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(Not) Coping with Soviet State Crimes from 1991 until Today“

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Herbert Küpper

**Coping Legally with the Injustice of Former Socialist Regimes:
a Comparative Overview**

(Vergleichender Überblick über die juristische Bewältigung
der sozialistischen Vergangenheit)

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There is a vast amount of literature on how the formerly Socialist states of Eastern Europe have coped with their past in legal means since the change of system. Most of this literature was written in the 1990s and early 2000s, both in Eastern Europe itself and in Western academia. More recent literature on the politics of the past and their legal side concentrates on international law and domestic developments in overseas countries.

This working paper abstains from giving reference in footnotes for every bit of information. Instead, the list of literature at the end of this working paper contains an overview of comparative works concentrating on the legislation on the past in Eastern Europe's formerly Socialist countries. These works contain numerous further references for the details of every aspect mentioned in this Working Paper.

Footnotes in this Working Paper only refer to individual pieces of legislation and to the sources of verbatim quotations as well as, in individual cases, to information contained in other Working Papers of this project.

Introduction

Ideology-based totalitarian dictatorships were typical for larger parts of Europe in the 20th century. Some dictatorships propagated extreme right-wing ideologies such as Fascism and National-Socialism whereas others were based on the extreme left-wing ideology of Communism. In the ideology of the states that followed that ideology, Communism was the final goal, and even the most “advanced” state on its way to Communism, i.e. the Soviet Union, had by own admission not reached that goal yet but only the intermittent state of Socialism. Since the regimes in question defined their status as “Socialist”, with “Communist” being a state to be achieved in the future, we will define Eastern Europe's left-wing dictatorships as “Socialist” rather than “Communist”. The names of the parties, on the other hand, often used the word “Communist” because that was the vision they purported to follow. This is why we speak here of “Communist parties” and not of “Socialist parties”, for the sake of uniformity even in relation to state parties that bore “Socialist” and not “Communist” in their name.

0.1. Politics of the past and legislation on the past

After the end of a totalitarian regime, both the need and the desire to address and redress the injustices it committed arise. This is especially true if a rule of law-based system replaces the dictatorial regime. In a state respecting the rule of law, addressing the injustices of the past necessarily has a legal side, too. The “politics of the past” give rise to a “legislation on the past”. That politics are converted into legal norms is not a speciality of the politics of the past but a normal process in any rule of law-based state, especially if that state is part of the Continental European legal culture.

A comparative survey of the legislations on the past of the various East European countries leads to the identification of several fields that past-related legislative instruments concentrate on. These fields are:

- a formal or informal condemnation of the Socialist regime (chapter 1),
- the criminal prosecution of the perpetrators of state crimes (chapter 2),
- the employment of perpetrators of state crimes in public offices and lustration (chapter 3),
- the care for the victims of the state crimes (chapter 4),
- the archival legacy of the secret police and other repression authorities (chapter 5),
- the assets of the state party, which was a problem not in all formerly socialist states (chapter 6).

These fields somewhat differ from what Robert Uerpmann-Witzack’s paper sets out: truth seeking, criminal justice, reparations, and guarantees of non-recurrence¹. The reason for this difference is that Uerpmann-Witzack takes the scholarly view of international law, whereas the toolbox approach of this paper defines the fields of activity from the practical perspective of the domestic legislator.

Before analysing the divergent past-related measures the various formerly Socialist states in Eastern Europe enacted, we will deal with two aspects common to all these states: the time frame of such legislation and the constitutional framework.

0.2. Time frame

Most countries did not start politics of the past and therefore legislation on the past immediately after the end of Socialism, i.e. right in 1989/90. One exception was the German Democratic Republic which undertook first attempts at dealing with some aspects of the Socialist dictatorship even before

¹ Robert Uerpmann-Witzack: Restorative and Transnational Justice in International Law, Working Paper no. 2, point III.

reuniting with West Germany. After reunification, Germany embarked on past-related legislation right away, partly in order not to repeat the mistakes and shortcomings of both German states in dealing with the Nazi past after 1945/49. Czechoslovakia, too, was quick to enact first legislative instruments to deal with certain aspects of the Socialist past, but soon the growing conflict between Czech and Slovak politics put an end to this early Czechoslovak legislation on the past.

The other East European countries usually started five to ten years after the end of Socialism to address the open questions of the bygone dictatorship. Various reasons can be identified that explain this delay.

0.2.1. An incomplete change of system

In some countries, the Communist Party or its successor organisation managed to stay in power in the new system, i.e. won the first post-socialist elections. It is obvious that these parties had little interest in unearthing and addressing the sins of the past.

This happened, e.g., in Bulgaria, in Serbia or, outside Europe, in Mongolia. A similar situation arose in countries like Romania or Russia where the old state party and its successor parties were elected out of power, but the elites of all new political parties stemmed from the former state party elite. The new political parties were founded and dominated by the members of the Socialist power elite whose interest in shedding too bright a light on the past was as limited as was the continuous Socialist elite's interest in Bulgaria, Serbia or Mongolia, for the same reasons. Any scrutiny of the past would necessarily have revealed their involvement in the old regime.

0.2.2. A conscious political decision

In some countries, post-socialist governments took a conscious decision not to look backwards but to deal with the present and the future only, and incorporated this decision into their political programme. This policy was more than a passive silence, it actively advocated to disregard issues of the past. Such a decision was usually revised later but prevented an early start of the politics of the past during and immediately after the change of system. The past became politically relevant only some years after the political transition.

The most conspicuous case was Poland with its policy of a “gruba kreska” (clean break).

0.2.3. More pressing tasks

All formerly Socialist states embarked on a course of a total reorganisation of all relevant fields of life: the political system, the economic system, the legal system etc. The goal was the transformation of the Socialist one-party state with its planned economy and state-controlled society into a multiparty democracy based on the rule of law and respecting human rights, with a market economy and a free and vivid civil society. In this radical change in all spheres of public and, quite often, private life, other, future-related tasks appeared more pressing than the past. In the realities of the transition years, the most pressing tasks were related neither to the visions for the future nor to the wounds from the past, but to the present and immediate survival. These absorbed all attention as well as all (political and other) energy and included

- building and consolidating the new political system,
- keeping the economy going, despite the grave economic decline in the transition from a planned into a market economy,
- upholding a minimum of state services for the population such as health care systems, old age pensions, public security etc in a situation of universal radical change and, often, chaos.

The pressing tasks of the transition were probably the main reason for the delay in the politics of the past in countries such as Hungary and Romania. In Czechoslovakia, another problem turned out to be so pressing that it was given priority over the politics of the past: the future of the federation and its Czech and Slovak constituent republics.

0.2.4. The end of socialism coincided with a fight for independence

In some regions, the collapse of the socialist regime caused a violent dissolution of the socialist federation, as in the Soviet Union and, even more brutally, in Yugoslavia. The post-socialist states had to fight for their independence or were driven into civil war. In former Yugoslavia, this is true for Slovenia, Croatia and Bosnia-Herzegovina as well as, in a somewhat different framework, Kosovo.

In such a situation, fighting for and defending the independence as well as ending the violence were the most important tasks which put most other policies on hold. This is, however, not just a special case of more pressing tasks as described under 0.2.3. The post-socialist wars for independence and civil wars had another effect on the politics of the past. The atrocities of the recent war or civil war dimmed or even wiped out the memory of the injustices of the previous Socialist system. The quantity

and quality of violence in the war in Croatia and the civil war in Bosnia made the injustices of Socialist Yugoslavia – which had practiced, since the 1960ies, a comparatively mild version of Socialist dictatorship – appear to be of little relevance, idyllic even. The memories of the war or civil war shielded the present, war-related resp. civil war-related politics of the past against the more distant memories of Socialist times. Socialist injustices faded away in view of the war crimes of the most recent past. This was true even in Slovenia where the war for independence was over very quickly but still has the potential to make the Socialist past and its crimes appear far away, perhaps even too far away to justify present-day legislation.

0.2.5. Decolonisation

In the three Baltic republics, the politics of the past had, from the beginning, not de-communisation as a goal but pursued a more comprehensive objective: the decolonisation of these three countries. Addressing the injustices and crimes committed by the Soviet Union was just one part of the Estonian, Latvian and Lithuanian decolonisation politics. This overall decolonisation, i.e. the undoing of all results of the foreign occupation that had lasted several decades, provides the Baltic politics of the past and the ensuing legislations on the past with a special quality that does not apply to other states. For this reason, we will not deal with the “special case” of the Baltics and its motives and dynamics of its own.

0.3. Constitutional framework

Whereas Socialist constitutions purported to be not more than political propaganda, the post-socialist constitutions claim to be valid law, even more so: to be the highest layer of valid law which all other law and state activity has to conform to. Therefore, the post-socialist legislation on the past has to observe the constitutional framework.

Although the post-socialist constitutions vary strongly in detail, they share some basic traits relevant for the legislation on the past. These basic traits were elaborated most pointedly by the constitutional courts of Germany and Hungary but apply to the other East European states as well. They can be summarised in two tenets:

0.3.1. Free political discretion about the “if”

The constitution does not make a policy of the past mandatory (with very few small exceptions), and certainly does not require any sort of a legislation on the past. Given this constitutional neutrality, parliaments, governments and other political decision-makers in the post-socialist state are free from constitutional restraints in their political decision whether or not to take legislative action with view to the bygone Socialist regime. The active Polish refusal to look at the past in the “gruba kreska”-policy was just as constitutional as the zealous legislation of reunified Germany to address even the most remote parts of GDR injustice.

0.3.2. Constitutionally bound discretion about the “how”: human rights

If the post-socialist state decides to take past-related action, it has to observe the basic rights in its constitution and in the international instruments it has ratified. Obviously, the state has to observe these basic rights in all its actions, including when legislating on the past. In practice, the basic right to equal treatment turned out to be most relevant in the legislation on the past. This means that the post-socialist legislation or state practice on the past may differentiate between various groups of perpetrators or victims etc only if there is a good reason for this differentiation.

Both the German and Hungarian constitutional courts, in unison with the European Court of Human Rights, stress that the human rights of the new constitutions only relate to the post-socialist state practice. They have no retroactive effect. This means that, e.g., victims of Socialist nationalisations or expropriations cannot argue that their present human right to property was violated by the Socialist measures. Their new human rights do not apply to the Socialist past *ratione temporis*, but they do apply to past-related activities of the post-socialist state. The same is true for the human rights enshrined in international instruments such as the European Charter of Human Rights².

In sum, the new constitutions leave a wide political discretion. This is wise because politics of the past and legislation on the past deal with societal justice and aim at societal reconciliation. Too narrow a constitutional corset would be an impediment to the social debate on the if and how to achieve these fundamental goals and would, in the worst case, hinder societal reconciliation.

² Robert Uerpmann-Witzack: Restorative and Transnational Justice in International Law, Working Paper no. 2, point II.

All this said, how did the various East European countries address the five resp. six fields of politics of the past we have identified?

1. Formal or Informal Condemnation of the Socialist Regime

“Condemnation of the Socialist regime” means that the new system makes it clear that it distances itself from the Socialist regime and does not accept its injustices. This distancing is a very wide and heterogeneous field. Some measures are of a symbolic nature whereas others define concrete rights, duties and legal consequences and therefore are normative in a strict sense.

1.1. Symbolic Condemnation

In a symbolic condemnation, the new system states formally or informally that it does not accept the bygone Socialist regime or at least some of its practices. This condemnation is symbolic because it does not have any legal consequences as such. Everybody is free to accept or refute the political opinion enshrined in such a symbolic condemnation.

In a legal sense, the most important symbol and symbolic text of the new system is its constitution. Constitutions are as a rule more symbolic than other law. They are not only a legal instrument but also the place to show the political capital of the state and its political and societal system. This is especially true for the preamble of a constitution.

No post-socialist constitution in Eastern Europe contained explicit text on the Socialist past, neither a condemnation nor any other position, statement or comment. It was only much later that some constitutions adopted text containing a negative judgement about the Socialist regime. The new Hungarian constitution of 2011³ is most outspoken in this respect. The reason lies in the function of this constitutional text. It is not designed to further societal reconciliation but quite to the contrary, was written to legitimise an illiberal regime beyond the democratic legitimation created by the elections. In comparison to the Hungarian constitution, the negative judgements about the Socialist past are quite reluctant, even hidden in the Polish Constitution of 1997 and the amended Romanian Constitution of 1991/2003⁴.

³ Especially the preamble and article U) of Hungary’s Basic Law of 25th April 2011.

⁴ Preamble of the Constitution of the Republic of Poland of 2nd April 1997; Article 1(3) of Romania’s Constitution of 8th December 1991 as amended on 31st October 2003 (the constitutional amendment of 31st October 2003 was the first and until now the only amendment of the Romanian constitution).

Whereas constitutional text on the negative sides of the Socialist regime was adopted rather late – if at all –, some parliaments enacted at an early stage of the political transition special condemnation laws or issued resolutions condemning the Socialist rule in toto or, more often, certain criminal aspects of that regime. The first condemnation laws were adopted in Czechoslovakia and its successor states. The very short Czechoslovak law on the “time of non-freedom” of 1991 united under that term both the Nazi German occupation of the Czech half and the Socialist rule in the entire country; whether the local Fascist regime in Slovakia (1941-1945) was also a “time of non-freedom” was an object of bitter debate. In the course of the separation of the Czech and the Slovak states, Czechia enacted in 1993 a rather long law which condemned the Socialist regime and took some concrete measures e.g. in respect to the statute of limitation in regard to state crimes. Slovakia followed with a very similar piece of legislation in 1996⁵. Very much later, Bulgaria joined the club and adopted a formal condemnation law⁶.

Resolutions to condemn Socialist injustice were adopted by the Hungarian and Polish legislative bodies. The pertinent Romanian resolutions condemned, in line with the incomplete elite change⁷, not the Socialist regime as such but only the “Ceașescu clan”. Compared with these resolutions, the “declaration of honour” issued by the German parliament was rather weak in its wording⁸. Whereas these parliaments started taking their resolutions during or immediately after the change of system, Croatia waited rather a long time. On 20th June 2006 – shortly after the Resolution 1481 of the Par-

⁵ – Czechoslovakia: Federal law 480/1991 Sb. on the Time of Non-Freedom of 13th November 1991;

– Czechia: Law 198/ 1993 Sb. on the Illegality of the Communist Regime and on the Resistance against it of 9th July 1993;

– Slovakia: Law 125/ 1996 Z.z. on the Immorality and Illegality of the Communist System of 27th March 1996.

⁶ Law on Declaring the Communist Regime in Bulgaria as Criminal of 27th April 2000.

⁷ On this, see the Introduction.

⁸ – Germany: Declaration of Honour for the Victims of the Communist Tyranny of the German Bundestag of 17th June 1992. The Bundestag is the “lower chamber” of Germany’s federal parliament.

– Hungary: the most important acts were Parliamentary Resolutions 19/1989 (XI. 1.) OGY on the Indemnification of Victims of Illegal Sentences, Internments and Resettlements of 1st November 1989, 20/1989 (XI. 1.) OGY on the Remedy of the Violations of Persons Imprisoned (Interned) in Police Custody as well as Expelled of 1st November 1989, 35/1990. (III. 28.) OGY on the Remedy of the Collective Violation of the German Minority in Hungary of 28th March 1990, 36/1990. (III. 28.) OGY on the Remedy of Violations of Hungarian Citizens Abducted into the Soviet Union for Reparation Labour as well as Sentenced by Courts of the Soviet Union and Meanwhile Rehabilitated for Lack of a Criminal Act of 28th March 1990, 37/1990. (III. 28.) OGY on the Indemnification of Persons Illegally Restricted in their Personal Liberty between 1945 and 1963 of 28th March 1990; Law 1990:XXVIII on Enshrining the Importance of the Revolution and the Freedom Fight of October 1956 in the Law of 8th May 1990.

– Poland: Resolution of the Sejm on the Recognition of the Decision on the Introduction of the State of War as Illegal (...) of 1st February 1992; Resolution of the Senate of the Republic of Poland on the Legal Continuity between the II. and the III. Polish Republic of 16th April 1998; Resolution of the Sejm on the Condemnation of Communist Totalitarianism of 18th June 1998. The Sejm is the “lower chamber”, the Senate the “upper chamber” of the bicameral Polish parliament.

– Romania: Communication to the Country by the Council of the Front of National Salvation of 22nd December 1989 (this is the resolution that condemned the “clanul ceașescu”).

liamentary Assembly of the Council of Europe – Croatia condemned “the Totalitarian Communist System in Croatia” and argued for active politics on the past by the post-totalitarian Croatian state⁹.

1.2. Strict Normativity: Concrete Measures

For some post-socialist countries, it was not enough just to issue formal or informal negative statements about the past dictatorship. They also took concrete measures, i.e. legislation that contained more than a statement, defining concrete rights, duties, and legal consequences. These measures cover a wide field but it is possible to identify the most important questions addressed: the dissolution and prohibition of the old state party or the former state ideology, the criminalisation of the symbols of Socialist rule, the criminalisation of the denial of certain Socialist state crimes, and the institutionalisation of the memory of, and research on, the past.

1.2.1. Prohibition of the former state party or former state ideology

Only few states forbade the old state party, i.e. the Communist party or its successor organisation. The most conspicuous example was Russia. At the same time, the Russian proscription of the Communist Party is an exception in the politics of the past because it was a reaction not so much to its past as the state party of a dictatorship but much rather to its involvement in the coup d’etat in 1990. The Russian Constitutional Court upheld most of the ban but allowed the continuation of the local party institutions which, in due course, became the basis of the re-formation of the Communist Party of the Russian Federation. In Romania, too, the ban on the old state party was short-lived¹⁰.

An alternative to the ban of the former state party is the prohibition of Communism as a political ideology. Albania’s and Poland’s constitutions forbid totalitarian parties respectively “political parties and other organisations relying on ... Nazism, Fascism, and Communism”¹¹. It is perhaps not by chance that these comprehensive interdictions of totalitarian ideologies can be found in the two latest

⁹ – Resolution 1481 of the Parliamentary Assembly of the Council of Europe on the Need for International Condemnation of Crimes of Totalitarian Communist Regimes of 25th January 2006;

– Declaration of the Croatian Parliament of 30th June 2006 on the Condemnation of the Crimes Committed during the Totalitarian Communist System in Croatia in the Years from 1945 to 1990.

¹⁰ – Romania: Decree-law on the Prohibition of the Romanian Communist Party of 12th January 1990 (not duly promulgated), Communication of the Council of National Salvation of 17th January 1990 (this communication effectively annulled the decree-law of 12th January 1990).

– Russia: provisional prohibition: Presidential Decree no. 79 of 23rd August 1991, permanent prohibition: Presidential Decree no. 169 of 6th November 1991; Constitutional Court of the Russian Federation, decision no. 9-P of 30th November 1992.

¹¹ Article 9(2) Constitution of Albania of 21st October 1998; Article 13 Constitution of the Republic of Poland of 2nd April 1997.

post-socialist constitutions, adopted as late as 1997 and 1998. In the question of the ban of totalitarianism, Albania and Poland chose a way that the Allied Powers had practiced in Germany and Austria in 1945. They forbade not only the Nazi party as such but National-Socialism as an ideology and basis for political action. A weaker form was chosen in the Bulgarian, Czech, Romanian and Slovak constitutions which emphasise that there shall be no more state ideology without explicitly forbidding Socialism. This formula, too, expresses the symbolic and legal break with the party state structures. Similar text in the Belarusian Constitution, however, could not prevent a new dictatorship in that old-new Russian satellite¹².

A rather bizarre situation has arisen in Czechia and Slovakia where the condemnation laws mentioned in chapter 1.1. define the (Czechoslovak) Communist Party as a “criminal organisation” but where that self-same party was never forbidden or dissolved. As a result, a by law “criminal organisation” sits in the Czech parliament.

1.2.2. Criminalisation of Socialist or Communist symbols

Soviet-style Socialism used the red star with five arms, hammer and sickle and other iconography as political symbols. Some post-socialist countries criminalised the use of these symbols by creating new pertinent crimes in their criminal codes. All of these crimes encompass not only Socialist or Communist symbols but also the symbols of the extreme right. In most cases, such criminal law was created years after the end of Socialism.

The criminal norms on the public use of Socialist or Communist symbols turned out to be difficult to apply. In Hungary, to give one example, the crime was introduced into the Criminal Code in 1993 but gained first relevant practice only in 2008 when a high-rank member of a very small leftist party was accused of publicly wearing the red star. The European Court of Human Rights decided that the Hungarian criminal norm was too far-reaching because unlike the symbols of the extreme right, the symbols of the extreme left are also symbols of democratic leftist organisations such as social-democrat parties or trade unions. In principle, the court held, there was a certain public interest in post-dictatorial states to criminalise the symbols of the former dictatorial regime, but since the red star and the hammer and sickle were symbols also of democratic political movements, their criminalisation

¹² Article 4(2) Constitution of the Republic of Belarus of 15th March 1994; Article 11(2) Constitution of the Republic of Bulgaria of 12th July 1991; Article 2(1) Czech Charter of the Basic Rights and Basic Liberties of 16th December 1992 (the Charter is an integral part of the Czech constitutional order); Article 8 Romania’s Constitution of 8th December 1991; Article 1(1)2 Constitution of the Slovak Republic of 1st September 1992.

was unproportional even in a post-dictatorial situation and thus a violation of the European Charter of Human Rights¹³. However, Hungary disregarded the Strasbourg decision, and the Hungarian Supreme Court upheld the criminal conviction for wearing publicly a red star. In a later case, the Hungarian Parliament even took a formal resolution about disobeying the European Court of Human Rights and keeping the crime of publicly wearing a red star on the statute-book.

Unlike their Hungarian counterpart, the constitutional courts of Czechoslovakia and later of the Czech Republic quashed the attempts of the Czechoslovak and later Czech legislators to criminalise the symbols of both Fascism and Communism. The wording of the bills was vague and thus not clear enough for a criminal norm. The Czechoslovak and Czech parliaments found it very hard to circumscribe the forbidden symbols in a way which was sufficiently clear linguistically and logically and at the same time limited the scope of the criminal norms to a use of those symbols advocating dictatorship. The text that made it into the Czech Criminal Code is still vague and, as a consequence, prosecution authorities and courts practically hardly ever apply these norms.

1.2.3. Criminalisation of the denial of socialist state crimes

Some states criminalise the denial of certain historical facts. In most cases, such criminal law refers to especially atrocious crimes. Their denial is criminalised because of the respect for the dignity of the victims. Apart from the victims' dignity, a post-dictatorial state may have a public interest in not accepting lies about central parts of the past. Turkey which builds its state identity on the denial of its genocide against the Armenians – and the denial of the existence of an Armenian people, for that matter – is a telling example for the violence, political and societal distortions caused by grounding the state on a lie. Therefore, there may be good reasons of public interest, beyond the respect for the victims, for criminalising certain lies about the own past. A prominent example of a denial crime is the denial-of-holocaust clause of the German Criminal Code¹⁴ which was introduced to protect the memory of Nazi Germany's anti-Semitic genocide against falsifications, trivialisations and denials from the extreme right.

The legal problem with denial crimes lies in their potential to limit the human right of freedom of opinion and expression which, as a rule, protects factually false opinions as well. In the constitutional weighing of the freedom of opinion and expression on the one hand against the dignity of the victims

¹³ ECtHR, case no. 44438/08, 8th July 2008, Vajnai v. Hungary.

¹⁴ § 130(3), (5) Criminal Code of 15th May 1871.

and the public interest in banning certain lies from the public debate on the other, the most widespread solution is that the freedom of opinion and expression prevails in principle. Only in the case of especially gruesome crimes, the public interest and the dignity of the victims carry a weight that suffices to legitimise the criminalisation of that denial.

The pertinent legislation in Eastern Europe follows these lines. One example is Ukrainian criminal law which penalises not the denial of all Socialist or Soviet crimes but the denial of Holodomor¹⁵. Another example is the Hungarian criminal law which refers to the public denial, trivialisation or attempt to justify “genocide or other acts against humanity committed by National-Socialist or Communist systems”¹⁶.

1.2.4. The institutional side

Some post-socialist states institutionalise the memory of the former dictatorship and its crimes in special institutions. The first of these institutions was the Polish “High Commission on the Research of Hitlerite Crimes in Poland” which was founded as early as 1984. Originally, its scope was limited to the crimes of the Nazi German occupation forces in Poland. Soon after the end of Socialism, in 1991, the crimes of the ousted Socialist regime were added. Consequently, the commission was re-named into “High Commission on the Research on Crimes against the Polish People” which contains the official acknowledgement that the Socialist regime had been based on injustice.

Some other post-socialist states created similar institutions where the purposes of official memory, information about the dictatorship, research, criminal prosecution and the handling of the archives of the repression organs mix in ways unique in every country. A common trait of these institutions is that they were founded – unlike their Polish role model – with some distance in time to the Socialist regime. Another common trait is that they put the crimes of Socialism and the crimes of Nazism and Nazi occupation on an equal footing. This happened, e.g., in Czechoslovakia and subsequently in the Czech Republic as well as in the Baltic states. In the same line, Hungary and Slovakia link the symbolic politics of the past concerning the Socialist regime to those concerning Nazi crimes, though with a somewhat hypocritical and apologetic tendency because it serves to white-wash the own past by attributing the crimes of the domestic Fascist respectively Nazi parties and governments to Nazi Germany.

¹⁵ Law on the Holodomor of 1932-1933 in Ukraine of 28th November 2006.

¹⁶ § 333 Law 2012:C on the Criminal Code of 13th July 2012.

Romania institutionalised memory in a slightly different way. In 2006, the head of state founded the “Presidential Commission for the Analysis of the Communist Dictatorship in Romania” which was a sort of “truth commission”. Its tasks included the unveiling of the truth about injustice, human rights violations and crimes committed by the Socialist regime. The commission presented its final report as early as December 2006. There was general consensus that that was only the beginning, and the commission continued its work. Unlike the other formal institutions for the research on the crimes of the Socialist regime, a presidential commission carries less weight in condemning the Socialist past but nevertheless is an informal way for the new system to show that it does not agree with the injustices committed under Socialism.

2. Perpetrators of State Crimes (1): Criminal Prosecution

2.1. Practical Problems

Many measures of the Socialist regime amounted to criminal acts even according to the Socialist criminal law of the time. Such measures include, inter alia, murder, false criminal accusations and manipulation of evidence in criminal procedures, the deprivation of personal liberty in prisons, psychiatric clinics and other closed institutions, child abduction (the state took away children from political opponents or certain minorities, taking them into state care or handing them over to loyal families to raise), defamation, slander and libel, blackmail, coercion and similar actions, high treason e.g. by allowing a foreign power, i.e. the Soviet Union, to determine domestic politics, or election fraud. This means that what the Socialist state and its servants did was criminal according to their own legal standards. In order to punish these acts, it is not necessary to introduce crimes retroactively in the Criminal Code and apply them to past crimes. This is a difference to the Nuremberg trials which, despite all lip-service paid to previous pertinent international law, created new international crimes and applied them retroactively.

A practical problem of the criminal prosecution of Socialist state crimes is the fact that both the crimes and the perpetrators are old. Socialist regimes were most brutal from the 1930s to the 1950s in the Soviet Union and in the late 1940s and 1950s in the Soviet satellite states. After the end of Stalinism, the general level of brutality and lawlessness of Socialist regimes went down. Exceptions to this rule were, e.g., the retorsions after the “Prague spring” in 1968, the enactment of martial law in Poland in 1980, the forceful assimilation, suppression and expulsion of Muslim minorities in Bulgaria in the 1980s, the generally very bad human rights record of Albania or Ceaușescu’s Romania or the lethal border regime practiced by the GDR.

Another practical problem is that the prosecution of the state crimes of a former dictatorship requires special knowledge: historical, legal and other. For this reason, some states created special institutions for the prosecution of the state crimes of the former dictatorship, e.g. a specialised prosecution service. Germany did so for Nazi crimes, Poland for Socialist crimes. In some cases, the memory institutions mentioned in chapter 1.2. also serve the purposes of prosecuting Socialist state crimes or of providing the prosecution organs with special knowledge.

2.2. Legal Problems: the Statute of Limitation

The fact that most of the crimes are very old is not only a practical, but also a legal problem. In many cases, the criminal prosecution of those acts is statute-barred (time-barred) according to the criminal law and criminal procedure law valid at the time of those crimes. Statutory limitation is an important element of the rule of law. All post-socialist countries define themselves as based on the rule of law and therefore adhere to the ideas of statutory limitation of criminal prosecution.

On the other hand, there has been the societal wish for a punishment of the perpetrators of Socialist state crimes. This societal wish carried different weight in the various post-socialist states but has existed everywhere. Depending on the public opinion vis-à-vis Socialist state crimes, societal reconciliation seems difficult if the new rule of law literally lets the perpetrators of the old regime get away with murder. Some governments wished to accommodate the societal need for punishment and tried to find ways how to get round prescription in a way which was not too blatantly in opposition to the self-definition of a rule of law state. We can call this situation “the post-totalitarian dilemma of rule-of-law criminal justice”¹⁷. A comparative analysis can identify five different ways how governments tried to cope with this dilemma.

2.2.1. Abolition of the current statutory limitation

If the crimes that the post-socialist state wanted to punish were not yet time-barred but that point of time was close, one way to secure criminal prosecution is to abolish the institute of statutory limitation for the most serious crimes, e.g. for murder or, more generally, all sorts of homicide, for child abduction, for high treason or similar acts. This gives the prosecution services time. They are no longer in a rush because of the pending deadline.

This method was used in West Germany when the end of the limitation period was close to set in for Nazi-time killings. The statutory limitation for murder was abolished, though for reasons of the rule of law it was abolished for all murders, not only for those committed by the Nazi state. As a result, murder can be prosecuted as long as the (alleged) perpetrator lives.

¹⁷ Quoted from Küpper, Herbert: Kollektive Rechte in der Wiedergutmachung von Systemunrecht, Studien des Instituts für Ostrecht München vol. 52, Peter Lang Verlag: Frankfurt/Main 2004, pp. 145-150 and passim. The original German wording of the quote is: “das posttotalitäre Dilemma des strafenden Rechtsstaats”.

The problem with this method is that it will not help in old cases. Once the statutory limitation period is over, which is the case with most Socialist crimes, this method does not produce any results.

2.2.2. Lifting the statute-barred status for certain crimes retroactively

Since method no. 1 (chapter 2.2.1.) only affects the comparatively few crimes the prosecution of which still is not statute-barred, one might think of lifting the statute-barred status of the other, older crimes retroactively. This method may be limited to the especially serious crimes mentioned in chapter 2.2.1.

The problem with the retroactive abolition of the time-barred status lies in the rule of law. Under the rule of law, perpetrators may trust that their act will not fall under a less favourable legal treatment retroactively. This is quite a universal tenet in rule of law-states. If the state retroactively annuls the statute of limitations for certain crimes, the question arises whether the rule of law ban on a retroactive aggravation of the pertinent criminal norms includes statutory limitation? To put it more clearly: under the rule of law, can a perpetrator legitimately trust in the limitation period valid at the time of the crime? Or is the limitation period only a formal impediment for the prosecution and therefore not or at least not necessarily included in the ban on retroactive aggravation?

The German law-maker and the Hungarian Constitutional Court interpreted the statute of limitation as more than a mere formality¹⁸. For them, statutory limitation was much rather an essential element of rule of law-conform criminal prosecution. Consequently, they decided that the rules of statutory prescription could not be made more onerous for the perpetrator after the act. The Hungarian Constitutional Court declared legislation to that effect unconstitutional. If one takes a closer look at the nature of the effect of time on the prosecution of crimes, the German law does not seem to be the only rule of law-conform solution and the Hungarian cases seem decided wrongly. The limitation period defines a formal end for the time during which the prosecution authorities may get active. It does not, however, form an element of the legal appraisal of the act because the act itself remains a crime even after its prosecution has become statute-barred. It is true that ending the possibility of prosecution after a certain while is also rooted in considerations of social peace, but basically its reasons are more pragmatic. After so many years, proof becomes a serious problem, and the limited resources of the prosecution authorities should be concentrated on fresh crimes and not on old ones because the

¹⁸ – Germany: Article 315a Introduction Law to the Criminal Code of 2nd March 1974.

– Hungary: Constitutional Court decisions 11/1992. (II. 25.) AB of 25th February 1992, 41/1993. (VI. 30.) AB of 30th June 1993, 53/1993. (X. 13.) AB of 13th October 1993, 36/1996. (IX. 4.) AB of 4th September 1996.

wounds that the old crimes had caused once have more and more healed in the course of time. These pragmatic considerations are not necessarily elements of the rule of law, nor is the statutory limitation of the prosecutability of crimes at the heart of the rule of law. In this perspective, it seems doubtful that the rule of law wants to protect the perpetrators' trust in the length of prescription period that the law defined for their crime at the time of the act. It therefore appears constitutionally possible to retroactively prolong or even abolish the time period of that limitation, especially in an exceptional situation like after the end of a dictatorship. However, the divergent state practice in this question demonstrates that any answer is far from being unequivocal.

2.2.3. Starting the prescription period after the end of Socialism

The Socialist state naturally did not prosecute its own crimes and spared the perpetrators of those crimes. Put in a more constitutional way, the Socialist state refrained from exercising its punitive power for political reasons. In this situation, it appears to be a valid argument that the time during which the state had no will to prosecute does not count for the purpose of the statute of limitation. One reason for the time bar to the prosecution of crimes is to force the state to prosecute crimes as soon as possible after they were committed. If the state is not willing to prosecute, this argument goes nowhere, and statutory limitation loses its sense. In this reasoning, it is consequent not to count the Socialist period into the limitation period but to start calculating the deadline from the moment the state has the will to prosecute, i.e. from the end of Socialism. This argument has the advantage that it leaves intact all constitutional functions and guarantees of the statutory limitation of the prosecution of crimes and reverts to the factual side of the justice system. In German law, it is a well-established institute not to count into statutory periods the times when prosecution services or, more generally, the justice system did not function; this is the so-called “Stillstand der Rechtspflege” (“judicial standstill”). This institute was used after reunification to count the prescription periods for Socialist state crimes starting from the end of Socialism.

Constitutional courts in different post-socialist countries reacted differently to this argument. Their response in the Czech Republic and Germany was positive. The German Federal Constitutional Court accepted this argument for homicide, relying on the gravity of that crime, whereas the Czech Constitutional Court accepted it for all the crimes that the Law on the Illegality of the Communist Regime¹⁹ referred to, i.e. state crimes that were not prosecuted during Socialism for political reasons. In contrast to the Czech and German courts, the Hungarian Constitutional Court found pertinent legislation un-

¹⁹ On this law see chapter 1.1.

constitutional because it amounted to circumventing the constitutional guarantees for perpetrators of crimes.

2.2.4. Constitutionalisation

The above three arguments all face the problem that the statutory limitation of the prosecutability of crimes relates in one way or other to the rule of law and its guarantees for perpetrators of crimes. Constitutional arguments may be raised against all three ways to achieve prosecutability, and legislation to that effect failed the test of constitutionality before some constitutional courts in Eastern Europe. Their constitutionality is therefore not guaranteed, given the divergent court practice in various states.

If the constitutional rule of law raises objections against terminating the statute of limitations either *pro futuro* or retroactively or against not counting the time of Socialism into the limitation period, the more or less obvious solution is to enshrine the desired solution into the constitution. Since such a clause would relate to a very special case, i.e. the legal methods of dealing with the dictatorial past, the Final and Transitional Provisions of the constitution would be the adequate place to include such a norm into the constitution. Germany and Hungary constitutionalised certain past-related measures in order to immunise them against other constitutional rules such as the rule of law. If one does not want to accept this constitutional immunisation, only the dubious concept of “unconstitutional constitutional law” will offer a remedy. No constitutional court in Europe so far has accepted this concept.

The method of constitutionalising a past-related exception from the rule of law raises the serious question of whether this is politically desirable? After all, Socialist regimes rejected the rule of law (with the partial exception of Socialist Yugoslavia). After the end of Socialism, the rule of law very quickly has become a symbol for the new system, its “Europeanness”. In such a situation, is it politically wise to accept exceptions to the rule of law, even on a constitutional level, the minute the country has gained or, as the case may be, regained the rule of law? Are the “politics of the past” worth weakening the position of the rule of law immediately after it has been established? This eminently political as well as ethical questions requires a comprehensive societal debate in the country that wishes to constitutionalise past-related exceptions from the rule of law.

2.2.5. International law

A last strategy to achieve the prosecutability of Socialist crimes in spite of statutory limitation is to revert to international law. The Nuremberg trials and subsequent international treaties abolished the statutory limitation of certain very serious crimes such as crimes against humanity, genocide and similar acts. International law thus obliges (or, according to perspective, authorises) the states to exempt these crimes from time-related limitations of prosecutability. The details of international criminal justice are laid out in Working Paper no. 2 by Robert Uerpmann-Witzack.

If the crimes of the Socialist regime fall within the scope of these international categories, post-socialist legislators and prosecution authorities may rely on this international law to prosecute perpetrators of such crimes irrespective of any domestic rules on statutory limitation. Reverting to international law does not create any problems from the perspective of the rule of law because the abolition of prescription on Socialist crimes would not be retroactive. The “eternal” prosecutability of those crimes was established latest in 1945/47 and was confirmed by the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, i.e. it existed at the time of many Socialist state crimes. The Socialist crimes older than the end of WWII – e.g. Stalinist crimes such as Holodomor, or the crimes committed by Communist partisans starting from 1943/44 in countries like Yugoslavia – will hardly be the object of criminal prosecution because their perpetrators no longer live.

This solution was applied in Hungary in the 1990s and 2000s before the exceptions to the statutory limitation were enshrined in the constitution. The Constitutional Court did not raise any objection because this solution was not contrary to the rule of law.

3. Perpetrators of State Crimes (2): Employment in the Public Sector and Lustration

In the previous chapter, perpetrators were examined under the aspect of criminal prosecution. Their position in the post-socialist state has yet another angle. State crimes usually were committed by persons working for the state and other public bodies (public service). With the partial exception of East Germany, all formerly Socialist states shaped their transition on the basis of continuity which meant for persons working in the public service that they could continue to do so if they so wished. A majority of post-socialist states abolished the repression organs of the former dictatorship such as the secret police. Persons employed in these services were dismissed. However, the Socialist state had exercised political and other repression through many state organs such as the regular police, the prokuratura (prosecution service) and the courts, but also through organs which, at first sight, do not have repression in their portfolio such as, e.g., housing authorities that denied political opponents or other “undesirable elements” an apartment or child welfare authorities that took away the children from political opponents or from certain minorities.

The question arose whether these persons should be allowed to continue working for the state, or should they be dismissed? A second question was whether persons with a questionable political past, e.g. an employment in, or collaboration with, the secret police, should be allowed to assume a public office? If a post-socialist state wants to exclude persons with a politically questionable past from public offices and public employment, it has to answer several questions.

3.1. The Question of the “If”: Should Persons with a Politically Tainted Past be Allowed to Hold an Office in the New System?

The first problem was the question of the “if”. This problem was of a practical nature. Many persons who had collaborated in Socialist state crimes were specialists in their fields. In many cases, their knowledge was valuable for the new system, too, and was difficult to replace. The post-socialist state had to decide whether it could and wanted to operate without those specialists, whether a high rate of dismissals in, e.g., the judiciary, the police, or the child welfare services would paralyse these public sectors, or whether those persons were expendable if their past showed certain flaws.

This dilemma is exemplified by the divergent answers found in Germany at different occasions. After 1945, both the West and East German governments decided that the new systems needed administrative and other specialists despite their Nazi past. Thus, West and East Germany continued to employ

them, or re-admitted them into the public service if the Allied Forces had removed them, provided that two conditions were satisfied. First, they were no longer partisans of Nazi ideology (West Germany) or actively followed the Socialist ideology (East Germany). Second, they had not been exponents of the Nazi regime and had not committed too grave state crimes. In 1989/90, however, the answer of reunified Germany was that the employment of politically tainted persons in the public service was not tolerable. Those persons were removed from their posts on quite a large scale. This was possible because they could easily be replaced by specialists from West Germany who were paid high wages to take over leading posts in the public – as well as the newly created private – sectors in East Germany²⁰.

Apart from Germany, Czechoslovakia and its successor states – Czechia more than Slovakia – as well as Hungary enacted legislation for a more or less systematic exclusion of certain persons from certain public offices²¹. Other countries limited the legal consequences of a politically tainted past to individual cases or chose not to look at all at the political past of post-socialist office holders.

3.2. The Question of the “How”: How to Hold Whom Responsible for What?

The second problem concerned the “how”. It was about the legal form of removing or keeping away persons with a tainted past from public offices. No post-socialist state decided to examine the past of all persons employed in the public service, not even all persons employed in the sectors close to political repression such as the criminal prosecution system or the police. Such a practice would have paralysed those administrative branches, which was considered unacceptable. Therefore, all post-socialist states that opted for screening certain parts of the public service for a questionable political past employed finer methods to filter out those persons they did not want in their post-socialist public service²².

²⁰ The extra payments West German specialists were paid for their readiness to move to and work in East Germany were called unofficially “bush bonus”, which illustrates quite clearly the problems of the German way of reunification.

²¹ – Czechoslovakia: Law no. 335/1991 on Judges and Courts of 27th August 1991, Law no. 451/1991 Establishing Some More Conditions for Exercising some Functions in the State Organs and Organisation of the Czech and Slovak Federal Republic of 4th October 1991 (the so-called lustration law).

– Germany: Chapter XIX A) III. no. 1(5) annex 1 Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of Germany’s Unity of 31st August 1990 (Unification Treaty; this treaty has constitutional rank) and pertinent legislation.

– Hungary: Law 1994:XXIII on the Control of Persons Having Certain Important Offices as well as Offices Enjoying Public Trust and Forming the Public Opinion of 5th April 1994.

²² The three Baltic republics came comparatively close to a universal screening of certain parts of the public service. We will not deal with them because, as mentioned above, this practice is not so much post-socialist (post-authoritarian) but much rather post-colonial.

Given this basic decision to apply a fine-tuned screening, the questions that the pertinent legislation had to answer were:

- Which activities in the past disqualify a person from holding, or running for, a public office?
- Which public offices in the post-socialist system are important enough to be denied to persons with a questionable past?

The legislative answer to these questions was the so-called lustration, derived from Latin “lustrare” which means, inter alia, “to shine at”, “to shine through”, “to look at”, “to survey” or “to cleanse (spiritually)”. Lustration in our sense is an administrative procedure to examine whether a person who holds, or applies for, a certain public office has committed in their past certain (political) activities making them in the present unsuitable for that public office. By (1) defining the offices that require lustration, (2) the acts in the past that disqualify the person now and (3) the legal consequences of those acts, the legislator has to find a balance between doing justice in every individual case on the one hand and the simplification and schematisation necessary to administratively cope with larger numbers on the other hand. Every post-socialist country that went this way found its own balance. These are the solutions that East European states found.

3.2.1. Offices that require lustration

The list of lustrated offices strongly varies between the East European states. Some countries concentrate lustration on the high echelons of the public sector and subject holders of, or candidates for, high political and administrative offices to a screening of the past. In this context, political and administrative offices follow a somewhat different logic.

Holders of high political offices decide for, and represent, the new system. Therefore, this kind of office should not be entrusted to persons who have demonstrated in the past a more-than-average proximity to the Socialist state, ideology, or power institutions. These offices may include, as the case may be, members of parliament, heads of government and ministers, heads of state, on the local level mayors and, eventually, members of the local and regional councils.

High administrative offices are involved in the state’s non-political decision-making and therefore have a considerable influence on the working of the new system. Here again, persons with a tainted past may not appear suitable for being entrusted with such an office. These offices include, e.g., leading posts in state and communal administration and the heads of important state institutions such as

the national bank. Offices that require an enhanced degree of professional neutrality such as judges, prosecutors, constitutional justices, leaders of state-run media and cultural institutions, leading officials of police and other law enforcement and security organs as well as the leading officers of the armed forces, are especially liable to lose public trust and esteem when pillars of the old regime are active in them. Where there was a lustration, these offices were usually included.

Some countries drew a wider circle and included many high- and mid-level decision-making positions, even beyond the public sphere. Such a country was Hungary where, at times, the leaders of large state-owned companies and banks, leaders of national private media or the leaders and teachers of universities were required to show an uncompromised past. However, this wide circle of lustrated offices very quickly reached its constitutional limit in the question of the leaders of the churches. The post-socialist government did not want to include the leadership of the larger religious communities in the scope of lustration, well knowing and arguing publicly that such a lustration would reveal that practically the entire leadership of the two largest churches, the Catholic and the Calvinist church, had been agents of the secret police. The government tried to spare church leaders from lustration in order to protect those churches. The Constitutional Court accepted the exclusion of high church offices from compulsory lustration but argued that equal treatment would require to take comparable other non-state offices off the list of lustrated positions²³.

It may be argued that also the new, democratic political parties should not be led by persons who had been close to the Socialist regime. In a modern multi-party democracy, political parties are a central instrument to transform the rather abstract sovereignty of the people into concrete political decisions. The role of the political parties therefore is pivotal. Yet, no post-socialist state decided to include the leaders or high officials of the political parties in the circle of lustrated offices, for various reasons. First, it was thought that politicians should be judged on the personal and political programme they represented now, and not on their past. Second, in most East European countries, leading members of the old Communist party were the ones to found the new, non-Communist parties for the simple reason that they had the knowledge, the experience, and the social capital to do so. Without them, a post-socialist multi-party system could hardly emerge and function. Third, as party leaders, they were not allowed to immediately exercise public power in that capacity but had to appeal to the voters to be voted into some office. The new system left it to the voters to judge on the past of the contestants in the political arena.

²³ The first of a row of pertinent decisions was the judgement of the Hungarian Constitutional Court 60/1994. (XII. 24.) AB of 24th December 1994.

3.2.2. Disqualifying past acts

Exactly which past acts disqualify for a present career in the public service or for holding a public office depends largely on the specifics of how the Socialist dictatorship worked in that given country, and which events are considered to be especially atrocious.

A first indicator of political proximity to the Socialist regime might be membership in the Communist party or, where they existed, in the other political parties. In some Socialist countries, the Communist party operated as a mass party with a large number of members whereas other Communist parties behaved more like a religious order and chose very carefully whom they admitted. Especially in countries where the Communist party had been of the religious order type, membership may suggest a certain affiliation with the regime.

Depending on the specifics of the Socialist regime in the country, a mere party membership may not be considered sufficient to suggest that the individual was a pillar of the Socialist system. That is true, e.g., for parties with a mass character. In these countries, a special political taint may be seen in having held a leading position in the party or in the membership in party organs that specifically exercised political repression, such as a party militia.

A second disqualifying factor may be work for the secret police or other repression organs of the Socialist system. This encompasses the professional members of those organs, but also their “informal collaborators”, as the GDR term was, i.e. citizens who had accepted to be an informer or, more colloquially, a “snitch” or “nark”. Secret police work counts as an especially odious form of a tainted past in many post-socialist states and societies. It is, however, not always easy to identify who these persons had been. Identification is fairly easy with the professional secret police officers but may be doubtful with the informal informers. Files on informal informers often used code names instead of the real names. Historical research in Germany has shown beyond reasonable doubt that both the Nazi and the Socialist secret polices sometimes forged files on informal informers. For reasons of their own, they created files on alleged informal informers who had never accepted that commission, and forged their signature. A lustration procedure therefore needs to assess the validity of secret police files on “snitches” and must not blindly believe the papers it finds in the archives.

A third factor reaches further back in time and includes membership in the local Nazi party or collaboration with the Nazi occupation regime. When the post-socialist lustration legislation was adopted

in the 1990s, the inclusion of a Nazi past was largely symbolic because most persons to whom that criterion applied were too old to hold public offices. Yet, for symbolic reasons it may make sense to put the collaboration with the earlier Nazi regime on the same footing as the collaboration with the subsequent Socialist regime.

3.2.3. Legal Consequences

If the lustration procedure discovered that the holder of, or candidate for, a certain office has a politically tainted past, various consequences may be drawn. First, the consequences in most states differentiated between an electoral public office and a professional public office. An electoral office such as MP, minister, or mayor is limited in time, and the decision about who is installed in this office is taken by the voters according to political preference. A professional office is a permanent employment in the public service and usually lasts until the pension age, and the decision about who is installed in this office is taken by the personnel departments of the public administration on the basis of – ideally – professional merits. Second, the legal consequences may vary according to the weight of the “sins” of the past. Whereas a secret police collaboration may disqualify totally, a simple party membership may be an obstacle only for some but not for all lustrated offices.

The legal consequences of the lustration are most frequent differentiated into what may be termed a “legal” or a “moral” responsibility. A “legal” responsibility means that the person is barred from remaining in, or running for, the office in question. The findings on that person’s past are an obstacle that disqualifies them absolutely, either for the rest of their life or for a certain period. Such a solution was adopted in Germany in respect to employment in the public service.

A “moral” responsibility consists in the publication of the findings on the person’s past. This happened, e.g., in Bulgaria and Hungary. We can differentiate two sub-types. The findings of the lustration procedure may be published in any case or only if the lustrated person does not resign from the office or from running for the office. In the second alternative, the incriminated person may avoid publication of the findings on their past by retiring from the office resp. the candidature. The moral responsibility leaves the decision to the lustrated person as well as to the public that may or may not exercise pressure on that person. In the case of elected offices, it is the voter who decides whether the taints on the candidate’s past are so grave that they will not vote for that candidate, or whether they forgive the candidate their past and vote them into office. This solution links lustration with democratic transparency.

3.3. Lustration in Practice

The experiences of the post-socialist states that decided to apply some form of sanctions for a politically tainted past are mixed. Whether lustration achieves its goals depends on many details including the political culture and the administrative structures of the post-socialist state. Therefore, it is not possible to give any generally applicable answers here.

4. Victims of State Crimes

Depending on the date of Socialist state crimes, many of the victims of political repression are still alive. There may be a feeling that it is a question of natural justice that the new system should care for them in one way or another and address their needs. This can be done in manifold ways.

4.1. Acknowledgement of the Injustice Incurred: “Rehabilitation” in a West European Sense

The first necessary step is the official acknowledgement that what happened to the victims of repression and human rights violations was unjust, that these persons have suffered from state injustice. Practical experience with victims of state crimes shows that this official acknowledgement by the new system is often the most important bit. Money or other privileges may be welcome, but for most victims they are secondary. What counts most to them is that the state no longer denies the truth and its responsibility, that it formally acknowledges that what happened was wrong and amounts to state injustice. For this reason, reparatory justice in international law puts a strong emphasis on the acknowledgement of former abuses²⁴.

If the human rights violation by the Socialist regime consists in a violation of the victim’s honour and reputation such as a criminal sentence or a previous conviction, the official acknowledgement of the former injustice may, in one act or separately, officially quash these acts of disapproval issued by the Socialist state. This leaves the victims with a clean record. The restoration of the victim’s honour and reputation is termed in West European legal parlance “rehabilitation” – contrary to the Soviet and post-Soviet legal vocabulary that defines “rehabilitation” much wider and includes more or less all past-related legislation with view to the victims of state crime²⁵.

4.2. Compensation for the Injustice Incurred

Even if the formal acknowledgement of the unjust nature of the former state acts is of supreme importance for the well-being of the victims, the post-socialist state does not need to stop at that. It may take a second step and award the victims a pecuniary or non-pecuniary compensation for their sufferings and their losses. This compensation may take many forms, adjusting to the peculiarities of the

²⁴ Robert Uerpmann-Witzack: Restorative and Transnational Justice in International Law, Working Paper no. 2, point III.

²⁵ For the meaning of “rehabilitation” in international law see Robert Uerpmann-Witzack: Restorative and Transnational Justice in International Law, Working Paper no. 2, point III.

state injustice it reacts to as well as to the possibilities, resources and political will of the post-socialist system and society.

4.2.1. Restitution in Kind

If something was taken away from the victims, this right or object may be restored to them. Such a restitution in kind is not limited to property but may happen with respect to a variety of rights and legal positions.

4.2.1.1. Citizenship

Some Socialist regimes deprived certain persons of their citizenship. The citizenship of the post-Socialist state may be granted to these victims or, as the case may be, to their descendants in two ways. The beneficiaries of this legislation may be given the right to re-acquire the lost citizenship on their demand. This happened e.g. in Czechia, Poland, or Slovakia as well as in West Germany after 1949. Some countries opened a time-frame for exercising this right, other countries grant it without any deadline. Or the law itself may settle upon the beneficiaries the lost citizenship without the requirement of an individual demand. This was the solution of the Russian Citizenship Act between 1991 and 2001. From a human rights perspective, the requirement of an individual demand seems to be preferable because it makes sure that nobody is included in a citizenship they do not want. Yet, the 1949 German model of combining *ex lege* re-acquisition and re-acquisition on demand shows that an *ex lege* re-acquisition may be modelled in a way that respects the will of the persons concerned.

The citizenship laws of all East European states rely on the *ius sanguinis* principle. Children automatically acquire the citizenships of their parents. Therefore, it is legitimate to extend the restitution of the citizenship to the victim's descendants. In a normal course of things, i.e. without the deprivation of citizenship, these descendants would have acquired the citizenship that their parents (or grandparents) were deprived of.

4.2.1.2. Name

In some states such as Socialist Bulgaria in the 1980s in the so-called “Process of Rebirth” or Nazi Germany, certain minorities were forced to change their names. A restitution in kind allows them to

adopt the names that they were no longer allowed to have (Bulgaria) or to get rid of the names that the state forced upon them (Nazi Germany)²⁶.

4.2.1.3. Family relations

If the Socialist state took children away from their parents, the post-socialist state may allow the biological parent-child-relationship to be entered in public records etc. This restores upon the children their true biological identity and also invests the parents in their biological role. It must be noted, however, that such a process may unsettle children who until then had not known about their past, who have to face the fact that their social parents are not their biological ones. The well-being of the children should be supreme in such procedures and prevail, as the case may be, over the parent's wish to be acknowledged as the child's biological parent. Redressing past injuries should not cause new ones, and family relations are an especially sensitive field, particularly with view to the children

4.2.1.4. Property

Where property was taken away by the Socialist state, and where this property exists to this very day, it may be given back to the old proprietors or, more often, to their heirs. The most common form of still existing property is land.

In Eastern Europe, we find many different models of how and to what extent property is restituted in kind. Probably none of these models is useful for Ukraine because the Soviet expropriations on Ukrainian territory took place much earlier than those in Eastern Europe, and restitution in Eastern Europe took place soon after the change of system, not more than three decades later.

A very basic question about the restitution in kind of expropriated property is that restitution in kind, especially of land, will reconstitute the property relations that had existed before Socialism. The basic decision to be taken by the post-socialist state and the post-socialist society is whether this is desirable? Were the pre-Socialist property relations of a kind that appears acceptable today? In many East European states, the answer has been negative because pre-Socialist property relations meant large estates in the hand of feudal and ecclesiastical lords, combined with bitter poverty of large parts of the rural population. This was a situation that only marginal political forces wanted to restore.

²⁶ Bulgaria: Law on the Names of Bulgarian Citizens of 9th March 1990; Germany: various legal acts by the Allied Forces in the different occupation zones, e.g. in the American zone: Third Decree to the Law on the Modification of Family Names and Given Names of 1948.

A second very basic aspect is the economic consequences. The East German example shows that the restitution of land leads to lengthy procedures during which the unclear property situation prevents investment in that land. During the entire 1990s, the so-called “open property questions” were a first-rate obstacle for investments in most of East Germany. The post-socialist state has to decide whether it wishes to pay this economic price for the restitution in kind of land.

The experience with restitution laws in Eastern Europe hints at a practical aspect. The restitution of, and the compensation for loss of, property should be regulated in one comprehensive and equitable law. If there are only many short laws regulating one detail each, former proprietors and their heirs will turn to the courts. Courts find it very difficult to develop a general line beyond the individual case and come to widely differing decisions. This happened e.g. in Poland and Romania, and courts in both countries including the constitutional courts as well as the European Court for Human Rights in Romanian cases were inundated with restitution cases that courts are not well equipped to deal with if pertinent legislation is absent, full of lacunae and / or contradictory. If there is the political wish to restitute property in kind, this is a task for the legislator. The courts are unable to fill the gaps the laws leave.

Where restitution in kind was effectuated, a common differentiation in the restitution laws was whether the object (i.e. usually the land) was unchanged at the time of restitution. If the object of property had not been changed and was under more or less the same use as at the time of expropriation, it was given back in kind, whereas if the land had been invested in, e.g. built upon, developed or modernised, restitution in kind was often replaced by a compensation in money. In practice, this differentiation limited restitution largely to agricultural property whereas urban (industrial as well as residential) objects quite frequently were not returned in kind but compensated for.

The experience of the countries that chose restitution in kind of agricultural land shows a grave conflict. Should the land be given back to the heirs of the former farmers, who often had been feudal or semi-feudal lords, or should it be given to the farmers who now worked on the land? In many countries other than Germany, e.g. Croatia, the farmers who now worked the land were given preference, and the heirs of the old proprietors received a monetary compensation.

However, there are cases where no conflict between the old proprietors and the present users arises. One such case is the restitution of church land which still is in religious use, e.g. because a church is standing on it. Even post-socialist states that did not restitute land in kind sometimes gave back church

buildings and similar property to the churches. Constitutional courts did not find any constitutional problems in this differentiation because the special treatment of objects of church property in continuous religious use is justified by the human right of freedom of religion. Another comparatively easy case was the restitution of the Polish expropriations in 1980 in connection with the introduction of martial law. When Socialism ended in 1989, these expropriations had been fairly recent, and they had not hit individuals but “oppositional” organisations such as churches and free trade unions. The restitution in kind of church and office buildings did not cause social unrest among the present users of those objects.

In some cases, the restitution of property in kind was embedded in the more general privatisation of the economy. In this case, sometimes the term “re-privatisation” is used.

4.2.1.5. Deportations, especially collective deportations

Collective deportations happened especially during and after WWII. In the Soviet Union, entire ethnic groups were accused of high treason and collaboration with the enemy and were deported to Siberia, e.g. Germans, Crimean Tatars or Meskhetians, to name only some. The East European states used the window of opportunity after 1944/45 to get rid of their German, Italian and, in some cases, Hungarian minorities.

Collective deportations and expulsions in the Soviet Union and the East European states are two different cases. Deportations in the Soviet Union happened within the deporting state whereas the East European states expelled their minorities to other states. In the latter case, a restitution in kind would mean that persons living outside the state are allowed to settle back to their ancestors’ home country. This hardly ever happened. In respect to the post-war expulsions of minorities, the present states, i.e. Czechoslovakia and its successor states, Yugoslavia and its successor states as well as Poland, do not even accept these measures as injustice but define them as a reaction to the alleged Nazi resp. Fascist orientation of the German, Hungarian, and Italian minorities. Consequently, they deny the need to react to these expulsions. The exception is Hungary which as early as 1990 acknowledged in a parliamentary resolution²⁷ that the expulsion of Germans in the late 1940s had been injustice, allowed them to re-acquire Hungarian citizenship and consequently did not object against individuals with re-acquired Hungarian citizenship to take their residence in Hungary.

²⁷ Parliamentary Resolution 35/1990. (III. 28.) OGY on the Remedy of the Collective Violation of the German Minority in Hungary of 28th March 1990 (see fn. 8).

The situation in the Soviet Union and its successor states is different. The deported peoples remained within the Soviet Union which in principle made their resettlement to their former dwelling grounds easier than in the case of the expelled minorities in Eastern Europe. The “rehabilitation”, i.e. the negation of the official accusation of high treason and collaboration, started on a people-by-people-basis in the 1960s and continued until the end of the Soviet Union. Individuals from these ethnic groups were informally allowed to re-settle in their old locations, although the concrete conditions varied widely. Later, several resolutions and declarations by the Supreme Soviet of the USSR and by the Russian Supreme Soviet in favour of the so-called “repressed peoples” cleared their honour by stressing (sometimes: again) that they were not collective traitors, and by allowing them to return to their old dwelling grounds. However, the state gave no practical help to those individuals who made use of this, e.g. no help in finding housing or work. Thus, this sort of “rehabilitation” was limited to restoring the collective honour of the “repressed people” and to lifting the existing repressions but did not include any positive measures for their benefit.

4.2.2. Pecuniary Indemnification

Where restitution in kind was not possible or where the post-socialist state did not want to restore property to the heirs of former owners, damages were compensated for in money. Such payments were usually defined with reference to the legal right that had been violated. Therefore, various states granted compensations for, inter alia,

- damage to health,
- damage to life, i.e. the death of close relatives such as parents, spouse or children,
- damage to liberty, e.g. false imprisonment,
- expropriation of property which was not restituted in kind,
- loss of home and / or forceful deportation to another part of the country,
- thwarted professional life, exclusion from university education and similar restrictions.

Any state enacting such compensation schemes must, in a first step, examine very carefully which state crimes and repressions were exercised and what the situation of the victims is. All compensation legislation must react to these historical and present facts in order not to give rise to new discontent and new disappointments. Experience shows that equal treatment is a politically and psychologically very important factor. Post-socialist compensation legislation should avoid a situation that anybody feels victimised anew through a compensation scheme they find unjust. This new injustice happened, e.g., in the West German compensation for Nazi crimes after 1945. Only some groups were granted

payments whereas other groups and individuals were not. Experience shows that it is not a low amount of compensation that causes disappointment, provided that every victim receives a low amount, especially if these low amounts have a viable reason such as empty public purses in the transition years immediately after the end of Socialism. The source of discontent and disappointment is much rather a legal differentiation between various groups of victims which cannot be legitimised in the eyes of the victims or the general public.

Therefore, countries that take the care for the victims seriously usually enact extensive pertinent legislation which they continually adapt to solve the problems arising in practice and to fill the lacunae becoming apparent during the application of those laws. The best examples are Germany and Hungary.

Some countries that paid compensation to the victims of Socialist state crimes did so quite soon after the change of system. Those years were economically difficult, and the state had little money due to the economic transition from a planned to a market economy. Several states decided in that situation not to pay the indemnification in large lump sums of money but much rather either in state-issued securities which were to be paid for later (e.g. Bulgaria, Hungary) or in a raise in the expected or current old age pension. This way, the state did not “waste” money on victims of old crimes but could concentrate its scarce resources on the needs of the transformation of the economy, the social security systems etc.

5. The Legacy of the Secret Police and Other Repression Authorities

All socialist states maintained extensive apparatuses of secret police and similar repression organs to spy on, and control, their own citizens. These secret polices amassed huge amounts of information, documents, and files about practically everybody. This practice constituted a severe violation of the private sphere and the right to dispose of one's own data. These documents and files are a very delicate legacy because they contain protected sensitive information. As was mentioned before, their content is not necessarily true but may have been invented by the secret police which aggravates the danger they constitute to the human rights of the persons about whom the files were written. The disclosure of that information to unauthorised recipients can harm the persons in question even after the end of the Socialist dictatorship. Therefore, those materials need to be handled with special legislative and administrative care in order to avoid perpetuating the violation of the citizens' basic rights.

What is the post-socialist state to do with these potentially dangerous documents? They may be dangerous to the basic rights of those persons who are the object of the information on the one hand but they are valuable material for historical and other research as well as evidence in administrative or court procedures on the other, sometimes the only evidence available. Given this public interest, no post-socialist state opted for their destruction.

When legislating about these documents, the post-authoritarian state needs to take into account several points:

- (1) Which institution(s) is / are to be the caretaker(s) of the documents? Are these documents better handled by a specialised institution? Or is the general state archive the best place? Or should they be destroyed in the end, given their potential danger?
- (2) Who is granted access to the files? In practice, access is requested by various groups of persons. The post-socialist state has to decide whether the files and documents are to be made available to
 - the person they contain information about?
 - family members of that person? If so: only if that person is dead, or also if the person is still alive?
 - historical and other research? If so: only in an anonymous version?
 - lustration or indemnification authorities for their past-related tasks?
 - criminal prosecution authorities and criminal courts in procedures against the perpetrators of Socialist state crimes?
 - state institutions for their purposes? If so: which institutions and for which purposes?

– media? If so: for what purpose? Are the media allowed to publish the documents or quote them verbatim, or are they only allowed to report on the files in an indirect and anonymous manner?

(3) As far as access to, and publication of, information in the files and documents are concerned, should there be special rules if documents contain information about persons who were then and / or are now persons of public life? On the one hand, the public may have a legitimate interest to know about their past. On the other hand, information in those documents may be false or untrue or concern aspects of private life the disclosure of which is not expected from persons of public interest.

(4) What are the procedures to verify the truthfulness of the content of the documents? If they are proven to contain false information, what are the procedures to inform the person(s) concerned and / or the general public about the falsification of the truth? Are there procedures to inform the persons concerned and / or the general public about what is true?

In the question of the old secret police archives, every East European state has found its own solutions, given the huge differences between the amount, the content and other aspects of the files of the secret polices. The tailor-made solutions to the questions outlined above make generalisations and lessons for other states difficult.

6. The Assets of the Former State Party

In some Socialist states, the Communist parties, the other legal parties (where they existed) and other systemic organisations such as trade unions amassed huge fortunes, e.g. land, buildings, but also foreign currency etc. In these countries, the question of what was to happen with those assets needed to be answered.

On a comparative basis, pertinent legislation had several aspects to consider.

(1) The leaders and administrators of the party had to be prevented from stealing, embezzling or misappropriating party assets.

(2) If the Communist party was not forbidden but allowed to continue its work: Its huge fortune gave it, or its successor, a considerable advantage vis-à-vis the other, newly founded and therefore poor political parties. The state had to intervene in order to minimise this distortion of the political competition. For this reason, states like Bulgaria or Poland nationalised the buildings owned by the Communist party.

(3) If the Communist party was forbidden: What was to happen to its assets? The two most obvious solutions were the transformation into state property or a transfer to the other, newly founded parties. An argument for the first solution was the fact that the Communist party had taken (“stolen”) its fortune, in principle, from the general public. Giving it back to the general public meant giving it to the state which represented the public. An argument for the second solution was that a share in the fortune of the former Communist party was a valuable help for the new parties and thus could contribute to get the new multi-party democratic political life going. This solution may, however, discriminate against political parties founded after the distribution of former Communist party assets among the early new parties. Another path was taken by reunified Germany. East Germany’s Communist party and its organisations had been large employers, and their dissolution respectively expropriation caused massive unemployment. Consequently, a part of the quite considerable assets was used for social measures for the now unemployed former party and organisation employees.

(4) The population’s feeling for natural justice should not be neglected. To whom do the party assets “belong” in a moral sense in the eyes of the people? As was mentioned before, in most Socialist

countries the party had amassed its fortune at the expense of the people. What does this fact mean for the future of those assets? Should they be returned to the people and if so, in what way?

In the question of the fortune of the former Communist party, we again have to accept that there is no fit-for-all solution. The answer has to be developed according to the historical facts and political culture of the given state.

7. Conclusion

When a post-authoritarian state of the European rule of law-type wants to address the authoritarian past, there are two questions to be answered: the “if” – should the past be addressed at all by the state? – and the “how” – if so, with which means and to what ends? Under constitutional law, the state is quite free to decide whether or not to deal with the past, to conduct politics of the past and enact legislation on the past. If the answer is positive, the means and ends underlie the guarantees of the constitution of that state. For past-related measures, the constitutional requirement of equal treatment is most important.

Can Ukraine learn from the experiences of other post-socialist states in the field of “politics of the past” and “legislation on the past”?

The question of the “if”, that is whether or not the Socialist – in the case of Ukraine: Soviet – past should be dealt with legally, is a question that every post-authoritarian state must answer for itself. There are few lessons to be learnt from other post-socialist states. A general assessment of the politics of the past of other East European states suggests that Ukraine would be wise to enact a comprehensive legislation dealing with the injustices and leftovers of the Soviet rule. If the Ukrainian state refrains from addressing and redressing certain past-related issues, this leaves open wounds in the society. The Russian propaganda aimed at destabilising Ukraine shows that it is fairly easy for an external aggressor to make use of these open wounds and sow discord. It appears to be in Ukraine’s best interest to heal those wounds from the Soviet past with pertinent politics and legislation in order to create one important prerequisite for an overall post-war societal reconciliation.

The question of the “how” is more open to lessons learnt from other formerly Socialist countries. It is necessary, however, to take into account the special situation of Ukraine. The state crimes were committed not by a genuinely Ukrainian but by an imperial Soviet state. Soviet rule in Ukraine encompassed more than seven decades, as opposed to four and a half decades in the East European satellites of the Soviet Union. More than three decades have passed since the end of that dictatorship. It is true that most legislation on the past was enacted with some distance to the former regime, but more than 30 years later many instruments need to be shaped differently than five or ten years after the change system. Finally, Ukraine has suffered a more recent aggression by the successor of the imperial centre of the Soviet Union: Russia. It is necessary to address these more recent crimes in order to found post-war societal reconciliation in Ukraine on a firm basis. It is safe to say that one

element of this safe basis is satisfying politics of, and legislation on, the open questions of the Soviet rule in Ukraine. It would be a grave mistake to concentrate on the more recent Russian crimes against Ukraine and to leave the open questions of the Soviet time unanswered, its wounds unhealed.

If these caveats are borne in mind adequately, Ukraine may learn substantially from the examples developed in other post-socialist states and does not have to resort to “reinventing the wheel” again and again.

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Author Information:

Prof. Dr. Dr. h.c. Herbert Küpper

Institute for East European Law, Regensburg, Managing Director

<https://www.ostrecht.de/team/prof-dr-dr-h-c-herbert-kuepper>

Andrássy German-Speaking University Budapest, Chair for European Public Law and its Jurisprudence

<https://www.andrassyuni.eu/mitarbeiter/prof-dr-dr-h-c-herbert-kupper-353.html>

herbert.kuepper@ostrecht.de