

# Justice or Revenge? The Human Rights Implications of Lustration in Poland

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## Introduction

After the collapse of the communist regimes across Central and Eastern Europe in the late 80s and early 90s, the newly independent states began the long and difficult journey towards creating strong, democratic systems. One of the questions which quickly arose was how to approach the process of dealing with the trauma of the communist past. Especially given the fact that many of the elites of society had been involved in collaboration with the former regime, the states of Central and Eastern Europe were faced with the challenge of bringing about justice while simultaneously completely restructuring the political and social patterns of society.

One way in which these states attempted to bring about this justice was through processes of “lustration”. It is related to the process of “vetting”, which is, in general terms, evaluation and examination process in order to eliminate abusive and corruptive officials through due procedure. As a rule vetting is used as the tool in post-conflict situations in order to rebuild the society based on democratic values. Lustration (from Latin *lustratio* – “purification by sacrifice”) is presently being used as the “term meaning the “purification” of state organizations from their “sins” under the communist regime and it is mainly used in the context of public life of post-communist Central and Eastern Europe”. To define lustration very broadly, it is a measure barring officials and collaborators of a former regime from positions of public influence in a country after a revolutionary change of government. Various states adopted various laws relating to lustration in Central and Eastern Europe some of which were significantly stricter than others, and all of which were adopted at different times in the early to mid-90s.

In this paper, we will begin by outlining the basic historical situation of the totalitarian regime in Poland. Next we will discuss two lustration acts, which have been passed in Poland, focusing on the human rights implications of aforementioned acts. We will examine a few of the most important issues relating to the most recent acts of lustration in Poland. Finally, we will conclude with an analysis of lustration in contemporary Poland, arguing that this process is highly problematic from a human rights standpoint.

## Historical Background

The communist regime in Poland was an oppressive, authoritarian regime. Like most authoritarian regimes, it had an enormous security infrastructure. According to senator Zbigniew Romaszewski, there were times when there were as many as 70,000 officers in the Secret Police in Poland. This group was strongly connected with the elites of the communist party and had as its aim the maintenance of communist party power in society using wide-scale surveillance.

“The secret police in all communist states was well-known for ruining careers, using blackmail and torture in the name of protecting the regime. After the end of the communist system, however, these people were fired and largely left outside of official structures,” says Senator Romaszewski.

He points out that operatives of the communist era secret police had specific skills which put them in a unique position. They had strong connections with organized crime both in Poland and abroad, and so organized crime began to center around these former operatives. They were also heavily recruited by foreign intelligence services, and strongly influenced by Moscow. This influence from Moscow formed the basis of numerous political scandals in the 1990s including attempts of high ranked Moscow officials to take over the media and the company in charge of petrol industry in Poland. In understanding the strong influence of these secret police in Poland in the 1990s, we have a better starting point for understanding lustration.

## Lustration Acts in Poland

Although there were some ideas to adopt a lustration law during the 1990s, the political climate was such that the legislation never went through. In the early post-communist years, the government's approach to history was to draw a "thick line" between the communist past and the new era, concentrating on the future and the economic sphere. Poland's first lustration act, therefore, was not adopted until 1997. This Lustration Act 1997 was in compliance with the Resolution 1096 passed by the Parliamentary Assembly of the Council of Europe on measures to dismantle the heritage of former communist totalitarian systems. The Council of Europe Parliamentarians stated in their 1996 resolution that "the key to peaceful coexistence and a successful transition process lies in striking the delicate balance of providing justice without seeking revenge".

Though the Resolution is non-binding, it has influenced the "spirit" of the Lustration Act 1997 in Poland showing the adherence of the Polish state to the values recognized and shared by the member states of the Council of Europe. Lustration Act 1997 compiled formally with the human rights provisions in the Polish Constitution and international instruments ratified by Poland.

It required that high-level elected officials submit an affidavit declaring whether or not they had collaborated with the secret police in past years. The law was intended to focus on reckoning with the past, and there were no legal consequences except for those who were considered lustration liars, meaning that they had lied in their affidavit and that this lie had been verified by the Commissioner of Public Interest and they had been sentenced. The importance of the aforesaid legal provision lies in the fact that the "punitive" effect of the law would be applicable only to those people who had lied in their affidavits. If the person had truthfully declared his/her collaboration with the past regime, none of the sanctions would be applicable in that situation and it could be fraught only with public condemnation towards activities of the person in the past. The focus was made on the confession itself rather than on any sanctions applicable for those collaborating with the communist regime. Nonetheless, the social consequences of having been associated with the past regime could be quite serious.

There were some objections to the law, although Adam Bodnar from the Helsinki Foundation for Human Rights says: "Many of the issues lay in the implementation of the law rather than in its substance". The decision of the European Court on Human Rights in the first and only Polish case on lustration was in line with the aforementioned view. This case, *Matyjek v. Poland*, deal with Article 6 of the European Convention on Human Rights — the right to a fair trial, and thus it was concerned primarily with procedural issues. The Court has found the violation of Article 6 of the Convention as the "applicant's rights were seriously curtailed due to confidentiality of the documents and the limitations of access to his case file placing an unrealistic burden on the applicant in practice and respectively contributing to the breach of the principle of equality of arms". This case was also important because the decision was made during a period of intense public debate about the constitutionality of the lustration act, then being considered by the Constitutional Tribunal. The *Matyjek* case served to raise public awareness of the issue and became a part of the debate on the human rights implications of

lustration legislation.

The new bill put forward by the parliament in 2006 and amended in 2007 dramatically altered the process of lustration in Poland. It broadened the scope of those who were required to be lustrated to include a vast number of professions. This new law included inter alia judges, lawyers, tax advisors, certified accountants, court enforcement officers, journalists, diplomats, municipal officials, university teachers, heads of public and private educational institutions, heads of state controlled companies, and members of the management and supervisory boards of companies listed on the stock exchange. These individuals were obliged to submit an affidavit as to whether or not they cooperated with state security organs of the Polish People's Republic (PPR) from 1944 to 1990. Additionally, under the new law, non-submission of an affidavit had the same consequences as being a lustration liar. In both cases the consequence was the exclusion from public life for 10 years. While the past law had affected about 36,000 people, the new law was estimated to affect between 400,000 and 700,000 people. Human Rights organizations, as well as members of the media and the public have questioned whether all of the professions included in the law really pose a significant danger to human rights or democracy in contemporary Poland, especially given the fact that 18 years have passed since the collapse of the totalitarian system.

This law provoked a heated argument both internationally and among the Polish public. There were complaints that it violated the right to work, "which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts". The inclusion of journalists and scholars as categories of people who were subject to lustration led to arguments that the law threatened freedom of speech which forms the fundamental basis of a democracy. Eventually, the law was brought before the Constitutional Tribunal and many provisions were declared to be unconstitutional.

## Key Issues

Given the harshness of the law so long after the end of the communist regime, many people also questioned the motivations behind the new lustration act. The goal of lustration should be a coming to terms with the past and the development of stronger potential for a strong democratic society. Jacek Żakowski, however, comments: "The goal of lustration is not to clarify the past, as it should be, but to create traps for hundreds of thousands of people and to give the social elites of the culture the right to decide who is in a proper social category and who is not". He argues that the real motivations of lustration were political revenge. In fact, he argues that the new law on lustration embodies totalitarian, not democratic principles.

This is especially true because the law creates the possibility of censoring journalists and independent scholars based solely on their personal political beliefs. These individuals do not hold a position in which their past political actions impact their present situation, nor do they pose a threat to the Polish public. These also constitute two professions, which it is particularly important not to censor in a democratic society.

Some who held aforesaid positions have simply refused to submit affidavits or have publicly condemned the requirement. For example, Jan Turulske, a professor at the Institute of Chemistry at the University of Białystok, submitted an affidavit with the words "kiss my ass clowns" written across it along with a letter explaining his objections to the affidavit requirement. Such an individual is, however, at risk of losing his position and his livelihood.

These sorts of issues have led many to agree with Żakowski's analysis of the motivations behind the lustration act. Broniław Geremek, a member of the European Parliament, refused to submit an affidavit. When elected to

the office, he had already submitted such an affidavit under the previous law, and been cleared. He insisted that the threat to take away his seat in Parliament if he did not resubmit an affidavit was “contradictory to the rules of law” and violated the rights of those who elected him. Additionally, he felt that it was “contradictory with the human rights provisions provided in the Constitution”.

Geremek famously questioned the moral goal behind lustration. He argued that as it stood, the law infringed “moral rules” itself by threatening the freedom of speech, independence of the media, autonomy of academic institutions. It attempted to create a “ministry of truth” which unfairly policed the public. This argument then suggested that far from helping to deal with the communist past of the country, the new lustration act served to recall it and reenact some of the most troubling aspects of that regime.

One of the reasons that the severity of the law was so sharply criticized, was related to timing. According to Mikołaj Pietrzak from the Helsinki Foundation, lustration is inherently a process, which limits human rights, meaning that the arguments outlined above are not incurred. However, in post-communist states this limitation was justified because it is necessary to secure the transfer from a non-democratic to a democratic system. In other words, the limitation of human rights through lustration is justified only in situations where the establishment of a democratic society is threatened. When the majority of the lustration acts in Central and Eastern Europe were adopted, including the earlier Polish act, it was widely accepted that there was an existing threat, because these states remained in transition, and their future stability was not certain. We must question, however, whether this is still the case in Poland today?

The new lustration act limited human rights more severely than the previous lustration act from 1997. Mr. Pietrzak argues that this does not make sense. He argues that lustration should have been done effectively and immediately in 1990, but that the farther we get away from that time, the less we can justify the limitation of human rights through vetting. The most recent lustration act, according to Pietrzak, contributed to the severe limitation of the human rights, which form the foundations of a democratic society, and 18 years after the fact, it is more important to protect those rights than to ensure an effective lustration process.

The issue of sensitive data was also raised in relation to the 2006 Lustration Act. Under the act, public access was granted to the files of people who performed public functions within Poland. The law outlined 20 categories of people to whom it should be applied. Despite this public access, there was still a limitation placed on access to sensitive data. The problem, which arose, was in defining what kind of information could be considered as sensitive data.

This issue came up in front of the Constitutional Tribunal, which ruled that access to certain kinds of personal data could contribute to the groundless discrimination, and thus data such as genetic code, information on addiction, political views, membership in a political party, philosophical views, past convictions and applied administrative sanctions should be regarded as sensitive data.

Krzysztof Persak has argued that the Constitutional Tribunal went too far in the interpretation of sensitive data. He points out that it is of vital importance for the public to know information regarding the political views and past political party membership of public figures. On the other hand, Mikołaj Pietrzak stated that the reasoning of the Constitutional Tribunal should be interpreted in light of the fact that the right to privacy is a cornerstone of democracy (article 47 and 51 of the Constitution of Poland). As discussed above, especially given the timing of the law, it is not appropriate to violate such a central right even for the purposes of effective lustration. The protection of human rights is more important for the long-term development of Polish democracy than the lustration process.

Another problem is the lack of resources in Poland for dealing with the archives. In order for the archives to be completely open, while still protecting sensitive data, each file would need to be read through and have sensitive information removed. This is not a reasonable possibility in Poland given the enormous number of files, and as such the issue of privacy and protecting sensitive data becomes a central problem in the opening of the archives to the public.

Finally, the issue of sensitive data is strongly linked to the issue of censorship. Even if the resources were available, it is problematic to have a bureaucrat who is responsible for deciding what information should or should not remain available to the public. In this case, a single individual would be responsible for making decisions which effect people's right to privacy and which have the potential to infringe upon those rights. This opens up the possibility of numerous legal challenges, and additionally threatens the integrity of the lustration process.

Another issue related to the most recent lustration act is the definition of collaboration. Under the original lustration act of 1997, collaboration was defined as:

“...a conscious and secret cooperation with operational or investigating units or organs of the state security as a secret informer or as an assistant of operational gathering of information.”

The Constitutional Tribunal interpreted this definition and declared that there were 5 conditions, which were necessary to be considered a collaborator. First, there had to be contact with the secret police during which a transmission of information took place. Second, that collaboration had to have been conscious and the collaborator must have been aware that they were in contact with the secret police. Third, the collaboration must have been secret. Fourth, there must have been an operational gathering of information by the secret police.

Fifth, it was not enough for there to have been a declaration of will, but the collaboration must have materialized in conscious, specific actions.

The 2007 law ignored this ruling however and used the same definition as the 1997 law for the first part of the definition. The second part of the definition was much more controversial. It said that:

“collaboration is also a conscious action, that was a result of an obligation from a legislative act that was binding at the time of the action which was connected with performing a function, a post, work, or service, if information were transmitted to organs of the state security with the intent to infringe upon human and civil rights and freedoms.”

This change in definition was problematic for two main reasons. First, it made the definition of collaboration so broad as to include even people who perhaps did not actively collaborate. According to Mr. Pietrzak of the Helsinki Foundation it could include, for example, those who signed a sheet agreeing to collaborate but never submitted any substantial data, and those who never signed an agreement and were not aware that the things they were saying were being passed to the secret police. This breadth of responsibility is highly problematic especially 18 years after the fact.

Secondly, because the definition is so broad it is also confusing. It is not always clear when submitting an affidavit whether an individual's actions constituted collaboration or not. In some cases, it would be possible for an individual to become a lustration liar without even being aware of that fact, because his/her situation under the law was unclear. This is highly problematic, as any time a government asks an individual a question, it is essential that the individual knows exactly what he/she is answering, and the consequences of giving that answer.

One of the tasks of the Lustration Bureau, a division of the Institute of National Remembrance (INR) is to compile and publish catalogues of lists that include the personal data of people who were informers and collaborators, those who were surveilled, agents and employees of the secret police, and top functionaries of the communist party. Additionally, they drew up a list, which contained the names of public figures and influential people in Poland who allegedly collaborated with the communist secret police in the past. The release of this list was blocked by the ruling of the Constitutional Tribunal, and the issue has since become highly politicized.

Some people have questioned whether such a list even exists, including from within the Institute of National Remembrance. It has been suggested that the list does not exist as a unified document but only in a preparatory form. Taking into account the short period of time given to the INR, it is unlikely that such a list could be drafted, and so some people argued that the list is actually based upon a previous list compiled by the Commissioner of Public Interest.

The list has become an issue of speculation in the public, and it is difficult not to see it as a political tool. There have been views spread throughout the media that non-disclosure of the list is a form of civil disobedience as it is a moral right of the public to know the truth. Adam Bodnar of the Helsinki Foundation argues, however, that it is impossible to call an act a civil disobedience if it constitutes a breach of human rights.

Some believe that the public has an absolute right to know the truth, and that the ruling of the Constitutional Tribunal has interfered in the necessary process of revealing the truth to the public. On the other hand, Mikołaj Pietrzak believes that the compilation of the list in the first place was illegal. There is no provision in Polish legislation authorizing the compilation of such a list. State authorities are obliged to act according to the principle of legality, and as such the maintenance of the list contributes to the violation of fundamental constitutional rights.

## Conclusion

As we have explored in this paper, the human rights implications of the most recent lustration act in Poland are far-reaching and quite serious. Although many provisions of the lustration act were declared unconstitutional, lustration is still occurring in Poland in a weaker form. Additionally, there are both parliamentarians and members of the public in Poland who still believe that the law should have remained in place. When considering the issue of lustration, we must always ask whether the need for lustration is serious enough to warrant the limitation of human rights that is required in order to carry it out.

This report has illuminated only a few of the multiple implications of far-reaching lustration legislation. The situation in Poland today is far from perfect, and it is still a country in the state of transition, but the country has repeatedly demonstrated a commitment to developing a democratic system, which respects human rights. It seems difficult then, given the current situation of the Polish state, to argue that democratic transition is still in serious jeopardy. If the situation of transition is no longer in jeopardy, then it is no longer acceptable for the Polish state to severely limit the human rights of citizens in order to safe guard it. Had lustration been carried out effectively immediately following the end of the communist regime, such limitations might have been justified, but they are not justified in 2007. As Mikołaj Pietrzak says: "While giving the choice between a full and effective lustration process and the strong protection of the human rights, which form the basic foundation for democracy, we must choose human rights. If these rights are not protected, then the democracy is damaged before it starts".

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