

The Short History of the Romanian Lustration Law

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On May 19, 2010, the Romanian Chamber of Deputies approved the Law of Lustration regarding the temporary limitation of access to certain public functions for persons who were members of the power and repressive bodies of the communist regime between 6 March 1945 and 22 December 1989. The law had previously been adopted by the Senate in April 2006, but was stalled in the Chamber of Deputies for four years. However, the unexpected victory of lustration advocates and supporters did not last long as the Constitutional Court (CCR) repelled the law as being unconstitutional, following a complaint by 29 Senators and 58 Deputies.

It was for the first time that such a legal initiative found enough political support to actually make it through the Parliament. Although the issue of former communist leaders or collaborators being present in the Romanian political life has constituted a major line of divide, mainly between rightist and leftist parties, such an initiative never saw day light. The hope that after all these years Romania could finally rebuild its leadership without former communist activists was high.

However, the decision of the Constitutional Court did not necessarily come as a surprise for those who have followed the debates on the topic. The law, as any lustration law, had a problematic status from a legal certainty and human rights point of

view. Moreover, despite the political momentum, it comes at a time when the danger of communism seems very far away.

In what follows we will briefly present the provisions of the law and the reasoning of the Constitutional Court, as well as their political and social implications.

Some consideration regarding lustration in Romania

Lustration has been a constant fuel for debate in Romania for the past 21 years and has from the beginning touched upon the issue of opportunity. After the 1989 regime overturn, in the rush to organize the first democratic elections after almost half a century, the mainstream opinion was that reconciliation would better serve the purposes of democratic transition. Moreover, the violence by which the transition of political power took place, as well as the revelation that a huge number of people had been Communist Party members were strong arguments in favor of the so-called national reconciliation. On the other hand, for some people, lustration was the sine-qua-non condition for the irreversibility of the democratization process in Romania.¹ This line of thought was not

¹ In March 1990, a group of revolutionary associations adopted the Timisoara Proclamation (*Proclamatia de la Timisoara*), which is one of the best known programmatic anti-communist documents in Romania. Point 8 of this document outlines the principle of lustration as it proposed the interdiction of the right to run for public offices of former leaders, activists and

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only pursued by non-governmental associations, groups of intellectuals or research institutes, but was also embraced by parties which built their political credit on this opposition towards the former regime.² Associations of former victims of the communist regime and those of revolutionaries (i.e. persons who took an active part in the 1989 demonstrations) were particularly proactive and constantly lobbied politicians and decision-makers to promote lustration.

Moreover, the debate regarding lustration went hand in hand with the one concerning the criminal prosecution of communist perpetrators and reparation to victims. These two aspects constantly formed part of the public agenda for the past 21 years. Information about former collaborators of the political police (from amongst the current elite, such as judges, politicians, etc.) still constitute a contentious topic and very often put entire careers under question marks.

Thus, the 2010 Lustration Law could have been the expression of a very

members of the political police for the following three legislature terms. *Point 8* remained the emblem of the idea of lustration and it is still referred to in debates regarding this topic. The justification of lustration, as provided by *Point 8* is that persons who actively served the Communist Party are not the simple unwilling members, but those "who abandoned their professions in order to serve the Communist Party and thus to benefit from the special advantages offered by it." Such activists do not present the moral guarantees to run for public offices in the new democratic regime.

² The Democrat-Liberal Party, for instance has a provision in the preamble of its Political Program stating that the PDL deems necessary the clear breakaway from the communist past. The National Christian Democrat Peasants Party (no longer represented in the Parliament) specifically lists lustration as one of the political directions in its political program.

long process of societal and political negotiation. It also seemed the logical step after the formal condemnation of the communist regime in front of the Parliament by the President of Romania, Traian Basescu, in December 2006. It took the Romanian political elite about 20 years - which corresponds to almost half of the duration of the communist rule - to promote a law attempting to cut off the influence of the previous regime officials in the current public life.

Quick insight into the provision of the Law

In the initial draft submitted in 2005 by four liberal Parliamentarians, lustration provisions had a more far-reaching scope. The persons who worked for the former regime would, according to this first draft, lose their function immediately after their previous position is confirmed. Moreover, persons who are responsible for appointments in public offices have to check whether the people they appoint are in one of the situations defined by the law and take the necessary measures. Failure to do so would be followed by criminal charges.

The final law forbids persons who were part of the ruling and repressive apparatus of the former regime to run for or hold public offices, both in the central and local administration; state agencies, judiciary or military structures, for a period of five years. The range of people targeted by the law varies from former members of the Council of Ministers to propaganda activists, party secretaries and printing house directors. The law obliges any candidate to the listed public offices to submit a declaration that he/she does not fall under the categories of communist personnel listed in the law. As to the persons already holding public offices who find themselves in this incompatibility situation, the law distinguishes between two categories: Those who have been elected will

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continue to exercise their function until the end of the mandate, when the five year interdiction starts. The mandate of those appointed to a public position ends in three months from the coming into force of this law.

The law faced a lot of criticism from both supporters and opponents of lustration. The former consider it a limited instrument, which excludes certain important categories of former communist activists, some of which are still in very important positions. The latter, mainly from the social-democrat camp consider the law anachronistic and un-democratic, specifically targeting certain high-ranking personalities and introducing a sort of eradication specific to totalitarian regimes.

Both types of criticism have strong underlying arguments. They both relate to the time period after which such measures are put into force. There are two practical arguments which might make lustration an overdue measure. First of all, persons targeted by this law have already held offices under the new democratic rule for 20 years. Whatever personal connections and ideological heritage we wanted to eliminate by enforcing this law have already produced effects in Romania's public life. Apart from a sort of moral retribution, lustration would have a minimal practical outcome. Secondly, many archives containing important information on former communist officials that would have documented the interdictions introduced by the law are still not accessible (while other parts of it had been destroyed).

On the other hand, the social context briefly described above seemed favorable to such a law. Since collaboration with the former regime is considered a moral impediment to holding public offices, turning this moral issue into a legal interdiction follows as a logical step. In this way

other fields of social life, such as politics, economics, and justice, are relieved from the people who controlled these domains before and after the fall of the communist regime. All these opportunity arguments, as well as other legal issues have been taken into consideration by the CCR in its decision of unconstitutionality.

Lustration and Constitutional adjudication

In Romania, like in other post-communist countries, transitional justice was intertwined with constitutional justice. Constitutional courts play a decisive role in ensuring the supremacy of the rule of law, while maintaining equilibrium between abstract norms and social needs. The decision of the CCR regarding the Lustration Law is a case in point, but it comes on the background of a certain public dissatisfaction with respect to its decisions.³ As for its decision on the issue of lustration, the arguments have indeed very intricate implications.

The criticism by the social-democrats materialized in two unconstitutionality objections, formulated by a group of senators, and one of deputies respectively. The arguments presented to the CCR have a legal, but also a more conceptual character. They are based on the provisions of the Romanian Constitution, on international human rights conventions to which Romania is a party and on the

³ Regarding the topic of transitional justice, in 2008 the CCR rendered unconstitutional the Law regarding the access to communist files and the disclosure of the political police. The decision was criticized to the point of public protest, and as a consequence an Emergency Ordinance was issued to replace the unconstitutional provisions. However, due to this decision and other ones envisaging other sensitive domains, the CCR became somewhat unpopular because of its legalistic approach (keeping more to the letter of the law, rather than its spirit).

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jurisprudence of the European Court of Human Rights (ECHR).

In its decision, the CCR acknowledges the meaning of lustration and its importance for the newly established democratic regimes. Lustration is clearly defined as a means to ensure the responsibility, credibility and loyalty of public officials towards the new regime. However, lustration is not acceptable if it serves the purposes of revenge or social exclusion based on “mistaken ideological choices”.

The Court also claims that lustration is no longer justified 21 years after the demise of the communist rule, especially since there are no clear indicators that the democratic regime is under threat. Since the preventive aspect is not decisive, the measure appears tardy and disproportionate. Moreover, lustration is only permitted with respect to people who have violated human rights and freedoms during the previous regime. The CCR responds therefore to the argument brought by the critics of the law: there can be no collective guilt, but only individual liability.

The Romanian Constitution guarantees the indiscriminate right of access to public offices and the right to be elected. The limitations of these principles are clearly defined by the Constitution, and lustration cannot be assimilated to one such limitation, states the CCR.⁴ Furthermore, the law violates the presumption of innocence and does not offer adequate judicial review mechanisms. The idea that the mere belonging to the communist structure (which was not an offence at that time) constitutes guilt in itself is a

⁴ One of the restrictions provided for in Article 53 of the Romanian Constitution is “the defense of national security, of public order, health, or *morals*”. The public morals argument, invoked by the supporters of the Lustration Law, did not justify such a restriction of the civil rights.

clear violation of this principle, as well as of that of non-retroactivity of legal norms. With this reasoning, the CCR declared the law unconstitutional.

Non-retroactivity and legal certainty are over-arching principles of any legal system and they are clearly not easily avoidable when it comes to lustration (as well as other means of transitional justice, such as criminal prosecutions). Moreover, if the time-span is this long, the arguments regarding the preservation of democratic values, the preclusion of a communist return or the safeguarding of public morals and integrity lose their urgency and thus their justification. Should a lustration law come into force in the early nineties, the reflection would have been different or a Constitutional amendment could have given way to lustration laws. That is why the issue of lustration is such a delicate matter. Assertions for and against are equally valid if considered from the perspective of their respective justifications.

Some final reflections

The decision of the CCR strictly follows the above-mentioned principles, but remains somehow unconvincing. First of all, the reasoning is rather unsatisfactory because it does not provide a clear explanation of the legal philosophy behind it in more detail. The issues of collective guilt or of whether retro-active legislation is sometimes acceptable or not should have been explained for every Romanian reader. Examples of decisions by the ECHR are of course relevant and important, but they should not replace the substance of national constitutional adjudication. Secondly, some of the judges at the CCR might themselves fall under the restrictions of this law due to the positions they held during the communist regime. This is one of the ironies of every post-totalitarian regime.

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Thus, the discussion on lustration needs to tackle the issue of opportunity as well. Two arguments derive from the opportunity discussion: first of all, is transition necessarily time-bound? More precisely the pace and rhythm of transition (and transitional justice in particular, which includes lustration) depends on many factors, among which is political will. As one of the means to achieve transition, lustration could in theory intervene at any moment in time as long as the heritage of the previous regime has a bearing on the construction of the present one. This is not the case of Romania right now.

Secondly, lustration is not only a political and legal instrument. It also responds to a cultural and social need to rebuild the society from clean grounds and with people who were not tainted by the former regime.

Therefore, lustration is a matter of political choice and of the importance and urgency the society attaches to this issue. It is nonetheless a matter of timing as constitutional adjudication needs to follow the basic rule of law principles. It remains to be seen whether the Romanian Constitutional Court decision will be followed by a modification of the Lustration Law that would satisfy the legalistic approach as well. It can also be considered a test for the commitment of the politicians or of the society for a topic that has for years formed an important public concern.



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