policję II RP, gestapo i NKWD (Eng: *Head of the Ukrainian security forces compares the police of the II Rzeczpospolita, the gestapo and the NKVD*). Gazeta Wyborcza, 03.08.2009. URL: https://wyborcza.pl/7,75399,6786790,szef-ukrainskiej-bezpieki-porownuje-policje-ii-rp-gestapo-i.html.).

13 Даниленко В. (ред.) Галузевий державний архів СБУ: Путівник. Харків: Права людини, 2009 (Eng: *Danylenko, V. (ed.) (2009). State Security of Ukraine Branch-Wise State Archive: Guide-book. Kharkiv: Prava ludyny.*).

14 Химка І.-П. Музей-меморіал «Тюрма на Лонцького»: Приклад посткомуністичного заперечення Голокосту (Eng: *Khimka, J.P. The "Prison on Lontsky" Memorial Museum: An Example of Post-Communist Holocaust Denial*). Спільне (Commons), 01.05.2018. URL: https://commons.com.ua/uk/muzej-memorial-tyurma-na-lonckogo.

15 Рудлінг П.А. (2012). Навука забіваць. 201-ы батальён ахоўнай паліцыі і гаўптман Раман Шухевіч у Беларусі 1942 годзе (Eng: *Rudling, P.A. Science of Killing: 201st Security Police Battalion and Hauptmann Roman Shukhevich in Belarus in 1942). ARCHE*, 7-8, pp. 67-87.

In 2010, the coalition of Viktor Yanukovych's Party of Regions and the Communist Party of Ukraine won the elections. The new government appointed Valery Soldatenko[16] as director of the IUNM. Nalivaichenko was dismissed and cooperation between the Tyurma na Lontskoho Museum and the SBU terminated. A raid was conducted at the museum and its head Ruslan Zabily was detained. The special services suspected the researchers of stealing some secret KGB documents.[17] The pro-Russian politician Dmitri Tabachnik set a course to debunk the constructed national myths about the OUN-UPA and the Holodomor, supported by the previous administration, and he used the KGB archives towards this end as well.

After the new revolution of 2013–14, official historical and archival policy changed again. The ruling coalition has included many nationalist politicians from Western Ukraine. Volodymyr Vyatrovych (former head of the Center for Studies of the Liberation Movement), became the new UINM director, involving his colleagues of the Resuscitation Reform Package[18].

On the one hand, Vyatrovich and a group of his associates were able to promote the law "On access to the archives of the repressive organs of the Communist totalitarian regime of 1917–91"[19]. In pursuit of this law, the opening of the SBU archives was announced, and Andriy Kogut, a member of the *Reanimation Package of Reforms Coalition*, became its director. This was supposed to open up new opportunities and access to documents about crimes and personal files for researchers and ordinary citizens.[20]

On the other hand, in the case of the possibility of access to previously secret documents, it is not enough to grant the right; equally important is ensuring its execution. Despite the formal opening of the archives in accordance with the law, itis currently closed to "ordinary" citizens and many researchers. The reason is that it is located in the SBU building, a high-security

16 A member of the Communist Party since 1969 (left it before being appointed to the post), in Soviet years – a researcher at the Institute of Party History at the Central Committee of the Communist Party of Ukraine and the Kiev Higher Party School.

17 Обшук СБУ в музеї "Тюрма на Лонцького" (Eng: *Shakedown by State Service in the "Prison on Lontsky" Museum*). BBC Ukraine, 13.07.201. URL: https://www.bbc.com/ukrainian/news/2010/09/100913_lonckogo_lviv_reports_sp.

18 Політика національної пам'яті. *Реанімаційний Пакет Реформ* (Eng: *National Memory Policy. Reanimation Package of Reforms*). URL: https://rpr.org.ua/groups-rpr/17polityka-natsionalnoji-pam-yati.

19 Про доступ до архівів репресивних органів комуністичного тоталітарного режиму 1917-1991 років (№316-VIII, від 09.04.2015). *Верховна Рада України* (Eng: *On Access to the Archives of Communist Totalitarian Regime Repressive Bodies of 1917-1991 (No. 316-VIII, dated 09.04.2015). Verkhovna Rada of Ukraine).* URL: https://zakon.rada.gov.ua/laws/show/316-19#Text.

20 Pyrlik, G. Ukraine's Soviet archives are opening up – and changing memory politics // openDemocracy, 11.07.2019. URL: https://www.opendemocracy.net/en/odr/seven-kilometers-memory-en.

facility, which is difficult to access. Also, due to the law adopted by the Verkhovna Rada prohibiting any academic contacts with Russia at all levels, Russian researchers are currently deprived of direct access to this archival files' database.

Another, much more acute problem are the accusations that Vyatrovich is not only carrying out historical policy but also hiding and even falsifying archival documents to whitewash the figures of the so-called "liberation movement" and deny their links with crimes of the Holocaust. [21]

The opening of the archives of the special services contrasts sharply with the active use of the historical past for current politics and flirting with nationalism and the ultra-right movement. Such duality is the content of the archival policy of Ukraine and postpones the prospect of understanding the traumatic experience of the twentieth century in this Eastern European country.

Russia: From Acceptance to Denial

Already during the period of perestroika in the USSR, the memory of the sociocide (the Red Terror of 1917–22), the repressions of the Stalinist period (the Great Terror of 1937), the mass deportations and political persecution became the property of the general public. The publication of individual archival documents on the pages of the Soviet press had an explosive effect on society[22].

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21 According to Alexey Miller (EUSPb, CEU) and Jared McBride (USC Shoah Foundation, Kennan Institute), Vyatrovich's activity was devoted to glorification and justification of Ukrainian nationalist fascist movements, including attempts to defend against accusations of ethnic cleansing and taking part in the Holocaust (Миллер А., Касьянов Г. Россия-Украина: как пишется история (Eng: *Miller, A., Kasyanov, G. Russia-Ukraine: How History Is Written*). Polit.ru, 02.04.2009. URL: https://polit.ru/article/2009/04/02/historia; McBride, J. How Ukraine's New Memory Commissar Is Controlling the Nation's Past. The Nation, 13.08.2015. URL: https://www.thenation.com/article/archive/how-ukraines-new-memory-commissar-is-controlling-the-nations-past.). Jeffrey Burds (Northeastern University) claims that the UINM under the leadership of Vyatrovich produces archival collections with falsified documents where significant fragments of the originals are missing or changed. Marco Carynnyk (Mandel Center, US Holocaust Memorial Museum) notes that it was difficult for him to get access to documents from the archives about the crimes of Ukrainian nationalists in the World War II and their participation in the Holocaust (Cohen, J. The Historian Whitewashing Ukraine's Past. Foreign Policy, 02.05.2016. URL: https://foreignpolicy.com/2016/05/02/the-historian-whitewashing-ukraines-past-volodymyr-viatrovych. Efraim Zuroff (Simon Wiesenthal Center) and Per Anders Rudling (Lund University) believed that "an open, honest and truthful engagement of the wartime role of the OUN and UPA is unlikely as long as Viatrovych runs the UINR. Providing this government propagandist a platform at an international scholarly forum not only risks legitimising his activities, it does harm to scholarly research" (Rudling, P.A., Zuroff, E. The Fight for Historical Truth about the Holocaust in Ukraine. The Jerusalem Post, 30.03.2017. URL: https://www.jpost.com/Opinion/The-fight-for-historical-truth-about-the-Holocaust-in-Ukraine-485696.).

22 For example, in "*The Communist*", the official CPSU magazine, under the leadership of Yegor Gaidar, the grandson of the commander of the Red Army and the son of the party leader.

Alexander Yakovlev, head of the Propaganda Department of the Central Committee of the CPSU, led the commission of the XIX All-Union Conference of the CPSU that prepared the "On Glasnost" (1988) resolution, and a special commission of the Politburo of the Central Committee for additional study of materials related to the repressions of the 1930s,1940s and early 1950s. After Yakovlev's report, which acknowledged the existence of secret protocols to the Molotov-Ribbentrop Pact, the II Congress of People's Deputies of the USSR (1989) condemned their signing. The Democracy Foundation, established by Yakovlev, continued to actively (until 2018) publish collections of declassified documents on repression from the funds of the Party, the special services and the diplomatic department.

The historical and memorial movement attracted a significant number of citizens and had a political dimension, becoming one of the powerful cultural and political factors of the bankruptcy of the ideology of communism, the collapse of the Communist Party and the disintegration of the Soviet Union. In post-Soviet Russia, perpetuating the memory of victims of political repression has become part of state policy, and many archives were opened to researchers for the first time. Rehabilitated victims of political repression and their relatives have received the right not only to compensation but also access to personal files.

However, already in 1992, the initiated "CPSU case" was declared unconstitutional by the court and terminated.[23] The "Archival revolution" gradually began to wind down, and archives were rapidly closing. As in the cases of East Germany and Ukraine, it is necessary to understand the logic and mechanisms of changes or their absence.

According to Jan Rachinski (Head of the *Memorial* historical and civil rights society), the state does not deny the crimes of the past, and officials participate in events to commemorate and consolidate the memory of the victims of the Great Terror and the Holocaust[24]. According to Andrey Doronin (*Deutsches Historisches Institut Moskau*), the work with historical documentary heritage in archives is gradually entering the normal framework[25].

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23 Henderson, J. (2007). The Russian Constitutional Court and the Communist Party Case: Watershed or Whitewash? *Communist and Post-Communist Studies*, 40(1), pp. 1–16.

24 История под замком: почему в России до сих пор засекречены архивы 1930-х годов? (Eng: *History Under Lock: Why Are 1930s' Archives Still Classified in Russia?*). RTVi, 14.03.2019. URL: https://youtu.be/in_g1dnxKus.

25 Доронин А. (ред.) Российские архивы в гостях у Deutsches Historisches Institut Moskau: Материалы архивного коллоквиума DHI Moskau 2006–2010 (Eng: *Doronin, A. (ed.) (2010). Russian Archives Visiting the Deutsches Historisches Institut Moskau: Materials of the DHI Moskau Archival Colloquium, 2006-2010*). Moscow: DHI Moskau, p. 7.

Nonetheless, the Russian policy regarding the archives of the Party and the KGB resembles the policy of non-publicity of the Kuchma administration: It is a rejection of discussions about historical memory, which can divide society.[26]

As in the Ukrainian case, the principle of access to archives contrasts with the practice of its provision and non-provision. After 1991–92, the archives of the KGB were not made public – not even to the government itself. As in the Ukraine, they became the departmental archive of the new FSB (heiress of the KGB), the NKVD, and the "CheKa". The special services of Russia remain a close-knit closed corporation, reminiscent of the Department of Transport personnel from "*Maigret's Memoirs*" by Georges Simenon. This principle of continuity and corporatism of the special services makes the FSB disinclined to cooperate with researchers in studying the crimes of repressive Soviet bodies.

In practice, all documents of the FSB archives ceteris paribus remain confidential. To gain access to them, individual documents must be declassified by an Interdepartmental Commission. However, in order to offer documents for declassification, it is necessary to know about their existence, which is impossible if access to them has been denied beforehand. Thus, a great number of documents remain secret – even those that are more than 100 years old – and many valuable documents about the crimes of the special services and the party could not only be hidden but also destroyed and lost to history.

Conclusion

The politicisation of national history and the revival as well as creation of a new national mythology for political purposes is a characteristic feature of many, if not all, post-communist states of Eastern Europe. History and law are turning academic disciplines into political instruments.

Opening of the Party and state security archives should become a solid documentary basis for overcoming historical politics in Central and Eastern Europe, as well as for memorialisation and museumification of the traumatic historical experience of the XX century in Central and Eastern Europe.

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26 So, the 100th anniversary of the "Red October Revolution" passed without a broad public discussion about the results of these historical events, almost without going beyond the professional community.

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Marica Mišić

The (in)sufficiencies of legal mechanisms within the framework of transitional justice

Justice. The word mostly associated with law, not only in the etymological sense of the term (ius – iustitia, pravo – pravda), but as one of the fundamental goals the law strives for. Justice is the value law should realise and accomplish. It is often followed by equity and fairness, and according to Aristotle, fairness is personalised justice, justice applied in every concrete and individual case. Besides, for example, legal justice, arithmetical, corrective and retributive justice, in the discourse often mentioned a divine justice and divine judgement, moral justice, social justice and injustice, distributive justice, criminal procedural justice and formal justice (it is necessary to stress out that some scholars deny possibility of this type of justice, since the concept of justice is something rather substantive, and not formal[1]), and restorative justice. After the fall of the Berlin Wall and the collapse of the Soviet Union, the term "transitional justice" is increasingly mentioned. What is transitional justice and how does it differ from other justice, such as retributive, corrective and distributive justice?

Restorative justice views crime as a problem in the relationship between victim, offender and the local community which disrupts social equality; hence the purpose of criminal justice system is to restore the balance in the relationship and its key is forgiveness. On the contrary, retributive justice aims to punish the offender and thus provide justice based on the desire for revenge. Both kinds of justice should be distinguished from transitional justice, although transitional justice may seek forgiveness and reconciliation as well as punishment the offenders.[2]

Transitional justice is tied to transition states and waves of democratisation. Transitional states are a type of state that seeks to establish or stabilise a new type of state on the ruins of the old state. This transitional period from the old regime to the new social and political formation

1 Vukadinović, G. Mitrović, D.(2019). *Introduction to the Theory and Philosophy of Law* (pp. 126-127). Belgrade: Dosije.

2 Murphy, C. (2017). *The Conceptual Foundations of Transitional Justice* (pp. 21–22). Cambridge: Cambridge University Press.

rationalised and positivised by the new legal order is called transition.[3] The term "transitional justice" generally refers to "formal attempts by post-repressive or post-conflict societies to address past wrongdoing in their efforts to democratize".[4] Although the transition is a transformational period from one type of state to another, at the end of the twentieth century there was mostly talk of the transition from authoritarian regimes to democracy. Democracy should be the basic social and normative framework for the realisation of human and civil rights.[5] The presumption of transitional justice is that the previous regime committed bad deeds – crimes – and that its reign produced numerous victims. One of the important issues that the new regime needs to address is finding the best possible way to more or less correct these past mistakes. An overall agreement between scholars and experts on the subject is that the key precondition to successful transition to democracy is that societies are needed to "address their legacies of violence, which typically include systematic brutal human rights abuses".[6]

The way of reckoning with former regimes and treatment of former legal system created a desire for transitional justice in the fields of legal and political discourses, first after the Second World War and even nowadays, especially in transitional societies and states after the fall of the Berlin Wall.[7] "Dealing with past wrongdoing is a prominent and recurring issue for many societies".[8] For example, the USA struggles with its legacy of slavery and segregation; for the European countries – especially Central and Eastern European countries, including Eastern Germany, states of former Yugoslavia and the Soviet Union – the problem they need to confront is their communist past. Communist regimes are deemed to be – if not totalitarian in its exact meaning of the term, as in the case of Soviet Union during the Stalin's reign –authoritarian and repressive. "In the transitional justice discourse, revisiting the past is understood as the way to move forward[...]the paradoxical goal in transition is to undo history".[9]

The process of introducing communism presumed abolishing private property in the domain of means of production and widespread nationalisation. Given that the right to private property is recognised as one of the most important human rights, it is possible to restore

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3 Kovačević, S. (2015). *Transition to Democracy – Transformation of Society and Consolidation of Democracy* (pp. 16-17). Niš: Faculty of Law, University of Niš.

4 Murphy, Ibid., p. 1.

5 Kovačević, Ibid., p.26.

6 Murphy, Ibid., pp. 7–8.

7 Teitel, R. (2002). *Transitional Justice*. New York: Oxford University Press.

8 Murphy, Ibid., p. 7.

9 Teitel, R. (2003). Transitional Justice Genealogy. *Harvard Human Rights Journal*, 16, pp. 69–94.

ownership to its previous owners or their successors and provide some kind of satisfactory material compensation. However, communist regimes, as well as other authoritarian or totalitarian regimes, needed to produce their own specific enemies in order to stay in power. In many, many cases people who suffered the oppression and were persecuted were intellectuals and indeed politically innocent individuals. Whether they were put on show trials and then executed or imprisoned or just faded away as if they had never existed, or just their privacy was in some way infringed, the consequences are irreversible. Every life or freedom taken away is injustice not only to that very person but to their family and friends as well. This kind of political practice has destroyed the closest human relations. Aspirations of this essay would be to do further research on what the remedies of transitional justice and law in attempts to overhaul harms done to one's personality are, when it seems that everything which could be done is insufficient.

Wrongdoings from the past place "moral demands on particular perpetrators and generate moral claims of particular victims", but the response depends on the context which may require societal change in some cases, while in others societal transformation is not necessary.[10] Any changes in society can encounter a kind of resistance and aspiration to preserve the status quo. Dramatic social changes in an individual can cause a feeling of uncertainty and insecurity and lead to a "syndrome of transitional depression", which manifests itself, among other things, in nostalgia for the previous political and social order, obsessive attitude towards the past and then as rigidity of opinion and behaviour created by an earlier cultural and psychological pattern of consciousness, as a destructive behaviour that is a reaction to changed circumstances.[11]

So, what are the legal mechanisms that transitional justice relies on and in what degree are legally and morally justified? A similar question was raised by Colleen Murphy: "What are the appropriate standards of justice to use when evaluating various legal responses to wrongdoing in transitional contexts?", regarding general principles that these mechanisms – "responses to wrongdoing"– have to meet in order to be just.[12]

First things first: Consequences of show trials and elimination of opponents behind the court stage as well, are irreversible. The human life or freedom is taken away and the victim is

10 Murphy, Ibid., pp. 7–8.

11 Kovačević, Ibid., p. 20.

12 Murphy, Ibid., p. 5.

irreparably deprived of their greatest assets: life, freedom and human dignity. The harm done to individual and one's closest friends and family cannot be undone in the majority of cases. Further questions linked to this topic may have direction towards measures of repairing – or in most cases measures of addressing – the damage caused to innocents (and their families). which were tried as enemies of the state and society or as spies.

For example, one form of justice is rehabilitation of the tried victims, which further opens problem of amending the cases of victims who perished behind the scene without a show trial. A Serbian Rehabilitation Law was enacted in 2011, and it defines "rehabilitation and legal consequences of rehabilitation of persons who are deprived of life, liberty or other rights for political, religious, national or ideological reasons". Legal consequences of rehabilitation according to this law are mostly pecuniary and include pension and healthcare insurance rights, the right to return confiscated property or compensation for that property, and the right to compensation for material and non-material damage (rehabilitation compensation).[13] This law regulates both, judicial and legal rehabilitation. Legal rehabilitation that occurs by the force of this law itself, should amend violations of rights and freedoms that have occurred without a judicial or administrative decision, and for violations on the basis of administrative or judicial decision for specific offences. The law itself also rehabilitated some categories of persons, such as those deprived of their liberty by a court or administrative decision on charges of voting for the Resolution of the Information Bureau of 28 June 1948 and held in camps or prisons on the territory of the Federal People's Republic of Yugoslavia in the period from 1949 to 1955, those declared war criminals and participants in war crimes who did not lose Yugoslavian citizenship but did not commit or participate in the commission of war crimes according to the principle of collective responsibility, and finally persons to whom in March 1947 ("Official Gazette of the Federal People's Republic of Yugoslavia", No. 64/47) citizenship was revoked and all property confiscated.[14]

The other mechanism is beyond the area of law and consists of establishing truth commissions, conducting the policy of remembrance and reconciliation, as well as building memorial centres dedicated to the victims of the regimes or opening the archives of the secret police.

Further legal mechanisms included in the concept of transitional justice are prosecuting the responsible perpetrators and passing the legislation which is aimed to lustration.

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13 Article 1–3. *The Law on Rehabilitation (2011)*. Official Gazette of The Republic of Serbia, No 92/2011.

14 Article 5. *The Law on Rehabilitation (2011)*. Official Gazette of The Republic of Serbia, No 92/2011.

Transitional justice seems to be related to criminal justice and the "trials of ancien régimes".[15] Teitel claims that there is a "potential for politicization in the use of trials to construct transitional historical understanding" in emerging democracies, also labelling them as "show trials", which are extreme cases of "sacrificing individual rights to the societal interest in establishing history record".[16] "Exemplary fair and apolitical trial is slow, expensive and uncertain when it is a transitional moment it seems to require speed, economy, and authoritative clarity."[17] From the standpoint of law criminal punishment exercised over wrongdoers is justice, "giving them what they deserve" in the course of criminal prosecution, trial and determining adequate punishment in the verdict, in case of conviction. The core of the retributive justice is that wrongdoers deserve to suffer according to their deeds and thus it is intrinsically just to inflict it upon them.

The potential shortcoming of this mechanism within the transitional justice is that in cases of mass atrocities and abuses of human rights during the former repressive regime and conflicts, the possibility of overwhelming the judiciary and criminal justice system is so great that it might backfire and cripple the whole judicial system. Other obstacles may be lack of evidence in order to accuse and convict and corruption, as well as insufficiency of trained legal staff and police officers. As a result, many of really guilty perpetrators may remain free due to the practical impossibility of accusing and convicting them all. It is often considered unjust that some of them are accused and punished while others still enjoy their freedom without taking any responsibility.[18] The problem is in determining who is really guilty for wrongdoings and those who may avoid prosecution and keep their current position in society and state. For example, in those repressive and authoritarian states, every member of public services and bureaucracy may be viewed as an accessory. If they are considered accomplices, what would they be accused of, if their duty was to obey their superiors' order and carry them out? It is the same dilemma Gustav Radbruch addressed facing the Third Reich's atrocities in the 20th century, focussing his thoughts on the problem on maxims "an order is an order" and "a law is law". The problem when determining who is wrongdoer of the former regime may be raised regarding moral dilemma whether an individual has a moral duty to disobey an unjust law or legal order.

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15 Teitel, R. (1997). Transitional Jurisprudence: The Role of Law in Political Transformation. *The Yale Law Journal, 106*(7), pp. 2009–2080.

16 Teitel (2003), Ibid.

17 McAuliffe, P. (2013). *Transitional Justice and Rule of Law Reconstruction – A Contentious Relationship* (p. 87). London – New York: Routledge, Taylor & Francis Group.

18 Murphy, Ibid., pp. 7–10.

Another obstacle is retrospective application of law in order to try and punish suggests characteristics of arbitrariness, thereby destroying legal values such as legal certainty and the principle of nullum crminen, nulla poena sine lege. If the former regimes brought laws which may be considered unjust, what would be the basis on prosecuting and punishing those who were mere members of executive and implementing these laws? Radbruch considers that validity of unjust and wrongful positive law cannot be affirmed absolutely.[19][20] Evaluation than must be done not only from the standpoint of legal certainty but also through criterions of justice and purposefulness.[21] If the perpetrators hid behind the excuse of conducting oneself in accordance with command of their superiors instead of as a result of their own will, then "the repressive state is allowed to triumph over captive society, even after regime change."[22] If we decide that there is moral duty to disobey such laws and orders, then we confront a new moral dilemma. If those who we may view as accomplices at the time of these wrongdoings had to choose between obeying an order on the one hand and on the other opposing and ignoring it, thereby endangering their own and that of their family and friends, we should ask whether one really had the freedom of choice.[23] If the answer is yes, and supposing one chooses to resist, would their sacrifice be futile, since they just one "cog" among numerous others in the state's proverbial "wheel"? How far in prosecuting and punishing should the new regime go, and who is innocent when the former regime made every citizen an accomplice in systematic oppression?

Moreover, in order to function the new regime needs competent and trained administrative clerks and other staff, hence it must rely on those who worked during the reign of the

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19 Radbruch, G. (2006). Five Minutes of Legal Philosophy. *Oxford Journal of Legal Studies, 26*(1), pp. 13–15.

20 Radbruch, G. (2006). Statutory Lawlessness and Supra-statutory Law. *Oxford Journal of Legal Studies, 26*(1), pp.1–11.

21 Radbruch, G. (1980). *The Philosophy of Law* (pp. 99–100). Belgrade: Nolit.

22 Stan, L. (2009). Introduction: Post-communist Transition, Justice and Transitional justice (pp. 1-14, p. 4). In: *Transitional Justice in Eastern Europe and Former Soviet Union – Reckoning with the communist past*. (ed. Stan, L.). London – New York: Routledge, Taylor & Francis Group.

23 When a person, conditionally speaking, can choose between alternatives to betray and thus kill friends and family members or commit suicide and thus drag his loved ones with him to death, he actually has no choice. In conditions in which the human conscience serves no purpose, because it has become impossible to do a good deed, there is complicity of all in the crimes of the totalitarian regime, which includes victims, to whom responsibility for a large part of the camp administration is transferred. These victims can choose whether to take part in committing crimes against other detainees or to refuse and thus commit crimes against family and friends. In both cases, they become murderers, and in fact they cannot solve that dilemma with the help of conscience, which becomes superfluous. The line that divides the killer and his victim, the persecutor and the persecuted is constantly blurred. The camps and the killing of political opponents are part of an "organised oblivion" that spreads to the victim's family and friends, who are forbidden pain and memory. The death became anonymous, because it was not possible to find out whether the prisoner was alive or not, from whom even death was taken away. By removing every trace of him, his life and death, as if he never existed, it is shown that nothing belongs to an individual. – Arendt, H. (2013). *Totalitarianism – part of The Origins of Totalitarianism* (pp. 338-340). Belgrade: Library Altheia. Edition Fragmenta philosophica/ Printer Makarije.

former regime. This is in close relation to lustration as an instrument to prevent and forbid individuals from holding certain offices. United Nations described lustration measures as an instrument of changing citizen views towards "the trustworthiness of public institutions", as means of trust-building.

It is also possible for lustration measures to backfire and instead of enhancing the foundations of a strong democracy could undermine them. The lustration procedures rely on information contained in secret police files, which could be manipulated, and its veracity could be dubious. Additionally, we may ask if there is a possibility of undermining interpersonal trust by the revelations about the betrayals among neighbours, friends, co-workers and even family members. Finally, the way the lustration is conducted may "potentially or actively violate individual rights, liberties and legal guarantees".[24]

Using the Republic of Serbia as an example, the law about lustration was enacted – known as the Law on Liability for Human Rights Violations[25] – but was never applied in practice, and its validity period has expired almost a decade ago, meaning that old political elites are still in power. This act determined that investigations about human rights violations apply from 23 March 1976 onwards, as this was the date when the International Covenant on Civil and Political Rights came into force. It was limited in the sense that would not go further into past when communist regime was stronger, such as after the Tito-Stalin split in 1948/1949. In defining the violations of human rights, this act refers to covenant in every case when the action of violation was not illegal according to domestic law and when it is committed in accordance with superior's order.

According to this law, special forms of human rights violations include violation of human rights which "infringes the right to privacy of another person, and which is undertaken with the aim of information concerning or in the possession of that person is obtained in order to obtain that information submitted to the Security Information Agency or to an earlier or other appropriate service". [26] In term of human rights violation, this law prescribes actions of the person who was in an official capacity in court proceedings or proceedings before a state body or an organisation exercising public authority whereby another person is restricted or

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24 Horne, C.M. (2017). *Building Trust and Democracy – Transitional Justice in Post-Communist Countries* (pp. 5–8). Oxford: Oxford Universtiy Press.

25 *The Law on Liability for Human Rights Violations (2003)*. Official Gazette of The Republic of Serbia, No 58/2003, 61/2003.

26 Article 6. *The Law on Liability for Human Rights Violations (2003)*. Official Gazette of The Republic of Serbia, No 58/2003, 61/2003.

deprived of certain rights, duties or some punitive or other coercive measure are imposed on them, "if they knew or should have known that the proceedings were being conducted solely for the purpose of applying political views and criteria, which are openly or covertly presented as legal rules or criteria."[27]

The problematic provisions, even if this act had been applied, could be those regarding measures in the cases of confirmed violations of human rights. Perpetrators are left to voluntarily leave their positions and offices as well as their eventual candidatures, and if they are not willing to do so, then they will be vetted to occupy positions and offices in the next five years. Thus, the measure is provided to last for limited period of time, to be temporarily and not permanent.[28] On the other hand, a lot of transitional countries opted to deal with those who participated in the past wrongdoings by granting them amnesty, as the amnesty itself was the precondition for the transition to occur in the first place. This means that punishment is precluded so its pursuit becomes "morally controversial insofar as it violates a prior commitment". In such circumstances, as victims or their families still deserve justice, other kinds of mechanism should serve this purpose. Victims may be offered reparations such as financial compensation as a mean of satisfaction for suffered harms and damages, guarantees of non-repetitions, symbolic measures in the form of public apologies and commemorations, as well as some social services (education, health care).[29]

Historical and political experience opens debate among scholars and experts on the subject and dealing with the past. It is important for transitional countries to recognise the importance of human rights, and not just for the sake of satisfying formal standards of liberal democracy and mere political rhetoric. Constitutional guaranteeing of human rights is worthless unless they are respected and exercised in everyday life. Besides, in order for them to be really respected, it is not enough to pass the legal acts. In addition, this legal and formal process guarantees society, its members and political elites will bear in mind that human rights are something essential and inherent to every human being and the legal manifestation of something that separates us from other living beings (i.e. animals), a by-product of our conscience and the capacity to understand and conduct ourselves in accordance with our own free will. Nevertheless, being free does not imply dissoluteness and arbitrariness. Unless society itself

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27 Article 9. *The Law on Liability for Human Rights Violations (2003)*. Official Gazette of The Republic of Serbia, No 58/2003, 61/2003.

28 Articles 32-33. *The Law on Liability for Human Rights Violations (2003)*. Official Gazette of The Republic of Serbia, No 58/2003, 61/2003.

29 Murphy, Ibid., p. 10.

and citizens adopt human rights and rule of law as fundamental values, there always will be the danger that in the time of democratic crisis authoritarianism, repression and repeating the past mistakes may occur again.

"Dealing with the past responds to true needs for justice, truth and reconciliation, but it can also be easily subjected to political manipulation and can lead to new injustices if the rule of law is neglected in favour [sic] of political expediency."[30]

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30 Stan, Ibid., p. 4.

Ana Nizharadze

Human Rights Protection in Communist Past

At the very beginning, it should be noted that the protection of human rights at all times and in all circumstances is of the highest human value. Whether in peacetime or in war, the protection of human rights is an unavoidable necessity in the light of the circumstances which may deviate from protection by States in cases expressly provided by law.[1]

Human rights violations can be evidenced by the existence of endless controversies from the past. It was the widespread bloodshed, injustice, impunity and lawlessness, as well as the dictatorial power and its elites seen by the international community first in World War I and then in World War II that demanded the creation of mechanisms, instruments or bodies of international influence to end impunity which would carry out prosecution, playing an important role in the conflict prevention and peacebuilding process really needed from the second half of the twentieth century onwards.[2]

The goal of the international community after World War I was to establish a peace that could be achieved by punishing the perpetrators. However, world leaders at the time were characterised by a lack of will, while the idea of arranging a trial for crimes of unprecedented brutality and scale gained in popularity. The first precedents for punishing international criminals were set by the Nuremberg and Tokyo tribunals. And then there were the ad hoc tribunals of the former Yugoslavia and Rwanda set up by the UN Security Council, where the number of human rights violations reached alarming levels.[3]

The legacy of the communist regime had very dire consequences. From communism to the establishment of democracy, a multi-stage process unfolded. Several Central and Eastern

1 Nooke, G. (2016). Human Rights Before and After the Fall of The Berlin Wall. In *Puente Democratico, 59* (pp. 1–7).

2 Ibid.; Vladimir, L. (2017). Human Rights and How They are Applied in Post-Soviet Societies. In *Journal of Political Sciences and Public Affairs, 5*(4) (pp. 1–4).

3 Nooke, G., Ibid., pp. 1–7.

European states participated in this.[4] During the communist era, on the one hand, there was the rule of law, democracy and the protection and respect of human rights, while on the other, dictatorship, the desire to gain or retain power was systematically manifested in the insecurity and with interference. There were different ideologies, with supporters and opponents of each making the achievement of the peacebuilding plan increasingly difficult and taking it into the long run. The socialist states intended to create a communist world system that denied human freedom and the existence of fundamental rights in general, which are now an integral part of the daily life of each individual.[5]

One of the key issues for these states was to establish a system of law that not only recognised human rights but also protected and respected each of them. In totalitarian regimes, these countries had to "live" with ignored human rights for about 40 years. Regarding the communism-related past, former Czech President Vaclav Havel noted that "It is important to find a fair balance, the right approach, which would be humane and civilised, but would not try to evade the past."[6]

The Soviet Party and the leaders of its allied states were enchanted by the seizure of power and international governance. For them, no person was a free individual with their own will, interests, or thoughts. This period in the history of human rights has been proven to be one of the most catastrophic. Here, people lived based only on the will of dictators.[7]

The existence of a constitution was paramount in post-communist states.[8] In West Germany, for example, a law was passed that guaranteed the rule of law and freedom along with other human rights. The first article of this law considered human dignity inviolable, the protection and respect of which was the responsibility of states.[9] The innovations made at the legislative level seem to have changed the outlook for humanrights abruptly.[10] Adopted policies struck a balance between human rights abuses and violations of which had previously been no idea.[11] Human beings were seen as part of society, and the protection of rights as a means of achiev-

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4 Szczerbowski, J. J., & Piotrowska, P. (2008). Measures to Dismantle the Heritage of Communism in Central and Eastern Europe. Human Rights' Context. In *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol nº 62/63*, (pp. 233–248).

5 Nooke, Ibid., pp. 1–7.

6 Szczerbowski, & Piotrowska, Ibid., pp. 233–248.

7 Nooke, Ibid., pp. 1–7.

8 Szczerbowski, & Piotrowska, Ibid., pp. 233–248.

9 Nooke, Ibid., pp. 1–7.

10 Ibid.

11 Szczerbowski, & Piotrowska, Ibid., pp. 233–248.

ing world justice. Furthermore, East Germany was again marked by complete dictatorship This was the reason that millions of people tried to breach the Berlin Wall they were not allowed to: for the prospect of a better life. According to ideology, they should not see relatively better living conditions and, in general, be free.[12] The problem was mainly lack of personal freedom and civil rights. At the same time, it was superfluous to mention the right to health, employment opportunities, or the provision of relevant services for disabled people. There were also no basic rights later recognised by many international instruments, such as: freedom of expression, of speech and thought ...

Given that the responsibility of the accused for the conduct of World War II was one of the most important goals of the international community, the establishment of this principle and the setting of the first precedents opened the door to the development of human rights law. It was this period that was considered the evolution of the branch of international law.

The basic human rights listed above were recognised by the international level instrument, the *International Covenant on Civil and Political Rights*, and its sibling covenant as the supreme human right, and before that by the *Universal Declaration of Human Rights (UDHR)*, which was an important milestone in the development of human rights law.[13] After several years of this regime, the states, along with the introduction of the human rights recognition system, also tried to reform the economy, another important factor for the development of each country.[14] There is one interesting fact about UDHR: While most of the Central and Eastern European states were found members of the UN in 1945, the eight opposed to the adoption of this declaration turned out to be the communist states, which put into question their real desire for them. It turned out at the time that they were not expressing a willingness to recognise the most important rights to human existence. The development of human rights turned out to be politically dependent for that period.

Thus, the communist period was characterised by strict dictatorial rule on the one hand, and a desire for democracy on the other. Such a period ended with the passage of time, the creation of new technologies, and movements. The outpouring of people on the streets for peaceful purposes and the desire for freedom of speech, press and expression prompted the role of human rights to come to the fore. After the collapse of the communism system, the situation gradually

12 Nooke, Ibid., pp. 1–7.

13 Ibid.

14 Szczerbowski, & Piotrowska, Ibid., pp. 233–248.

began improving, the political system started developing and the standard of living of the people also rose. The awakening of the people (civil society), the overcoming of fear and the public expression of the desire for democracy and freedom had a significant impact on the overthrow of the dictatorial and bureaucratic regimes and the overthrow of centralised institutions.[15] As Nooke notes in the article, he was no longer afraid of bloodshed: The first thing a human being wanted was freedom and everything that was associated with a person and created the means for a free life. It can be said that the people played an important role in ending the Cold War.[16]

Eastern European countries awakened to the process of democracy only during Gorbachev's so-called *perestroika* initiative, when political freedom became relatively possible.[17] This process was further facilitated by the fall of the socialist regime in 1989, which was followed by the international recognition and ratification of human rights instruments. This was followed by the development and the rule of law was then recognised. Communist states gradually became members of various international organisations[18] and implemented international responsibilities and obligations at the national level.

Today, it is impossible to ignore how the East and Central European countries have evolved from their communism heritage and reached a high stage of development.[19] In conclusion, it can be said that human rights protection, democracy and rule of law is a source of development in each state.

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15 Ibid.

16 Nooke, Ibid., pp. 1–7.

17 Szczerbowski, & Piotrowska, Ibid., pp. 233–248; Gorbachev, M.S. (1998). A Landmark in the History of Moral, Legal and Political Culture. In: B. Heijden and B. Tahzib-Lie (eds.), Reflections on the Universal Declaration of Human Rights: A Fiftieth Anniversary Anthology. (The Hague: Martinus Nijhoff Publishers), p. 134.

18 Council of Europe, NATO. Moreover, an important step for post-communist states was ratification of the ECHR and recognising the authority of the European Court to hear cases.

19 Szczerbowski, & Piotrowska, Ibid., pp. 233–248.

Veronika Pfeilschifter

A comparative reflection on Georgia's and Armenia's transitional justice processes

Abstract

This essay[1] offers a broad conceptualisation of transitional justice (TJ) and provides a comparative analysis of the TJ processes in Georgia after 2012 and in Armenia after 2018 until autumn 2020.[2] It is based on document analysis, qualitative interviews with human rights defenders, and discussions during the 2021 *Transitional Justice Summer School* of the Deutsche Gesellschaft. Human rights violations, crimes and mass murder committed during the Soviet period are not subject of this essay; it focusses on political processes of the post-Soviet transitory periods. In the 1990s and 2000s, Georgia and Armenia underwent neoliberal authoritarianism, causing profound human rights violations. Governments took later regime transitions as starting points to announce the introduction of processes of "dealing with the past". To date, however, both governments in Georgia and Armenia have realised TJ only on very low scale. The TJ matrix indicates a slightly broader extent of TJ implementation in Armenia than in Georgia, in particular in the socio-economic and symbolic-representative dimension. The paper concludes that despite challenging political circumstances in both countries, on-going TJ attempts, in particular on the level of civic initiatives, should be integrated into broader domestic human rights struggles and supported externally.

1 It is based on previous work on transitional justice by Pfeilschifter, V. (2021). *Righting the wrong? Illustrating and understanding post-authoritarian transitional justice in Georgia and Armenia*. University of Tartu. Retrieved 8 September, 2021, from https://dspace.ut.ee/handle/10062/71747.

2 The ending point has pragmatic reasons. I finalised my field research before the beginning of the second Nagorno-Karabakh war on 27 September 2020 and have to collect further data in the field which include all developments since the outbreak of the war until today.

Two understudied cases: Transitional justice in Georgia and Armenia

Not too long ago, governments in Armenia and Georgia declared the implementation of TJ in the respective societies: In 2012, shortly before the parliamentary elections, then-candidate Bidzina Ivanishvili and soon-to-be new prime minister and founder of the Georgian Dream (GD) party announced an end to the "bloody nine years"[3] of the Saakashvili administration.[4] In 2018, 100 days after Armenia's Velvet Revolution, Nikol Pashinyan, who had become the face of the popular mass civil disobedience and Armenia's new Prime Minister, announced the creation of "transitional justice bodies".[5]

Today, in 2021 – and this is something some of the participants of this summer school have agreed on – the idea of TJ in Georgia has been evaluated as 'politicized' and failed[6]. In Armenia, the TJ process has stagnated in the wake of the horrendous Nagorno-Karabakh war (2020). These observations are the basis for the guiding research question of this essay: *Which measures have precisely been implemented?* So far, the TJ cases in Georgia and Armenia remain widely understudied, in the manner of a single-case as well as comparative-case study and have not received enough attention among scholars of post-Soviet transitional justice. Only few analysts and policy experts have provided in-depth examinations of TJ perspectives in Georgia and Armenia.[7] However, various actors from local civic initiatives have repeatedly stressed the need for comparative analyses of the two countries. Based on these observations, this essay wants to jointly analyse both cases.

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3 *Georgian Dream's "Seven Bloody Years"*. (2019). OC Media. Retrieved 6 September, 2021, from https://www.opendemocracy.net/en/odr/georgian-dreams-seven-bloody-years.

4 Austin, R. C. (2018). Confronting the Soviet and post-Soviet Past in Georgia. In C. Horne & L. Stan, Lavinia (Eds.) *Transitional justice and the former Soviet Union: reviewing the past, looking forward the future* (pp. 243–262). Cambridge: Cambridge University Press.

5 The Prime Minister of the Republic of Armenia (2018) 'Prime Minister Nikol Pashinyan's Speech at Rally Dedicated to 100 Days in Office'. Retrieved 23 May, 2020, from https://www.primeminister.am/en/statements-and-messages/item/2018/08/17/Nikol-Pashinyan-100-day-rally/.

6 Varney, H. (2017). *Assessing the Prospects for Transitional Justice in Georgia*. Retrieved 8 June, 2020, from https://www.ictj.org/publication/transitional-justice-georgia.

7 Compare here, for instance: Dolidze, A., & de Waal, T. (2012). A Truth Commission for Georgia. Retrieved 4 June, 2020, from https://carnegieeurope.eu/2012/12/05/truth-commission-for-georgia-pub-50249; Carranza, R. (2018). *Shaping a Transitional Justice Strategy for Armenia: A Conversation with Anna Myriam Roccatello and Ruben Carranza*. Retrieved 8 June, 2020, from https://www.ictj.org/news/shaping-transitional-justice-strategy-armenia-conversation-anna-myriam-roccatello-and-ruben.

TJ as a human rights concept

TJ has diverse meanings depending on the ideological position of the speaker. Definitions vary from narrow approaches which include civil and political rights violations to broad ones addressing socio-economic inequality and social injustice. It includes a series of interrelated measures which have the potential to realise human rights in multiple dimensions – politically, socially and economically. Since its terminological creation in 1995,[8] TJ has gone a long and interdisciplinary way. On the one hand, various intergovernmental and supranational organisations have included it as a goal of liberal democratisation; on the other, international non-governmental organisations have offered consultancy on TJ formation and implementation to governments and civil society worldwide, becoming internationalised as a global justice project.

I myself look at TJ as 'the judicial and non-judicial processes designed to reckon with past human rights violations following periods of [...] state repression and[/or] armed conflict'[9]. Thus, I do not see TJ as a solely legal mechanism but as one which can achieve societal transformation, thereby covering multiple dimensions of human existence. TJ aims for accountability from groups and individuals who have previously committed human rights violations, and reconciliation for collectives and individuals whose rights were violated.[10] Its ultimate – and indeed utopian goal – is an end to previous structural political and economic violence.[11] Analytically, TJ can be subsumed into two major categories: post-authoritarian and post-conflict TJ.[12] Post-authoritarian TJ, which is the focus of my research, is a response to systemic violations of principles of democracy – namely, civil, political, social and economic rights. In the following, violations of political and civil rights, caused by murder, rape, torture and other forms of physical violence are subsumed under political violence. Violations of economic and social rights resulting from corruption, economic crimes and political policies which produce pervasive structural economic inequality are subsumed under "economic violence".[13] An authoritarian system is defined as a political system in which political and economic violence occur. Thus, democracy is defined

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8 Kritz, N. J. (1995). *Transitional justice: How emerging democracies reckon with former regimes, Vols.1–3*. Washington DC, USA: United States Institute of Peace Press.

9 Dancy, G., Marchesi, B. E., Olsen, T. D. et al. (2019). Behind Bars and Bargains: New Findings on Transitional Justice in Emerging Democracies. *International Studies Quarterly, 0*, p. 1.

10 International Center for Transitional Justice (2020b). *About Us*. Retrieved 12 June, 2020, from https://www.ictj.org/about.

11 Sharp, D. (2014). Introduction: Addressing Economic Violence in Times of Transition. In Sharp, D. (Ed.) *Justice and Economic Violence in Transition* (p. 25). New York et al.: Springer.

12 Post-conflict TJ is a response to periods of structural violence, which include large-scale physical violence committed in an armed conflict between two or more states, different state and non-state actors or in the context of contested statehood.

13 Sharp, Ibid., p. 2.

not only in a purely minimalist procedural definition which solely includes political and civil rights. According to this logic, any post-authoritarian TJ must include responses to violations of both rights groups. This is reflected in my own matrix of TJ implementation. The model is a combination of Vello and Eva-Clarita Pettai's 12-field matrix[14] and Dustin Sharp's thinking.[15]

	Accountability	**Reconciliation**
Legal-judicial	• (Criminal) investigations • Prosecution of perpetrators (1a)	• Legal rehabilitation of victims • Release of political prisoners (1b)
Political-administrative	• Purges, office bans and vetting of former regime officials (2a)	• Political rehabilitation of victims through awarding of special compensation (2b)
Socio-economic	• Return of illegally obtained property • Return of corrupted financial assets (3a)	• Restitution of property • Obtention of basic social security (3b)
Symbolic-representative	• Rhetorical condemnation of former authoritarian regime by new governmental officials • Non-judicial investigations revealing mechanisms of abuse (4a)	• Public remembrance • Official apology towards subjects whose human rights were violated (4b)

Table 1: Matrix of TJ measurement (Own image).

14 Pettai, V., & Pettai, E.C. (2015). *Transitional and Retrospective Justice in the Baltic States* Cambridge, UK: Cambridge University Press.

15 Sharp, D. (2013). Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice. *Harvard Human Rights Journal, 26*, pp. 149–178.

It consists of two categories, accountability and reconciliation, as well as four dimensions: "legal-judicial", "political-administrative", "socio-economic", and "symbolic-representative". The legal-judicial dimension (boxes 1a and 1b) refers to measures of criminal punishment and individual accountability. Instruments in the perpetrator dimension are investigations and legal prosecutions. One main challenge here is certainly how to deal with the old legal system, which served as a basis for legitimising decisions made by elites that caused and reinforced political and economic violence. The reconciliation dimension refers to the release of political prisoners and legal rehabilitation of former victims; the latter includes the legal status of former repression or access to judicial remedies based on special laws. The political-administrative dimension (boxes 2a and 2b) includes instruments that lead to changes in the architecture of the political system. These are purges (the direct deprivation "[…] of livelihood in positions of public trust"[16]), office bans and vetting (a mechanism which aims to assess "[…] the integrity of individuals – including adherence to relevant human rights standards – to determine their suitability for public employment"[17]). Further measures related to legal rehabilitation are the introduction of reparation programmes or the possibility of being awarded monetary or social benefits or advantages within the new political system to balance the injustice inflicted by the previous regime. Compensation, however, cannot be equated with changes in a state's political economy, since 'the main goal of a reparations program is not to resolve poverty and inequality'[18]. The socio-economic dimension (boxes 3a and 3b) refers to measures that aim to control states' social and economic equality and can lead to changes in the political economy. Four central instruments are to be mentioned here: the act of returning confiscated property and financial assets, the restitution of property, and (re-)obtaining basic social security to eliminate most pervasive forms of economic violence.[19] The symbolic-representative dimension (boxes 4a and 4b) encompasses measures which address the nature of the *ancien régime* in a symbolic and rhetorical way. Concrete instruments are rhetorical condemnation of the old authoritarian regime by new members of the government and non-judicial investigations that reveal the nature of old abuse. Non-judicial mechanisms can include reports or commissions. Further

16 Pettai & Pettai, Ibid., p. 36.

17 International Center for Transitional Justice (2020c). *Vetting*. Retrieved 24 September, 2020, from https://www.ictj.org/our-work/research/vetting.

18 Duthie, R. (2014). Transitional Justice, Development, and Economic Violence. In Sharp, D. (Ed.) *Justice and Economic Violence in Transition* (pp. 165–203). New York: Springer Science+Business Media.

19 Miller, Z. (2008). Effects of Invisibility: In Search of the "Economic" in Transitional Justice. *The International Journal of Transitional Justice*, 2 (3), pp. 266–291; De Greiff, P. (2009). Articulating the Links Between Transitional Justice and Development: Justice and Social Integration. In de Greiff, P. & Duthie, R. (Eds.) *Transitional Justice and Development: Making Connections* (pp 28–75). New York: Social Science Research Council. Retrieved 23 December, 2020, from https://gsdrc.org/document-library/articulating-the-links-between-transitional-justice-and-development-justice-and-social-integration/.

measures are public remembrance including commemorations, such as public events and individual or collective apologies.[20]

Field research and methods

The paper has drawn from four different methods, which are process tracing, content analysis, semi-structured interviews, and semi-participant observations. Process tracing is something that the participants of this school constantly made use of. It is an analytical tool which draws on descriptive and causal interferences from temporal sequences of events and phenomena.[21] Semi-structured interviews were conducted with 34 human rights defenders, lawyers, politicians, journalists and psychologists.[22] I undertook one field trip to Yerevan in 2019 and attended events which focussed on civil society exchange and assessing victims' needs. Finally, all data was evaluated based on content analysis which was applied to all materials and connected with the presented matrix. In the following, the most important results which were discussed again during the course of this summer school are presented:

The failure of TJ implementation in Georgia

As for the legal-judicial dimension, it can be concluded that few measures were implemented, albeit in a flawed way: After the 2012 transition in Georgia, the newly elected GD party initiated a row of investigations and prosecutions which were directed toward former high-ranking officials and to a lesser extent law enforcement staff. They led to several acquittals in 2012 and 2013, which were then later followed by quick trials and lengthy prison penalties of prominent former UNM members, such as former Minister of Internal Affairs, Ivane Merabishvili; former Minister of Justice, Zurab Adeishvili; and former head of the Constitutional Security of the Ministry of Internal Affairs, Bachana Akhalaia. In a number of cases, prosecutions were accompanied by new human rights violations related to exercising political pressure on the

20 Carranza, R., Correa, C., & Naughton, E. (2015). *More Than Words. Apologies as a Form of Reparation*. Retrieved 28 September, 2020, from https://www.ictj.org/sites/default/files/ICTJ-Report-Apologies-2015.pdf.

21 Collier, D. (2011). Understanding Process Tracing. *PS: Political Science and Politics*, 44(4), pp. 823–830.

22 For the list of participants, compare Pfeilschifter (2021), pp. 122–123.

prosecuted.[23] To date, investigations in Georgia have not revealed the full scale of torture and ill-treatment in prison and detention or violations of social and economic rights. While prosecutions against officials involved in political crimes have been on-going since 2012, prosecutions of economic crimes played a marginalised role and structures of economic rights violations have remained unexamined. Rights violations and fatalities at workplaces between 2003 and 2012 have not been looked into further. Victims of human rights violations could address the prosecutorial services to start re-investigations of their own cases; however, de facto, they had little chance to achieve legal rehabilitation. Legal victim status has so far only been granted to those who were political prisoners and some of whose property rights were violated.[24] Generally, the process of releasing political prisoners in 2013 (including 194 individuals) was criticised by the Venice Commission for non-transparency, lack of a legal definition of "political prisoner" and thereby arbitrariness.[25]

In terms of the political-administrative dimension, it was found that former officials were dismissed in ad hoc manners; a cohesive strategy on office bans was not formulated. 33 % of the staff in the prosecutorial agencies was renewed, however all post-2012 prosecutors have been criticised by local human rights organisations for lack of integrity or direct relations with Ivanishvili.[26] Though the Georgian government formulated the "complete overhaul of the judiciary"[27] as one of its political priorities in 2014, processes of thoroughly checking the integrity of judges have so far not been implemented. In fact, the new executive has continued to influence the judiciary and old judges who were involved in cases of severe human rights violations have remained within the judicial system.[28] In a line with the absence of a framework of legal rehabilitation and a lack of establishing an investigatory commission, victims of human rights violations have not been compensated.

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23 Georgian Democracy Initiative (2015). *Politically Biased Justice in Georgia*. Retrieved 4 October, 2020, from https://gdi.ge/uploads/other/0/241.pdf; Transparency International Georgia (2017). *The Fourth Trial Monitoring Report of High-Profile Criminal Cases*. Retrieved 27 December, 2020, from https://www.transparency.ge/en/post/fourth-trial-monitoring-report-high-profile-criminal-cases.

24 Interviews by Chanturia and Muskhelishvili (2020) compared to Pfeilschifter (2021), p. 38.

25 Venice Commission (2013a). *CDL-AD(2013)009-e. Opinion on the Provisions relating to Political Prisoners in the Amnesty Law of Georgia Adopted by the Venice Commission at its 94th Plenary Session (Venice, 8–9 March 2013)*. Retrieved 31 July, 2020, from https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)009-e.

26 Georgia Today (2019). *Authenticity of General Prosecutor's Diploma Questioned*. Retrieved 11 August, 2020, from http://georgiatoday.ge/news/17686/Authenticity-of-General-Prosecutor%27s-Diploma-Questioned.

27 The Government of Georgia (2014). *National Strategy for the Protection of Human Rights in Georgia 2014-2020*. Retrieved 2 August, 2020, from http://gov.ge/files/429_51454_924779_STRATEGYENG.pdf.

28 Compare Pfeilschifter (2021), pp. 42–43.

As for the socio-economic dimension, the paper has found that GD – except for small-scale return of property – abstained from implementing any related TJ measures. Local analysts underlined that there have not been changes in terms of the course of economic development after 2012 in Georgia. Neither have corrupted financial assets and illegally obtained property been returned nor has an independent anti-corruption agency been established.[29] A monitoring and control mechanism of high-level corruption and embezzlement of financial assets was established only in 2017 and does consequently not have retrospective effect. As for the return of property, a unit on the return of extorted property was set up in the Prosecutor's Office in 2015. Until 2018, only 149 out of thousands of reported cases were resolved successfully.[30] Furthermore, the Georgian government has generally continued UNM's social politics which still do not guarantee basic social and economic rights, such as minimum wage, unemployment benefits, and solid protection at workplaces.[31]

Though GD has been condemning UNM's politics under Saakhashvili and his successors, and has exposed UNM officials' wrongdoings by public shaming, real manifestations which express systemic and ethic recognition of past rights violations have not been implemented. This became evident when a legal proposal for the establishment of a *Temporary State Commission on the Miscarriage of Justice* was put on hold and then later rejected.[32] Other alternative forms of revealing abuse, such as political or historic documents, were neither discussed nor brought into practice. Furthermore, victims of human rights violations have not been commemorated nor have post-2012 governments apologised to them.

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29 Tutberidze, M. (2017). Independent Anti-Corruption Agency – Georgia and International Standards. *Institute for Development of Freedom of Information*. Retrieved 9 September, 2020, from https://www.idfi.ge/en/independent_anti_corruption_structure_creation_needs_georgia.

30 Human Rights Center (2018). *Monitoring of the Activities of the Department of the Chief Prosecutor's Office of Georgia for the Investigation of Offenses Committed in the Course of Legal Proceedings*. Retrieved 15 August, 2020, from http://hridc.org/admin/editor/uploads/files/pdf/hrcrep2018/research-eng.pdf.

31 Darsavelidze, D. (2019). *Impact of Possible Growth of Minimum Wage*. Retrieved 1 January, 2021, from http://library.fes.de/pdf-files/bueros/georgien/14970.pdf; OC Media (2020d). *Sweeping labour reforms go ahead in Georgia despite opposition from business groups*. Retrieved 12 October, 2020, from https://oc-media.org/sweeping-labour-reforms-go-ahead-in-georgia-despite-opposition-from-business-groups.

32 Civil.ge (2013). *Commission on Miscarriages of Justice "Put on Hold"*. Retrieved 1 January, 2021, from https://civil.ge/archives/186861.

The flawed TJ process in Armenia

100 days after the 2018 Velvet Revolution, Armenia's new prime minister Nikol Pashinyan announced the introduction of transitional justice bodies. So far however, the Armenian government has not established independent investigatory bodies which could examine previous human rights violations or observe the current investigatory institutions, such as the *Investigative Committee*, Armenia's biggest investigative body. Prosecutions can be considered as "soft", given that only few of them led to de facto trials. Most prosecutions which are based on grounds of embezzlement, large schemes of corruption and unfair competition (e.g., vote buying) have remained in limbo. Up to the finalisation of field research, no single official has been put on trial in relation to the hundreds of non-combatant fatalities.[33] Furthermore, prosecutions have made evident dissonances between the prosecutorial units and the courts, such as in the cases of the former presidents Serzh Sargsyan (2008–2018) and Robert Kocharyan (2000–2008). Similar to the Georgian case, the Armenian government has also not yet developed any legal framework for how victims of past human rights violations might access justice. There has been no systematic legal assessment on which forms of human rights violations define victim status. So far, ten individuals killed on 1 March 2008[34] and 63 individuals who were injured during these events as well as a few individuals who qualify as political prisoners have been legally recognised as victims.[35] Investigations concerning violations of social and economic rights, including the right to social security and labour rights, have not been initiated. Victims' successors of non-combatant fatalities have not received legal rehabilitation.

In terms of political-administrative changes, it can be concluded that unlike in Georgia, in Armenia attempts of introducing vetting have been made. So far, the Armenian government's efforts in reference to political and administrative changes among the judiciary have mainly focussed on the Constitutional Court (CC) and on the dismissal of judges in the CC who were appointed by Sargsyan. The government planned to hold a referendum on 5 April 2020 enabling Armenia's citizens to vote on the removal of these judges. It was seen as a crucial tool to increase legitimacy for TJ. However, the referendum was cancelled indefinitely on 18 May 2020 due to the state of emergency surrounding the COVID-19 pandemic. Instead, the government

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33 CivilNet (2020). *Criminal Cases in Limbo at Armenia's Investigative Bodies*. Retrieved 12 September, 2020, from https://www.youtube.com/watch?v=Q2FWjkMIgaY.

34 During protests in Yerevan against fraudulent elections which were violently dispersed by Armenian security forces, eight citizens and two policemen died.

35 Caucasian Knot (2019b). *Armenian CoM approves compensation for victims of March 2008 events*. Retrieved 31 December, 2020, from https://www.eng.kavkaz-uzel.eu/articles/4806.

enacted a law, which changed the 2015 constitutional amendments through a "grandfather clause". Judges who had served over 12 years were dismissed and could serve only up to a maximum age of 70 years.[36] As a consequence, three judges (who were among the nine leading judges in the CC) had to leave their posts. The actual implementation of vetting has focussed on declarations of income, property and good conduct including educational background and relations with criminal sub-culture. It refers only to declarations on or after 1 July 2017 and excludes acting and CC judges, prosecutors and investigators.[37] As for the compensation of victims of human rights violations, it has focussed on victims and victims' successors related to the March 2008 events. The successors of all ten individuals killed received around USD 63,000, and each victim who was severely injured (63 in total) received more than USD 31,500.[38] Other social groups have not yet been compensated.

As for the socio-economic dimension, the paper has found that economic injustice has been of higher priority for the post-transitory government in Armenia than in Georgia. In May 2020, the *Law on the Confiscation of Illegal Property* was passed in the National Assembly along with 14 related laws. Based on this legislation, law enforcement agencies can petition the courts if they suspect that property was acquired through illegal means during or after 1991.[39] Prosecutorial units can confiscate property if a difference of USD 52,400 or more is found between the declared income over time and the total value of the property.[40] Along with anti-corruption laws, the Armenian government has undertaken steps to facilitate the return of illegal financial assets. The *Law on the Confiscation of Illegally Acquired Assets*[41] came into force, which "aims to confiscate and nationalize the illicit assets of former officials accused of corruption"[42]. Furthermore, a special unit within the General Prosecutor's Office has been tasked to investigate illegally acquired assets. Cases can go back until 21 September 1991. Prosecutions can only be

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36 OC Media (2020a). *Armenian parliament votes to remove three judges from Constitutional Court*. Retrieved 8 September, 2020, from https://oc-media.org/armenian-parliament-votes-to-remove-three-judges-from-constitutional-court/.

37 Transparency International Armenia (2020). *Concerning Failure of Effective Vetting in the Judiciary and Law-Enforcement*. Retrieved 8 September, 2020, from https://transparency.am/en/news/view/3044.

38 Caucasian Knot, Ibid.

39 Dovich, M. (2020). *Armenia Passes Property Confiscation Law as Corruption Investigations Into Former Officials Gather Pace*. Retrieved 12 September, 2020, from https://www.civilnet.am/news/2020/05/11/Armenia-Passes-Property-Confiscation-Law-as-Corruption-Investigations-Into-Former-Officials-Gather-Pace/384422.

40 Nalbandian, N. (2019a). *Armenian Bill Paves Way For Asset Seizures*. Retrieved11 October, 2020, from https://www.azatutyun.am/a/30322591.html.

41 Armenian Legal Information System (2020). ՀՀ ՕՐԵՆՔԸ ԱՊՕՐԻՆԻ ԾԱԳՈՒՄ ՈՒՆԵՑՈՂ ԳՈՒՅՔԻ ԲՌՆԱԳԱՆՁՄԱՆ ՄԱՍԻՆ (Eng: *Law on seizure of property of illegal origin in the Republic of Armenia*). Retrieved 8 November, 2020, from https://www.arlis.am/DocumentView.aspx?docID=142347l.

42 Nazaretyan, H. (2020). *Illegally-Acquired Assets: Reclaiming the Plunder*. Retrieved 9 October, 2020, from https://www.evnreport.com/politics/illegally-acquired-assets-reclaiming-the-plunder.

initiated once a criminal case has already been opened before and shows "sufficient ground to suspect"[43] that the convicted individual possesses illegally acquired assets.

Unlike GD's rhetoric of condemnation, the Armenian government referred to authoritarian practices and the political system instead of individual perpetrators, which underlined its willingness to achieve a normative shift from the past system. Profound rhetorical distancing has so far however not been followed by a legal or political assessment of the previous regime; a form of political commitment to transitional justice that Pashinyan promised to issue in March 2020. One non-judicial measure is a fact-finding commission which was tasked to study and review specific cases of corruption and human rights violations from 1991–2018. Unlike the Georgian prime minister(s), Pashinyan strived for reconciliation with the Armenian population, issuing an official apology on the 11th anniversary of the March 2008 events. He apologised to "all victims of March 1, 2008; all victims of political murders that took place in Armenia since independence; all citizens and political powers that were subjected to political persecutions", which were, as he stated, an "eruption of unlawfulness, electoral fraud, political murders, persecutions and impunity that has depressed Armenia and its people for many years". This apology, issued "on behalf of the state", not only included the victims of the March 2008 protest, but also "[...] the victims of all political killings that have occurred in Armenia since independence, as well as [...] to all those citizens and political forces subjected to political persecution".[44]

Conclusion and outlook

The paper has comparatively analysed the patterns of post-authoritarian TJ in post-Soviet Georgia and Armenia. It has demonstrated that both governments so far have done little with regards to TJ measures. While TJ in Georgia has focussed on the return of property on a very small scale, in Armenia, measures in the symbolic-representative as well as political-administrative dimension have been central. Critiques have frequently stated that the TJ processes have failed in both countries. While it is true that only little has been done so far in order to achieve reconciliation and accountability for past human rights, the paper wants to underline that civil society has remained particularly active in both societies. Instead of focussing on

43 Armenian Legal Information System (2020).

44 Armenpress (2019a). *'Long Live Freedom' – Pashinyan apologizes to March First victims on behalf of Armenia*. Retrieved 5 June, 2020, from https://armenpress.am/eng/news/966028/eng/.

failed TJ processes, it is important to embed TJ measures in the broader struggle for human rights, which are – as outlined – multi-perspective and encompass social, economic, civil and political rights.

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Mariam Tinikashvili

Prospects for Transitional Justice – Coping with the communist past on the example of Georgia

There is no one prevailing view as to what is transitional justice. Different legislative acts and doctrinal works offer various interpretations. According to the United Nations, "Transitional justice is the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice, and achieve reconciliation."[1] It consists of both judicial and non-judicial processes and mechanisms, including delivering reparations, institutional reforms, and national consultations. Whatever combination is chosen must be in conformity with international legal standards and obligations. In this essay, I will focus on the judicial dimension of transitional justice, emphasising its challenges in the young democratic states like Georgia, which has been deeply influenced by the communist regime and until today, manifested in laws or practices that are not exactly human rights-friendly and traceable to the Soviet period.

The scourge imposed by the communist regime on its member states has been particularly acute. Eastern European countries faced many challenges in coping with the communist past, as the communist regimes especially influenced the post-Soviet Union rule of law in these countries, reflected in the laws as well as the daily life of their citizens. For instance, a wave of repression swept through Georgia – particularly in 1937– and caused a horrific human tragedy that should have been given a stricter qualification in modern human rights law. That is why in the process of change from a Soviet socialist to a democratic state various reforms needed to be carried out in Georgia.

However, evaluation of the consistency of the planned and implemented steps may require deeper analysis. Whatever was *prima facie* unambiguous was the need for the legislation to

1 *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*. March 2010.

be fundamentally reformed. Hence, I will focus on the judicial undertaking of dealing with the communist past based on the example of Georgia, by pointing out three main dimensions of overcoming the communist past via judicial means – namely, legal reforms, lustration, and the question of finalising the transition.

To review the historical background of the issue, it should be mentioned that on 9 April 1991, the Chairman of the Supreme Council of the Republic of Georgia, Zviad Gamsakhurdia, announced the restoration of the independence of Georgia and gave an extensive historical overview of the declaration of independence. Such a narrative of history should have become the legal basis for the restoration of Georgia's independence. Exactly two years earlier, such a narrative of history was considered as "anti-state", from the standpoint of the Soviet Union.[2] The reassessment of the past that began in 1989 completely transformed the official historical narrative, leading to a change in the collective memory of society. At the end of the same year, Georgia's aspiration for independence from the demands of informal circles became the country's officially declared goal.[3] Despite expressing patriotic, anti-Soviet approaches in his speeches, Gamsakhurdia did not reform the old Soviet-style state bureaucracy or open the KGB archives as he promised.

Since Georgia's independence in 1991, successive governments have struggled to deal with endemic corruption, organised crime, and various disputes along its borders, which sometimes sparked armed conflict.[4] Due to the turbulence of these events, the main issues often remained out of focus, resulting in Georgia's elite became lustration-prone a decade later and adopting lustration laws only twenty years after the dissolution of the Soviet Union. However, I reckon, that while ending a period of massive human rights violations in the country, implementing ad-hoc institutions is not always straightforward and effortless, which has been noticeable in Georgia.

To begin with, I would like to focus on the measures taken after regaining the independence and consider the legal reforms and domestic and international implications. In terms of domestic law, it would have been impossible to overcome a legal system in which free will and human rights were denied or private property was not recognised. The role of European countries,

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2 Kapitanov, L. 1989. *Change of the memory*. Within the framework of the 1989: *Research Grants Project* of the Heinrich Boell Foundation, Tbilisi Office.

3 Ibid.

4 Varney, H. (Feb 2017). Assessing the Prospects for Transitional Justice in Georgia. *The International Center for Transitional Justice.*

especially Germany, was immeasurable in reshaping the country into a democracy. Georgian law in force today is essentially a reflection of German law, especially with respect to civil law in the broadest sense. Firstly, the civil code was adopted in 1995 with the spirit of recognition and protection of private property. This was a progressive legal act after the communist past and served, among other things, to protect private property. It is still controversial among scholars with respect to international law whether Georgia's choice of the so-called Clean Slate Doctrine that denied state succession to treaties was concluded by the Soviet Union. However, I believe that by establishing bilateral and multilateral relations with other states Georgia has partially chosen to honour the *Clean Slate Doctrine*. While discussing this issue it should be kept in mind that in recognising this principle, both subjective and objective criteria must be evaluated as to whether membership of a successor state was forced or voluntary. With regard to Georgia, being obvious that it did not willingly become part of the Soviet Union, nothing could have prevented invoking this principle. The option of simply denying state succession to treaties known as the *Tabula Rasa* and re-inventing international law was chosen in the wide range of legal relationships, which I believe was a very progressive step in rejecting the Soviet past and declaring willingness to establish international relations as an independent state. Thus, forward-looking reforms in legal and diplomatic relations have been adopted from the beginning.

However, for the purposes of transitional justice, the Georgian law adopted in 1997 is the most important one. The law, *On the acknowledgment of citizens of Georgia as victims of political repression and social protection of repressed persons* states in its preamble: "The Soviet totalitarian communist regime that was built on an anti-human ideology, has committed many severe crimes and thousands of citizens of Georgia have become victims of repression committed by such regime. The Parliament of the independent State of Georgia notes the importance of the establishment of a constitutional state, the highest values of which are human life, personal inviolability, and freedom; It acknowledges special contributions of victims who have suffered political repression under the Soviet regime to the creation of independent Georgia; Being guided by the necessity of reviving the justice, it shall adopt this Law..."[5] Acknowledgement of the severity of crimes committed by the communist regime and the willingness of the state to restore the justice has to be evaluated as a progressive step as for the situation of 1997. This legal act defined the concepts of political repression and a victim of political repression, established the rules for acknowledging persons as victims of political repression, and granted the social protection guarantees of repressed persons.

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5 Law of Georgia *On the acknowledgement of citizens of Georgia as victims of political repression and social protection of repressed persons*. https://bit.ly/2XUjLka.

This law defined the concepts of political repression and its victims, established the rules for acknowledging persons as victims of repression, and granted the social protection guarantees of repressed persons according to which "Victims of political repression shall be: a) persons who have directly suffered political repression; b) a spouse, child (adopted child), parent and any other relative who stayed with such persons in penitentiary establishments, has been in exile and expulsion, and special settlements with such persons." This approach developed broad neglect of the concept of victimisation in terms of restitution of victims of political repression by the Soviet regime. It was quite a progressive step. To summarise its importance, it should be stressed that ensuring the centrality of victims in the design and implementation of transitional justice processes and mechanisms is one of the vital parts of the transition.

Having pointed out that adopting this legislation was a great step forward on the way to overcoming the communist past, any law can be measured by its tangible effects on the citizens. The above-mentioned *Law on Soviet Political Repression of December 11, 1997*, provided that Georgian citizens – as well as their first-generation heirs – who had been victims of various forms of political persecution in the former Soviet Union from February 1921 to 28 October 1990 could claim non-pecuniary damage. In particular, Article 9 of the law states: "A person who has suffered repression in the form of deprivation of liberty, deportation, eviction, placement in a special settlement, placement in a psychiatric institution, or who has died as a result of political repression and is recognized as a victim of political repression monetary compensation, the amount and procedure of which shall be determined by law."[6] Despite the general obligation outlined in this provision, Georgia has not adopted legislation to determine the procedures and amount of compensation to be paid. In this regard, the European Court of Human Rights (ECHR) has reviewed the *Klaus and Yuri Kiladze vs. Georgia* case, which originated on 22 February 2006, when the aforementioned legal act was already in force, as none of the direct addressees of the regulations have had received compensation. In the scope of the case, the applicants alleged they have not been able to assert their rights to compensation resulting from their status as victims of political repression. The father of the applicants was illegally shot by the Soviet totalitarian regime in 1937, and in 1938 their mother was arrested and deported. Upon the arrest of the mother, the family was deprived of the apartment and all personal property. After that, Klaus and Yuri Kiladze were placed first in Tbilisi and then in a special children's home in Russia, where they endured inhumane conditions for more than two years. About two years later, due to the grandmother's efforts, the children were brought to Georgia. In 1956 the applicants' mother and 1957 their father were rehabilitated. On 19

6 Ibid.

August 1998, the District Court recognised the applicants, as well as their parents, as victims of political repression. However, the applicants' claim for non-pecuniary damage was rejected by the Georgian national courts due to the lack of a special normative act on the payment of monetary compensation to persons recognised as victims of political repression.[7]

Bearing all the relevant shreds of evidence in mind, applicants met all the legislative requirements to be compensated accordingly. Having considered the facts and assertions of the sides, ECHR held, that "As far as the present application is concerned, it must be recognised that the problem of the legislative void which it raises does not only concern the applicants. According to the estimates supplied by the applicants, the number of people affected by the situation which has caused a violation, in this case, could vary, according to the categories, between 600 and 16,000. This situation is therefore clearly likely to cause a large number of applications to the Court, in a way that would represent a threat in the future to the effectiveness of the system put in place by the Convention."[8] Court stated that general measures at a national level are without a 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 11 December 1997 to effectively benefit from the right which they are guaranteed in this provision. Pursuant to Article 41 of the Convention, the court also held that if the necessary measures (legislative, etc.) were not taken six months after the final decision was taken, the respondent State would have to pay EUR 4,000 to each applicant in respect of non-pecuniary damage under Article 44 of the Convention.[9] The ECHR ruled in its judgment that it could not find any significant reason why the state, despite having been at its disposal for 11 years, would not take any steps to initiate the procedure provided for in Article 9 of the Law of 11 December 1997. ECHR found a violation of Article 1 of Protocol No. 1 to the Convention by the respondent state for failing to take the necessary measures under Article 9 of the Law of 11 December 1997 to ensure the effective exercise of the applicants' right to monetary compensation for non-pecuniary damage.

The subsequent events were also thoroughly reflected in the *Zeinab Burdiashvili et al. vs. Georgia* case before the ECHR. In March and April 2011, the Parliament of Georgia submitted a package of legislative amendments to the Law of 11 December 1997 and the *Code of Administrative Procedure* for the implementation of the general measures referred to in Article 46

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7 Publication: *European Court ruling establishes right to financial compensation for victims of Soviet political repression*. Georgian Young Lawyers' Association.

8 Case of *Klaus and Yuri Kiladze vs. Georgia* (Application no. 7975/06) §§ 84–85.

9 Case of *Klaus and Yuri Kiladze vs. Georgia* (Application no. 7975/06) § 90.

of the Convention in its judgment of 2 February 2010. On 14 April 2011, the government submitted the above package of amendments to the Committee of Ministers of the Council of Europe. The draft amendments were adopted by the Parliament of Georgia on 19 April 2011, with minor amendments and entered into force on 18 May 2011. Accordingly, according to the new wording of Articles 21-29 of Article 21 of the Code of Administrative Procedure, victims of Soviet political repression and their first heirs of 11 December 1997, pursuant to Article 9 before 1 January 2014, must apply to the Tbilisi City Court for monetary compensation. The new norms of the Code establish a number of additional procedures for filing such a claim for consideration and further appeal by the Tbilisi City Court in the Tbilisi Court of Appeals. The latter acted as the final instance on similar issues.[10]

Official statistics published by the City Court on 16 September 2011 confirm that more than 3,000 lawsuits filed under Article 9 of the Law of 11 December 1997 were registered in court five months after the above legislative changes entered into force, of which 73 cases were decided. The amount of compensation in the cases under consideration ranged from GEL 100 to 500 (from 46 to 230 euros, respectively), the maximum amount was determined by the heirs of the first row of victims who were sentenced to death.[11]

Therefore, despite the fact that the law itself came into force in 1997, its actual enactment is linked to the case of *Klaus and Yuri Kiladze vs. Georgia*, which gave thousands of repressed people the impetus to fight for their rights to receive compensation after being victims of communist repression. However, the time factor must be taken into account, as well as the fact that a lot of the repressed people who legally warranted restitution were already dead by the time of the precedent-setting decision was rendered. This fact makes it deeply regrettable that their rights became impossible to be restored while the Soviet political repression has been severe and consists of: "Different forms of coercion, such as deprivation of life, damage to health, imprisonment, exile, expulsion, deportation from the state, forcible placement in psychiatric institutions, deprivation of citizenship, forced labour, confiscation and destruction of property, illegal dismissal from office or from other workplaces, 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

10 *Zeinab Burdiashvili et al. vs. Georgia* (Application no.26290/12) §§ 9–11.

11 Ibid. §14.

of contradiction by peaceful means against illegal actions of the current political regime, to social or religious affiliation or a social class status."[12] When the notion of political repression implies such a gross and fundamental violation of human rights, it is unfortunate that its actual enactment has not taken place since the time the law was legally drafted.

As one of the major directions of transitional justice for overcoming the communist past, "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."[13] The oddity about the post-communist world is that transitional justice has been reduced to, by and large, the mechanism of lustration, which is the process of limiting the political participation of the former authoritarian elites.[14]

In some countries different lustration laws 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 or Central Asian countries. These countries, in addition to the lustration process starting at different times, are distinguished by the definition of lustration as a concept. While the contemporary use of lustration still contains "examination" as one of its basic conceptual components, the meaning evolved through time and space. The heterogeneous operations of lustration programs of the post-communist world significantly affected the broadening of the term. For example, in the Czech Republic, lustration refers to disqualification, in Hungary to revelation, in Poland to confession, and so on. [15]

Georgia was not able to adopt a law on lustration immediately after regaining independence. Although, in the late 1980s – and especially in the early 1990s – being a member of the KGB was a stigma in 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

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12 Law of Georgia *On the acknowledgement of citizens of Georgia as victims of political repression and social protection of repressed persons*. https://bit.ly/2XUjLka.

13 Moltz, R. (2014) *Dealing with communist legacies: the politics of lustration in Eastern Europe*. University of Minnesota (Ph.D. dissertation).

14 Rožič, P. (2012). *Lustration and Democracy: The Politics of Transitional Justice in the Post-Communist World*, p. 3. Georgetown University, Washington D.C. (Ph.D. dissertation).

15 Ibid. p. 113.

on the level of rhetoric. In 2011, the Parliament of Georgia unanimously adopted the *Freedom Charter*, 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). These people could not work in executive bodies and judicial authorities. In addition, the above citizens were unable to hold positions as heads of higher education institutions.[16] Still, we cannot deny the fact that in Georgia the process of lustration started quite belatedly with adoption of the Freedom Charter law in 2010, more than 20 years after the fall of the Soviet Union.

Nevertheless, the question still arises as to why the start of the lustration process was delayed. In this regard, I would like to stress two major challenges in terms of lustration that Georgia has faced. From a historical point of view, one might say that this fact was caused by various external circumstances. Georgia is situated in a turbulent region, and the dissolution of the Soviet Union accompanied with the gross interference of many domestic or foreign actors caused great unrest such as Civil War in 1991–93, the war in Abkhazia and in Samachablo region, respectively. Therefore, in the initial stage of gaining independence, the country faced more severe challenges.

The second challenge is that 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 full-scale lustration difficult.[17]

Nevertheless, many years have passed after and after about two decades, when asked for one of the studies conducted by Georgetown University why the new elite did not deliver on the promise of lustration, then-President Mikheil Saakashvili replied: “You should look at the age of our officials to understand that [lustration] had been already done. Every single public official in my government is younger than me! For a society to move forward we need all the time to have fresh blood. Moving away from a non-free society to a free society, we needed to do very unconventional things, including this generational change that happened by nature, age, by

16 Kldiashvili, G. Lustration. *Memory of Nations – Democratic Transition Guide (The Georgian Experience*), p. 20.

17 Ibid., p.19.

itself. We didn't push or force it [lustration]. It is puzzling because it was true, however, I don't think that this answer was sufficient in terms of the absence of the legal act stating against the totalitarian regime."[18] Evaluating this answer can be puzzling because the explanation given by the President was in line with the truth, however, in terms of the absence of the legal act stating against the totalitarian regime and lustration-prone ideas, this approach cannot be considered sufficient.

The *Law of Georgia on Lustration* (Law of Georgia Freedom Charter) finally adopted in 2011 is primarily aimed at dismantling the totalitarian ideology and the recognition of the Soviet Union as a criminal regime, which is a necessary step towards re-evaluating the past and recent history of Georgia. The law provides for the imposition of job restrictions on individuals who were in contact with the Soviet secret services until 9 April 1989. In addition, according to the law, the list of persons exposed in connection with the regime will not be public and it will be available only to a special commission to be set up in the Ministry of Interior.

In order to achieve its objective, the Freedom Charter prohibits the employees of the former USSR special services (Article 10), as well as persons holding various positions in the communist party from 25 February 1991 until 9 April 1991 (Article 9) from being appointed on various state positions of independent Georgia (Article 8). There have been amendments to this legal act in 2013, according to which it is necessary to develop a commission that determines the Soviet symbol of a particular monument and to impose liability under the *Code of Administrative Offences*.[19]

So, the lustration law, albeit delayed, was adopted in Georgia, the problem of access to files is still problematic for its implementation in practice. "Time is crucial in the process of restoring transitional justice. Delays only show the unwillingness of political actors and strengthen rumours that the process is being deliberately postponed."[20] According to the aforementioned legislative changes, the first article of the Freedom Charter, which stipulates its goals, was formulated in a different wording: "The purpose of this law is to prevent the violation of the principles of crime against the state, terrorism and national security in accordance with international standards, universally recognised principles and norms, taking into account modern

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18 Rožič, P. (2012). *Lustration and Democracy: The Politics of Transitional Justice in the Post-Communist World*, p. 87. Georgetown University, Washington D.C. (Ph.D. dissertation).

19 Chukhua, S. (Jan 2014), *Freedom Charter and International Lustration Practice*. Institute for Development and Freedom of Information, p. 2.

20 Kldiashvili, G. Lustration. *Memory of Nations – Democratic Transition Guide (The Georgian Experience*), p. 26.

approaches, effective implementation of the norms of Georgian legislation and strengthening national security: Take preventive measures against the foundations of communist totalitarian and fascist ideologies; Prohibition...” Quite unequivocal emphasis has been made in this legislative change, although it is noteworthy how it worked in practice. The delay in the adoption of the law was compounded by the delay in setting up a special commission that collects data and maintains a register of persons who secretly cooperated with the special services of the former USSR or whose data obtained in accordance with Georgian law indicates their secret connection with the special services of the former USSR.

While discussing the process of lustration, an account should be made of the decision of the Constitutional Court in *Citizen of Georgia Nodar Mumlauri vs. the Parliament of Georgia*. The ruling can have an important impact on contemporary Georgia regarding the lustration law. The court stated: “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.”[21]

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. For certain individuals who had occupied high positions in the Communist Party, there may be a 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.”[22]

Thus, the Constitutional Court has set aside two factors – time and individual examination of the circumstances – that may be the golden interval that precludes the punitive use of these environments. This decision has been evaluated differently by scholars – in particular, in the opinion expressed in one of the articles, the author positively evaluates the decision of the Constitutional Court: “We fully share the position of the Constitutional Court judges on

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21 *Georgian Citizen Nodar Mumlauri vs. the Georgian Parliament (Judgment N2/5/560 of 28 October, 2015*). Second Board of the Constitutional Court of Georgia.

22 Ibid.

imposing 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. We can draw a parallel 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."[23] I share the same point of view as trying to overcome the communist past should not become punitive by using the blanket ban without taking their role and the time elapsed after holding the position so as not to miss the main purpose of the restriction.

In conclusion, I would like to represent the issue of overcoming the communist past from a different angle, while focussing on the question of whether Georgia has finished the process of transition, inter alia, by modernising all the important legislative acts. Nowadays, most of the legislation is in accordance with European standards, but in everyday legal practice, we come across issues that definitely need to be refined and modernised today. Transitional justice is not just one measure to be adopted in the short period while focussing on short-term goals to be achieved, but there are still traces the Soviet regime left on Georgian law, which is still relevant today.

Namely, the code of administrative offense is still officially called the *Resolution of the Supreme Council of the Georgian Soviet Socialist Republic (SSR) on the Introduction of the Code of Administrative Offences of the Georgian SSR*. Thus, this code in Georgia was adopted during the Soviet era, and despite the fact that it has undergone many amendments lots and lots of changes still needs to be modernised. In the text of the code, we still find the soviet reminders including numerous terms such as "spirit of raising citizens", the code created in the Soviet period does not recognise the origins of the presumption of innocence. Despite the fact that in practice there is a human rights-friendly interpretation of this legal act, while Soviet symbols are banned by the Freedom Charter, I think the term "symbols" should be broadly interpreted and include the legal acts with the title containing the Soviet Republic. As in practice, being administratively charged in accordance with the aforementioned legal act could make an addressee feel that his fundamental rights are not duly respected. To address this injustice, the non-governmental organisation Georgian Young Lawyers' Association has launched a campaign called *This Code Violates Your Rights*. in addition to being appealed before the Constitutional Court, this movement resulted in quite a wide range of changes to specific norms. However, I reckon that the word "Soviet" appearing in the name of the most commonly used law in Georgian legal

23 Maisuradze, D. (December, 2015). *The Effects of the Constitutional Court Ruling of October 28, 2015 on the Freedom Charter of Georgia* (p. 8). Institute for Development of Freedom of Information.

practice indicates there are still issues that need to be addressed in order to finalise the process of transition, which has not been properly and consistently planned from the beginning.

Therefore, the influence of the Soviet Union turned out to be quite deep and acute, while Georgia has started to meet these challenges relatively late. This delay was initially due to objective factors, as it is difficult to take transitional justice measure in the context of civil unrest, which has taken place at the initial stage of the independence. Years later, in the absence of political will or in the context of concentrating on other legal and political issues, the need for significant action in terms of transition was relegated to the background. Inconsistent steps have led to the ineffective application of the adopted progressive legislative norms in practice and even today we face the influence of the Soviet Union in certain norms, which must be eliminated.

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Tamari Vardiashvili

The influence of the Soviet legislation on post-Soviet states' legal systems

Introduction

The collapsing of the Soviet Union in 1991 challenged the post-Soviet countries to start forming their very own systems. Georgia presents the topic of transitional justice with some complex questions. After the dismantling of the U.S.S.R, the birthplace of Soviet dictator Joseph Stalin was said to harness great potential on its way to becoming an independent democracy. Therefore, Georgia appeared as a necessary place for transitional justice following declaration of its independence on 9 April 1991 with adoption of the *Act of Reestablishment of Independence*[1] and finalization of its independence on 21 December 1991.[2]

On its way to maintaining independence and forming the legislative framework, Georgia had its ups and downs. While the 1991–2003 years were chaotic, with a strong influence from the Soviet past, with the *Rose Revolution* Georgia started going west and began passing laws that met European standards.

The process of transition had occurred with peculiarities. The Soviet legacy had its influence on forming the legislative system – particularly drafting laws, as initially society was still not ready for radical changes.

This article explores the influence of the Soviet legacy on the contemporary judiciary in Georgia, its challenges and Georgia's choices on its path to development.

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1 Act of Restoration of State Independence of Georgia, https://matsne.gov.ge/en/document/view/32362?publication=0.

2 Smith-Sivertsen, H. (2011). The Dissolution of the Soviet Union: Agency, Performance or Legitimacy?. 20 Years since the Fall of the Berlin Wall: Transitions, State Break-Up and Democratic Politics in Central Europe and Germany, 141.

At the beginning of the Soviet Era

The 30th of December 1922 can be easily considered one of the most important dates in modern history. This particular day led to tremendous changes for the whole world – especially for Eastern European countries: It was when the USSR was established by the Russian and Transcaucasian Soviet Federated Socialist Republics as well as the Ukrainian and Belorussian Soviet Socialist Republics. The Soviet Union was the successor to the Russian Empire of the tsars. After the 1917 Revolution, four – then founding – Socialist Republics organised on the territory of the former Russian Empire.[3]

During its history, there were 15 Soviet Socialist Republics (SSRs): Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.[4]

The Cambridge Dictionary offers us the definition of law, according to which "Law is a rule, usually made by a government, that is used to order the way in which a society behaves."[5] When we are speaking of law, we usually consider it as a group of compulsory rules.

In contemporary law, there is a presumption that all persons' primary rights are recognised, thus they have to be guaranteed. It is common sense that the rules of law are binding upon the state no less than the people. Yet, the Soviet idea of the law is quite different from every perspective. From the very beginning, the binding nature of the law was mistaken and mistreated by the Soviet authority; however, time went by, and they started realising its practical values.[6] According to Lenin, the law is "the expression of the will of the classes which had won the victory and kept the governmental power in their hands".[7]

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3 McCauley, M., Dewdney, J. C., Conquest, R., & Pipes, R. E (2020, 10 November). Soviet Union. Encyclopedia Britannica. Retrieved on 20 August, 2021 from https://www.britannica.com/place/Soviet-Union.

4 *Soviet Union*, History.com Editors, A&E Television Networks, Last Updated April 27, 2021. Retrieved on 21 August, 2021 from https://www.history.com/topics/russia/history-of-the-soviet-union.

5 Cambridge international dictionary of English. (1995). Cambridge: Cambridge University Press. https://dictionary.cambridge.org/dictionary/english/law.

6 Infra III, A, pp. 13–23.

7 Lenin, Collected Works (Russ. 2nd ed. 1929-32) 418.

To quote Krylenko: "In all instances the interests of the whole, the duty to safeguard the social order are to be the decisive criteria" in the operation of the Soviet law.[8]

One of the first commissars of justice, Stuchka, defined law in an interesting way. Ultimately, the definition was included in the Soviet laws. Stuchka believed "the law is a system (order) of social relations corresponding to the interests of the ruling class and protected by the organised force of this class (the State)".[9]

The Soviet concept of law

As the Soviet laws expressed various attitudes regarding the rights of individuals during the soviet governance, human rights protection certainly was not a priority for the regime. The announcement of the *New Economic Policy* (NEP) led to the creation of the Civil Code. NEP was mostly oriented toward compromising private property, thus private rights. Camouflaged as an attempt to restore the economy, it implied the provision of private rights. Section 4 of the new Civil Code stated that private rights are given to citizens, yet "for the purpose of the development of productive forces" only.[10]

In 1922 a boom of statutes began (i.e., codes), including criminal law and criminal procedure, civil law and civil procedure, labour laws, etc. It is fascinating that the new Civil Code merely denied the continuity and succession of the rights prior to the November 1917 revolution.[11]

At that time, despite the denial of private rights, codes' individualistic possibilities were novelties.[12] Lawyers and legal professors who were not communists – although unusual for the Soviet practice – were still allowed to write scientific papers.[13] They introduced the traditional methods of formal, dogmatic, and analytical jurisprudence in handling the legal problems of Soviet jurisprudence. While analysing the Soviet law, one can assume that the

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8 Krylenko, Judiciary of the R. S. F. S. R (Russ. ed. 1923) 176; *The Judiciary and the Law* (Russ. ed. 1927) 19.

9 Fundamentals of the Criminal Law of the R.S.F.S.R. (1919). R.S.F.S.R. LAWS, Item 590, § I (1).

10 Gintsburg, Course 110.

11 Collection of Interpretations of the Supreme Court R. S. F. S. R. pp 30–31.

12 Gsovski, V. (1938).The Soviet Concept of Law. 7 Fordham L. Rev. 1. https://ir.lawnet.fordham.edu/flr/vol7/iss1/1.

13 Among these scholars were: Elyasson, Grave, Landkoff, Martynov, Volfson, Kantorovich, Gordon, Gernet, Trainin, Poliansky, Piontkovsky, Isaev, Lublinsky, Poznyshev, Margaziner, Diablo, Pletnev, Kotliarevsky. At some point they were expelled from the universities and their writings thereafter seem to have disappeared.

Soviet judiciary, which was created through the first few years of the establishment of the U.S.S.R, was well-written but ill-used. The Soviet law was mistrusted; thus, its value was questioned.

Justice over the phone

Subordination was the keyword in the Soviet Union. Apart from the complex process of creating the whole judiciary, the Soviet Communist Party had their own sense of justice. They wanted their law enforcement, not the other way around. Legislation usually was discussed and approved by leading party members and then sent to the Supreme Soviet for rubber-stamp approval. The use of juries, which had been quite effective and independent during the tsars, was completely abolished.[14] The communist party introduced a trial court, consisting of a judge, usually a party member, chosen by the party members and two persons who regularly were under the influence of a judge.[15] Any case with political importance was subject to so-called "telephone law". Telephone law implied court judgments were dictated by phone calls. Defendants' futures were entirely in the hands of party officials.

Criminal law

Soviet legal legislation introduced some novelties in the criminal justice system. During this time, various 'counterrevolutionary' offences carrying overly severe punishments were added to the criminal code. After cancelling the right of ownership, engaging in any kind of private business was strictly punished. Other than that, for scholars who used to publish their papers abroad (in the U.S.S.R there was austere censorship) criminal code had the stigma of being "anti-Soviet agitation and propaganda".[16]

As Professor Olimpiad Ioffe wrote, "Soviet criminal legislation could not remain indifferent towards so obvious a vulnerability of some of its rules."[17] The Siniavsky-Daniel trial as an example of the Soviet reality makes it clear that the Soviet officials convicted a defendant and meted

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14 Solnick, S. L. (1991). *Revolution, reform and the Soviet telephone system*, 1917–1927 (pp. 157-176). Soviet Studies, 43(1).

15 Ibid.

16 Maggs, P. B. (2017, 4 August). Soviet law. Encyclopedia Britannica. Retrieved 3 September, 2021, from https://www.britannica.com/topic/Soviet-law.

17 Ioffe, O.S. (1985). *Soviet law and Soviet reality*, Vol. 30. BRILL.

out severe punishment for a serious crime, while any reasonable person would have said they were certainly innocent.[18]

After that, as a statute on skyjacking was passed, there was a case of Anatoly Shcharansky, convicted in 1978 for espionage.[19] As some scholars – including Professor Ioffe – think the accusation was groundless[20], however, the situation remained unclear due to the fact that the trial was closed.

Accordingly, one can assume that criminal law on the level of procedural principles was vastly different from contemporary continental law. In the Shcharansky case, the prosecution brought a claim regarding a crime that was not stipulated by any law.[21] Passing information comprising unofficial official secrets to foreign organisations has been considered a crime since 1984, as relevant law was made.[22] These events highlight the fact that the Soviet officials were determined to punish actions that should have been considered as crimes, even if none of the statutory sources addressed them. They clearly convicted people under the inapplicable law, with severe punishment and only after that they filled the remaining gaps.[23]

Family law

In the Soviet legal system, the divorce between spouses was possible not by bilateral but unilateral declaration; one-sided will of divorce was more than enough for legal separation. It is important to note that women were free to obtain abortions. Nonetheless, during the Stalin regime legislation became more conservative and outlawed most abortions.[24]

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18 Feofanov, Y, & Barry, D. D. (2019). *The Siniavsky-Daniel Trial. Politics and Justice in Russia* (pp. 38–50). Routledge.

19 Van Den Berg, G.P., & Simons, W. P (1981). The Soviet Union and Human Rights Legislation: The Shcharansky Case. *California Western International Law Journal, 11*, p. 479.

20 Ioffe, Ibid.

21 Lipson, L. S. (1985). The Laws of Rule in the Soviet Union. *Yale Journal of International Law, 11*(1), p. 13.

22 Ibid.

23 Ibid.

24 Maggs, Ibid. (Retrieved 10 September, 2021).

The normative legacy

The dissolution of The Soviet Union was followed by a difficult and complex period of transition. One may think that the transition between the Soviet Union and the new post-Soviet states was mostly political and economic rather than legal, as it seemed unfeasible to rectify and re-draft all the laws in such a short time frame. For some years, the applicable law was almost identical to that of the former republics.[25] Even for the last decade, it was still questionable whether the independent codification process had come to a conclusion. Despite the fact that The Russian Federation is considered the primary de facto internationally recognized successor to the Soviet Union, the legislation of the Soviet Union still was a legacy for all newly created post-Soviet countries.[26]

Challenges along the developmental path

Over the last two decades, Georgia – as a post-Soviet country – is paving the way to perfecting legislation. Because of Georgia's pro-Western aspirations, a new legal system is mainly based on meeting European standards. During this time, Soviet legislation has been replaced with new laws. Georgia successfully adopted new civil, criminal, administrative, and corporate laws. In 1999 the new judiciary legislation came into force, which was one of the most important turning points in the latest legal history, as it ensured the independence of the judiciary. It was freed from any kind of dependence or subordination to the government.

The new legal system introduced new court instances – appellate and cassation courts. The court system doubtlessly is very different from the aforementioned' justice over the telephone'. New laws stipulating jurisdiction of the courts were passed and the function of all instances clearly separated. From now on, every judgment was based on applicable law and not the will of any state official. It is fascinating that the *Cassation Instance* was a total novelty, as it was focussed on reviewing the law itself rather than any particular case.

Despite the fact that the transition has not been a pain-free process, Georgia was and still is categorical when it comes to outgrowing the Soviet past. The new system abolished the

25 Marie-Elisabeth Baudoin, *Constitutional Justice and the Post-Soviet State*, LGDJ, 2005, Collection of theses of the Doctoral School of Clermont-Ferrand, 556 p.

26 Flavier, H. (2015). *Russia's normative influence over post-Soviet states: The examples of Belarus and Ukraine*, Russian Law Journal, 3(1).

naturally established practices that were challenging or threatening the independence of the Georgian judicial system in any way.

A transparent judiciary has become one of the top priorities for the country. Principles of criminal, civil and administrative law were codified and protected. In contrast to Soviet practice, the publicity of proceedings is guaranteed. The schedule of hearings and all decisions of every instance are accessible for all interested individuals on public websites.[27]

The practice of issuing resolutions of a normative character by the Supreme Court was a challenge for many post-Soviet countries. In Georgia, it has been almost 10 years since the Court has been deprived of that right.[28]

Georgia and the Soviet past

Overcoming the Soviet past and Stalinism was challenging for Georgia.

Lasha Bakradze, with his ironic gravity, states:

> *"Stalin is still an important symbol but one with little political content. Georgians have a tendency to avoid discussion of painful topics and find it difficult to re-evaluate values. A reassessment has failed to take place regarding one of its most enduring legends – the 'famous son of Georgia', Stalin".*[29]

After the collapse of the U.S.S.R, leading Georgian politicians like Zviad Gamsakhurdia and Eduard Shevardnadze recognised the Soviet period as an occupation conducted in February-March 1921 that turned into annexation of the Democratic Republic of Georgia. Despite many cases of ill-treatment under Soviet governance, Georgia remained one of the most "prosperous" Soviet republics.[30]

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27 Meladze, Giorgi, "*UPDATE: Georgian Legal Research*", www.nyulawglobal.org, Hauser Global Law School Program, New York University School of Law, September/October 2020, Retrieved August 25, 2021, from https://www.nyulawglobal.org/globalex/Georgia1.html#Section_9.

28 Ibid.

29 Bakradze, L. (2013). Georgia and Stalin: Still Living with the Great Son of the Nation. In *The Stalin Puzzle: Deciphering Post-Soviet Public Opinion* (p. 53). Washington: Carnegie Endowment for International Peace.

30 Austin, R. C. (2018) Confronting the Soviet and Post-Soviet Past in Georgia. In *Transitional Justice and the Former Soviet Union: Reviewing the Past, Looking Toward the Future* (p. 243).

Throughout the transitional process, many symbols of the Soviet past have been destroyed. There was a discussion about removing the Stalin monument from his hometown.[31] In May 2011 the *Freedom Charter* was introduced, the main aim of which was strengthening national security, prohibiting Soviet ideology, and removing all symbols of the communist past. This meant that any Soviet-era functionary could be banned from any kind of public office.[32]

Democratisation

The transition into a more democratic regime was a challenge for Georgia – like most post-Soviet states.[33] The process of democratisation in Georgia included the institutionalisation of democratic laws and institutions, fair elections, freedom of information and press, an active civil society and human rights, and an independent judiciary.[34]

Post-Soviet states have experienced severe difficulties on their way to democracy. The legacy that Soviet politics left behind makes it easy to understand these complications. Georgia was considered a promising candidate in paving its way to consolidating democracy.[35]

The post-communist reality was much different from the past. As The Communist Party of the Soviet Union was gone, states started forming democratic institutions. It may sound unbelievable now, but novelties were reforms such as presidents with limited terms, three instances of court, constitutional court, parliaments, the right of ownership, freedom of movement, free and mostly private media, etc.[36]

The very first years of transition were arduous; the government was unquestionably mistrusted. The "thieves-in-law" institution, the infamous paramilitary grouping called *Mkhedrioni*

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31 Kuprashvili, N. (2010, 7 July). *Georgians Finally Topple Stalin. The Messenger (Tbilisi)*, 28, p. 7.

32 Horne, C., & Stan, L. (Eds.). (2018). *Transitional Justice and the Former Soviet Union: Reviewing the Past, Looking Toward the Future*. Cambridge: Cambridge University Press. doi:10.1017/9781108182171.

33 Lehoucq, F. (2012). The third and fourth waves of democracy. In J. Haynes (Ed.) *Routledge Handbook of Democratization* (p. 273). New York: Routledge.

34 *President Saakashvili's Inauguration Speech* (2004). Civil Georgia.

35 Fairbanks Jr., C. H. (2010). Twenty Years of Post-Communism: Georgia's Soviet Legacy. *Journal of Democracy*, vol. 21(1), pp. 144–151. Project MUSE, doi:10.1353/jod.0.0135.

36 Ibid.

("Knights" in English), led by the former bank robber and playwright Jaba Ioseliani, were still enforcing the unwritten laws.[37]

This time period marks the beginning of new ideologies, as Soviet politics utterly disappeared. There was the 2003 *Rose Revolution* in Georgia and the 2004 *Orange Revolution* in Ukraine.[38] The immense transformation fostered the disappearance of restrictions on liberty in people's private lives.

Conclusion

As an independent state, Georgia has evolved by synthesising Western values and the Soviet legacy, while still maintaining its unique culture and history. Many scientists have been eager to label the post-Soviet transition as failed or successful; however, realising the complex nature of transition, labelling can be dangerous.[39] I reckon, every post-Soviet state had its own method for outgrowing the Soviet past.

Although Georgia had some trouble with governance and legislative readiness at the beginning of the 1990s, despite all the peculiarities of transition it can still be considered a "success story".[40] Georgia had an attempt at building an independent state twice in the 20th century – in 1918 and 1991. In both cases, it was a result of a previously collapsing structure, the Russian Empire and the Soviet Union, respectively.[41]

In 1991, after the dissolution of the U.S.S.R, new structures were not yet created; therefore, the process was turbulent. Georgians, while focussed on maintaining independence, were still under the complete influence of the Soviet system. The period of 1991–2003 years was the most challenging part of the transition. While in the 90s paramilitary group Mkhedrioni was the whole judiciary, laws passed after the Rose Revolution embraced European standards.

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37 Gabritchidze, A. G. (2010). *Transition in the Post-Soviet State: From Soviet Legacy to Western Democracy? (Dissertation*), Ohio State University.

38 Ibid.

39 Carothers, T. (2002), The End of the Transitional Paradigm. Journal of Democracy, 13(1), p. 24. Baltimore: Johns Hopkins University Press.

40 Ibid., p. 25.

41 Gabritchidze, Ibid.

The transitional process has no particular timeline or turning point: Outgrowing the almost-century-long system is difficult. For example, while the marriage age in the Soviet Union was 15 years of age, in post-Soviet Georgia it was 16, and after some time raised to 18. It is still questionable how long the shadow of the Soviet legacy will influence the Georgian transition to democracy. Undoubtedly, when it comes to forming the legislation, it is difficult for society to obey the law that changed radically in such a short period of time, simply because legislation should be the reflection of social morality. The transitional process needs to be – and is – consistent and slow to be effective.

Georgian legal order and law enforcement are radically different from the Soviet reality; however, it is not surprising that the Soviet legacy still has its influence on contemporary jurisprudence, given that social readiness needs to be at a certain level for change to take root. The most problematic topics clearly are already covered, as we have a civil code, a criminal code, the Administrative Code of Georgia, as well as civil, criminal and the Administrative Procedure Code of Georgia. There is no threat in the constitution against the right to freedom of speech, thought, conscience, religion and belief, the right to liberty of movement, or rights of ownership, among others. There is no longer any “justice over the phone” and, despite the challenges the system faces, Georgian laws – while still improving – mostly already meet European standards.

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