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CONFERENCE ON

**“PAST AND PRESENT-DAY LUSTRATION:
SIMILARITIES, DIFFERENCES, APPLICABLE STANDARDS”**

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REPORT

“LUSTRATION: THE EXPERIENCE OF HUNGARY”

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The Hungarian lustration-experience – as probably is in the case of every nation – has at least three aspects:

- exclusion of the leaders and important political or administrative contributors of the former totalitarian regime from political and public law activities,
- possibility of criminal procedures against those who had committed serious crimes in order to sustain the former regime, crimes which were not prosecuted due to political reasons,
- publicity of names of those persons who had belonged to the communist nomenclature or who were deemed to be officers or collaborators of the former repressive internal intelligence structures.

All the three aspects can be interpreted from legal or political approach even if in the case of exclusion from public governance the legal and political approach is equally important, while the criminal procedures are essentially legal questions and publicity of names is more political.

Before I try to draw up the long way of legislative experiments in Hungary we should take into consideration that more than a quarter of century passed since the transition, consequently its details are fading. It looks helpful to refresh the historical memory

Beginning of the transition in Hungary

The second decade of the 21st Century started with a series of enthusiastic events from the point of view of a public law researcher in Hungary due to the will of the Parliament elected in 2010 to construct a new Constitution. This legislative action finished the long process of legal and political transition of Hungary. It is important to remember the timing of this process.

When it had started, there were no many samples or models to follow. Sincerely, it was only Poland, where the negotiations launched in February 1989 between the communist power and the opposition lead to free elections won by the Solidarity movement on 4th of June. Exactly a week later analogous negotiations began in Budapest. When we think about this phenomenon, we should not forget its circumstances: hard-line communist leaders ruled our region: Erich Honecker in the former German Democratic Republic, Gustav Husak in the Czechoslovak Socialist Republic or Nicolae Ceausescu in the Romanian Socialist Republic. And what required even more caution: the Red Army of the Soviet Union had stationed in Hungary. The length of transition was supposed to take a very long and dangerous time. Personal liberty and security of the participants of negotiations wasn't guaranteed. A considered, stepwise change was in the focus of the thinking, not the lustration.

Thus the former constitutional order of Hungary, the constitutional order of the transition was established after the negotiations of the National Roundtable. The three 'sides' of the 'round' table had been composed by the leading communist Hungarian Socialist Party of Workers – HSPW –, the group of the so called opposition movements and a third, mixed grouping of other social associations). The target of the negotiations was not more but only drafting of the inevitable legal texts – amendment of laws – necessary to free elections. In the first phase of negotiations the 'opposition' objected to formulate a new constitution proposed by the communists, hence the negotiations had no political legitimacy, the leading communist party was considered to be non-legitimate. However the outcome of the negotiations was practically a new constitution, a legal text which formally was adopted as Act XXXI of 1989 on Modification of the Constitution.

This constitution of the transition was adopted by the National Assembly of the People's Republic of Hungary composed mostly and overruled by Socialist Party. At this moment – 18th of October 1989 – the view of Central Europe was substantially changed, and the changes were going on until the free elections and the first session of the democratically elected Parliament – 2nd of May 1990.

In spite of these changes the official title of the Constitution just modified remained Act XX of 1949, the fundamental act of the transition and of the new Republic was formally an old and illegitimate statute. This characteristic nature of the old Constitution was well-known: its Preamble had limited its effect for an indefinite but not infinite time, until the adoption of a new Constitution. Beyond any doubt, the old Constitution of Hungary was an interim Constitution.

What is more important from the point of view of lustration, the transition was based on the understanding of 18th of September 1989 closing the negotiations of the National Roundtable. Of course, this understanding didn't say a word about lustration, but implicitly made it improbable. The Hungarian transition was based on a treaty not on social movements. As the first democratically appointed prime minister, Mr József Antal said later, when some politicians asked him about tolerance with communists: "If you did not do a revolution..." This shape of the transition, reforms based on reconciliation followed by legal changes, what is not strange from the Hungarian constitutional identity, had been still dominant, and determinative to the vestigial lustration. At least, exclusion of the leaders and important political or administrative contributors of the former totalitarian regime from political and public law activities was not and have never been on the agenda. Perhaps a new constitution in the first years could have changed this situation, but the new constitution, the Basic Law was adopted more than twenty years later, in 2011. Then it was too late to begin the exclusion process.

Lustration and rule of law

The history of transition did not overwrite completely the political will to face the decisive difference between the new constitutional order and the former totalitarian regime. The aim was the same as the later position of the Resolution by the Parliamentary Assembly of the Council of Europe 1096 (1996), the position of the European Court of Human Rights and the Venice Commission: "a democracy has to be able to take measures preventing a return of the totalitarian regime" (CDL-AD(2015)012, para 20).

The Hungarian Government tried to make possible prosecution of the most serious crimes committed before the transition, like the volleys and other cruel forms of revenge of communists after the crush of the revolution and war of independence of 1956. The legal obstacle was obsolation of crimes: at a first glance no communist crimes could be punished, hence to long time has been passed since that they were committed.

The Hungarian Parliament tried to make punishable these crimes despite the lapse. The reason was that will of State to punish a crime is immanent in the idea of obsolation, but before the transition the Hungarian State did not want to punish the crimes committed in the name of the same State. Just contrary, the totalitarian State had expected from its officials to commit such crimes. The Parliament accepted a bill on 4th of November 1991 which stated that obsolation was at a standstill (it was resting) before 2nd of May 1990. Due to a motion of the President of Republic the Constitutional Court stopped the new act by its decision 11 of 5th of March 1992.

Based on the interpretation of the declaration of the Constitution that Hungary is a State under the rule of law, the Court ruled that principle of rule of law is a formal one, and the transition in Hungary was fulfilled on the ground of legality. Consequently the fundamental

guaranties of legality cannot be removed by arguments like historical situation or justice. The famous formula of the Court was that legal certainty based on formal principles is stronger than the particular and subjective material justice. Thus it became one of the sad experience of many of Hungarians that rule of law meant safe-conduct for totalitarian crimes.

Later the Constitutional Court ruled by its decision 54 of 13th of October 1993 that on international grounds – Conventions of Geneva – the crimes in case may be prosecuted hence the Hungarian Criminal Code prescribed that war crimes and crimes against humanity can be punished indifferent of time lapse. The decision was underpinned after a joint motion of the President of the Supreme Court and the General Prosecutor by another decision in 1996. Some – very few – criminal investigations were started, but their outcome was very thin. One of the rare procedures finished with a positive judgement, was later circumvented by the European Court of Human Rights (Korbely v. Hungary, Ap. no 9174/02). The same thing happened with the symbolic lustration: prohibition of public wearing of communist symbols, e.g. the red star (Vajnai v. Hungary, Ap. no 33629/06).

It was our new Constitution, the Basic Law again, which tried to give enough legal ground for criminal prosecutions, but it is probably too late. The possible defendants are very old, and the criminal procedures are not quick enough, as we had to face in the case of Bela Biszku, one of the leaders of the repression of '56. Thus this type of lustration is practically also pointless.

What is left: publicity of names

The only – at least partially – successful branch of lustration in Hungary is regarding publicity of names of those persons who had belonged to the communist nomenclature or who were deemed to be officers or collaborators of the former repressive internal intelligence structures.

Neither the complete list of officials of repressive organizations nor the list of so called social contributors (informants) was made public. One of the plausible reasons is that there is no complete list. In the last period before the free elections there was enough time to annihilate or to tamper them.

By the Act XXIII of 1994 on the screening of holders of important positions the Parliament set up screening commissions composed by judges to control the possible totalitarian activity of Members of the Parliament, officials appointed by the Parliament, ministers, state-secretaries, judges, prosecutors, ambassadors, other high ranked civil or military officers and executives of companies if the State was their owner. If the commissions found that a screened person was contributor of the totalitarian regime, it called him/her to resign. If the contributor refused to resign, he/she could challenge the decision of the commission in a court. If the court agreed with the commission, the decision had to be published in the official journal. However, the decision had no binding effect, the contributor could keep his/her position, if he/she could face the pressure of the public opinion. They usually could. The commissions worked until the end of 2005, and I am afraid, the Hungarians had already forgotten them.

As another path to publicity the Parliament set up a specialised Archives for preservation and research of the documents which are still available and which have been not still classified. The Historical Archives of the State Security Services gives access to scientific researches. Persons observed by the communist state security agencies have access to the documents relating to them. The actual version of the Act III of 2003 provides the right to the observed individuals to get acknowledged with the name and other personal data of officers and contributors of the services, and make these data public. The system works, even if the documents are far from being complete

Conclusion

I hope that the sketchy picture I had the opportunity to present shows clearly that lustration is not one of the success stories of the Hungarian transition. The historical background, the rigid implementation of the principle of the rule of law and the lack of a new constitution served as practically unavoidable obstacles for more than two decades.

It was the new Basic Law – with great emphasis on its Preamble, the National Avowal – which definitively broke – at least in a legislative and symbolic manner – with the totalitarian past. This role of the Basic Law cannot be overestimated even if from the point of view of lustration – I am afraid – it is too late.