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LUSTRATION AND LAPSE OF TIME: 'DEALING WITH THE PAST' IN THE CZECH REPUBLIC

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Abstract

One of the most important challenges for the rule of law in the Czech Republic in the period of transition has been the so-called Lustration Acts. The Czech Lustration Acts have been widely acknowledged as one of the most far-reaching among the post-communist countries in the CEE region. As a result, they were met with fierce criticism, not only from foreign and Czech scholars but also from dissidents themselves. However, this paper does not intend to reopen the early debate on the legitimacy of the introduction of the Czech Lustration Acts. Instead, it screens the Czech Lustration Acts against the contemporary jurisprudence of the European Court of Human Rights. This paper concludes that the Czech Lustration Acts might still survive the scrutiny of the European Court of Human Rights, but it argues that they should be repealed by the Constitutional Court of the Czech Republic as they violate the Czech Charter of Fundamental Rights and Basic Freedoms.

Keywords

Transitional Justice - Lustration - Vetting Laws - Czech Republic - 'Dealing with the Past' in the Post-Communist World - 'Lapse of Time' – European Court of Human Rights

Lustration and Lapse of Time: 'Dealing with the Past' in the Czech Republic

David Kosař*

Czech Lustration Acts: basic features – Among the most far-reaching in the post-communist countries in Europe – Challenges for the rule of law – 2001: Czech Constitutional Court upholds their validity – Case-law of the European Court of Human Rights – 'Transition-to-democracy' circumstances that justified their adoption have ceased to exist

One of the most important challenges for the rule of law in the Czech Republic in the period of transition has been the so-called lustration. The Czech lustration consisted of two separate laws, the so-called 'Large Lustration Act'[1] and 'Small Lustration Act'.[2] Throughout the paper I will use the term 'Czech Lustration Acts' to refer to both of these Acts as they operate on the same principles, but the focus of this paper is primarily on the 'Large Lustration Act'.

Although the Czech Lustration Acts were initially adopted for five years, they are still valid and as such subject to recurring political controversies even two decades after the Velvet Revolution. In 2007, the former Prime Minister of the

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[1] Act No. 451/1991 Coll., on standards required for holding specific positions in state administration of the Czech and Slovak Federal Republic, Czech Republic and Slovak Republic [*Zákon č. 451/1991 Sb., kterým se stanoví některé další předpoklady pro výkon některých funkcí ve státních orgánech a organizacích České a Slovenské Federativní Republiky, České republiky a Slovenské republiky*] of 4 Oct. 1991.

[2] Act No. 279/1992, on certain other prerequisites for the exercise of certain offices filled by designation or appointment of members of the Police of the Czech Republic and members of the Corrections Corps of the Czech Republic [*Zákon č. 279/1992 Sb., o některých dalších předpokladech pro výkon některých funkcí obsazovaných ustanovením nebo jmenováním příslušníků Policie České republiky a příslušníků Vězeňské služby České republiky*] of 28 April 1992.

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Czech Republic,[3] a top manager in the Czech Television (state television)[4] and a famous singer[5] were accused of collaborating with the communist State Security Police or of being a former member of the Peoples' Militia. In 2008, the incomplete files of the State Security Police and the speculations based thereon played a seminal role in the heated presidential duel between the incumbent Václav Klaus and his rival Jan Švejnar. Each camp attempted to denigrate its opponent by misusing these files and the eventual victory of Václav Klaus was further tainted by the accusation that the MP from the opposition party who cast a decisive vote for Klaus was blackmailed by the threat of public revelation of his collaboration with the State Security Police.[6] These examples not only show the pain of 'dealing with the past' in a post-communist regime, but also reveal clear deficiencies of the Czech Lustration Acts themselves.

The Czech[7] Lustration Acts are widely acknowledged to be 'thorough and comprehensive'[8], 'one of the strongest'[9] and even 'the most sweeping'[10] among the lustrations acts of the post-communist countries in Central and Eastern Europe. As a result, they were met with fierce criticism, not only from foreign[11] and Czech[12] scholars, but also from dissidents themselves.[13] However, it is not my intention to

[3] *See* J. Kmenta, J. Vaca, 'Tošovský spolupracoval s StB' [Tošovský collaborated with State Security Police], *MF Dnes*, 12 Feb. 2007, p. 4.

[4] *See* J. Kubita, 'Rada ČT podržela Janečka i bývalého milicionáře' [the Council of Czech TV supported Janeček as well as a former member of the militia], *Hospodářské noviny*, 22 Feb. 2007, p. 1 and 3.

[5] *See* R. Malecký, 'Nohavica a StB: nová fakta' [Nohavica and State Security Police: new facts], *Lidové noviny*, 10 Feb. 2007, p. 7.

[6] A. Kottová, J. Jareš, 'Spolupracoval Snítilý s StB?' [Did Snítilý collaborate with the StB?], *Týden*, 12 Feb. 2008, available at <http://www.tyden.cz/rubriky/domaci/boj-o-hrad/spolupracoval-snitily-s-stb_43711.html>, visited 17 Aug. 2008.

[7] I do not refer to the lustration law as 'Czechoslovak' since it became a dead letter in Slovakia after the split of Czechoslovakia. More precisely, the lustration laws lapsed by *desuetude* in Slovakia due to the fact that no Ministry in Slovakia has been given authority to issue lustration certificates.

[8] G. Skapska, 'Moral Definitions of Constitutionalism in East Central Europe: Facing Past Human Rights Violations', 18 *International Sociology* (2003) p. 199 at p. 202.

[9] D. Robertson, 'A Problem of Their Own, Solutions of Their Own: CEE Jurisdictions and the Problems of Lustration and Retroactivity', in W. Sadurski, et al. (eds.), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Dordrecht, Springer 2006) p. 73 at p. 87.

[10] H. Schwartz, 'Lustration in Eastern Europe', 1 *Parker School Journal of East European Law* (1994) p. 141 at p. 142.

[11] *See* id.; *see also* T. Rosenberg, *The Haunted Land: Facing Europe's Ghosts after Communism* (New York, Vintage Books 1995).

[12] *See* Z. Jičínský, V. Mikule, 'Některé ústavněprávní otázky tzv. Lustračního zákona' [Certain Constitutional Questions Related to the So-called Lustration Law], 131 *Právník* (1992) p. 227.

[13] *See*, e.g., the stance of Jiřina Šiklová and Václav Havel in J. Šiklová, 'Lustration or the Czech Way of Screening', in M. Krygier and A.W. Czarnota (eds.), *The Rule of Law after Communism: Problems*

question the legitimacy of the introduction of the Lustration Acts in the early 1990's. I presume that (1) the Czechoslovak Parliament *immediately after the Velvet Revolution* enjoyed legitimacy to adopt the selective lustration laws;[14] (2) the most excessive aspects of these laws were remedied by the Constitutional Court of the Czech and Slovak Federal Republic (hereafter, Federal Court)[15] and the Czech Constitutional Court;[16] and that (3) the departure from the rule-of-law principles in 1995 and 2000 when the Czech Parliament extended the validity of both lustration laws[17] was still justified by the unique circumstances of the transition to democracy in the Czech Republic.

But this presumption does not prevent us from asking whether the Czech Lustration Acts are constitutional *today*. This question becomes even more pertinent due to recent case-law of the European Court of Human Rights (hereafter, ECtHR). The core of this paper thus focuses on the phenomenon of 'lapse of time' and screens the Czech Lustration Acts against the contemporary jurisprudence of the ECtHR. Although according to the ECtHR's jurisprudence as it stands now the Czech Lustration Acts do not necessarily violate the European Convention on Human Rights (hereafter, ECHR or Convention), I argue that they violate the Czech Charter of Fundamental Rights and Basic Freedoms (hereafter, Charter),[18] since the 'transition-to-democracy' circumstances that justified their adoption have ceased to exist. Therefore, they should either be repealed by the Parliament or annulled by the Constitutional Court of the Czech Republic.

In the following, the basic features of the Czech Lustration Acts are outlined, after which the recent case-law of the ECtHR is analysed. Subsequently, the Czech Lustration Acts are scrutinised in the light of the ECtHR's jurisprudence. Finally the conformity of this law with the Charter is reviewed.

and Prospects in East-Central Europe (Aldershot, Ashgate 1999) p. 248-258. Note also that then-President Václav Havel vetoed the extension of the time limit in the lustration laws both in 1995 and 2000 (*see infra*). Another famous Czech dissident, Petr Uhl, was even the main representative of the petitioners before the Constitutional Court of the Czechoslovak Federal Republic in the *Lustration I* case (*see infra*).

[14] *See* M. Gillis, 'Lustration and Decommunisation', in J. Přibáň and J. Young (eds.), *The Rule of Law in Central Europe: The Reconstruction of Legality, Constitutionalism and Civil Society in the Post-Communist Countries* (Aldershot, Ashgate 1999) p. 59-66.

[15] Decision of the Federal Court No. Pl. 03/92 of 26 Nov. 1992 (*Lustration I*), available in English at <http://angl.concourt.cz/angl_verze/cases.php>, visited 17 Aug. 2008. Note that the Federal Court was established in 1991, started to work in 1992 and had come to an end due to the dissolution of the Czech and Slovak Federal Republic on 31 Dec. 1992.

[16] Decision of the Czech Constitutional Court No. Pl. 09/01 of 5 Dec. 2001 (*Lustration II*), available in English at <http://angl.concourt.cz/angl_verze/cases.php>, visited 17 Aug. 2008.

[17] *See infra*.

[18] Act No. 2/1993 Coll. of 16 Dec. 1992.

Basic features of the Czech Lustration Acts

While the international scholarly literature devotes attention almost exclusively to the Large Lustration Act, the Czech Law knows two Lustration Acts.[19] Lack of awareness of the Small Lustration Act can be explained by the fact that only the Large Lustration Act was challenged before the Federal Court.[20] For this reason, this paper also focuses primarily on the Large Lustration Act. It is important to note, however, that both Lustration Acts should be read in conjunction. In fact, the second challenge to lustration, the first before the Czech Constitutional Court, was aimed at both Acts and was partly successful in challenging the Small Lustration Act.[21]

'Protected' and 'suspect' positions in the Large Lustration Act

The Large Lustration Act includes two lists, the so-called 'protected positions' on the one hand and the 'suspect positions' on the other.[22] The first label refers to the public offices[23] for which a negative lustration certificate is required. Thus, persons falling into one of the categories in the list of 'suspect positions' are barred from holding these positions. The second label covers the offices or activities held during the communist regime that disqualify its holder from working in capacities included in the 'protected positions'. In other words, the 'suspect positions' list stipulates '*who* is disqualified' whereas the 'protected positions' list specifies '*which* positions he is disqualified from'.

The 'protected positions' include, *inter alia*, all those filled by election, nomination, or appointment in bodies of state administration,[24] the army, security service, and police force, the staff working in the offices of the President, Government, Parliament, courts, state radio and television, and in the state-owned companies.[25] However, in contrast to Poland, the Large Lustration Act does not apply to positions for which individuals are elected by democratic vote. Therefore, MPs, senators and elected municipal authorities do not fall within the scope of the 'protected

[19] *See supra* nn. 1 and 2.

[20] Pl. 03/92 *Lustration I*. In fact, the Small Lustration Act did not exist at that time.

[21] Pl. 09/01 *Lustration II*.

[22] Gillis, *supra* n. 14, at p. 56.

[23] The term 'public offices' is understood broadly here and encompasses all forms of public employment including high-ranking positions in the state-owned companies, universities and state media.

[24] The term 'state administration' in the Czech Republic refers only to civil servants and does not cover democratically elected functions (*see infra*).

[25] Art. 1(1) of the Large Lustration Act.

positions'.[26] Put differently, 'democratic legitimacy took precedence over lustration procedures.'[27]

The 'suspect positions'[28] include, *inter alia*, high ranking positions in the Communist Party, members of the 'Peoples' Militia',[29] various offices related to the State Security Police[30] and informers of State Security Police.[31] Conversely, the *ordinary members* of the Communist Party (in contrast to its *officials*) are outside the scope of the Act.[32] The original text of the Large Lustration Act included also a highly controversial group of 'candidates for collaboration',[33] but inclusion of this group was – rightly – declared unconstitutional by the Federal Court.[34] However, this correction has not saved the Large Lustration Act from being labelled as 'striking' for allegedly giving priority to dealing with *informers and collaborators* instead of prosecuting and punishing perpetrators.[35]

[26] *See* J. Přibáň, 'Constitutional Justice and Retroactivity of Laws in Postcommunist Central Europe', in J. Přibáň, et al. (eds.), *Systems of Justice in Transition: Central European Experiences since 1989* (Aldershot, Ashgate 2003), p. 29 at p. 42, and the sources cited therein.

[27] Id.

[28] Art. 2(1) of the Large Lustration Act.

[29] People's Militias (in Czech '*Lidové milice*', in Slovak '*Ľudové milície*') was a paramilitary organisation of the Communist Party of Czechoslovakia during 1948-1989.

[30] The State Security Police was organisation analogous to the KGB in the USSR, i.e., a secret police force which was controlled by the Communist Party of Czechoslovakia.

[31] The category of the informers was divided into three subcategories: category A of 'agents, informers, and owners of conspiratorial flats'; category B of 'trustees', who, though not classified by any of the activities listed in category A, were conscious collaborators; and category C, 'candidates for collaboration' (*see infra*). Categories A and B are defined in Art. 2(1)(b) of the Large Lustration Act, whereas category C was stipulated in Art. 2(1)(c) of this Act.

[32] *See* Přibáň 2003, *supra* n. 26, at p. 42, and the sources cited therein.

[33] Art. 2(1)(c) of the Large Lustration Act (before the *Lustration I* decision). 'Candidates for collaboration' were persons who had been contacted and interrogated by the State Security Police and listed as potential confidants but who were not necessarily active collaborators (as they were listed even though they declined to collaborate).

[34] Pl. 03/92 *Lustration I*.

[35] A. Du Toit, 'The Moral Foundations of the South African TRC: Truth as Acknowledgment and Justice as Recognition', in D. Thompson and R.I. Rotberg (eds.), *Truth v. Justice: The Morality of Truth Commissions* (Princeton, Princeton University Press 2000), p. 127 [emphasis in original]. Du Toit is right since the Czech Lustration Acts have primarily affected those whose collaboration was disputable, whereas the worst perpetrators silently left their public offices and moved to more lucrative positions in emerging business areas, where they could sell their good contacts (Šiklová, *supra* n. 13, at p. 250). Instead of punishing perpetrators the positive lustration certificates have ruined the lives of hundreds of 'innocent' persons (innocent in a sense that they were not any more complicit with the Communist regime than the rest of the population); *see* J. Kavan, 'The Development of Rights of Access to the Media: the Role of Media in Lustration', in A. Sajó and M. Price (eds.), *Rights of Access to the Media* (The Hague, Kluwer Law International 1996), p. 259 at p. 277-278.

How does the Large Lustration Act operate?

The practical application of the Large Lustration Act is three-fold: (1) the candidates for 'protected positions' are screened; (2) positively lustrated candidates are barred from holding 'protected positions'; and (3) positively lustrated individuals who already hold a 'protected position' are removed from them.[36] The lustration certificates are issued by the Ministry of the Interior and these certificates, unlike those provided by the Gauck Office in Germany, have the effect of administrative decisions with direct consequences for the person being screened.[37] Furthermore, there are no exoneration grounds available and the few exceptions[38] the Large Lustration Act originally contained were annulled by the Federal Court in 1992 for a violation of the principle of equality enshrined in Article 1 of the Charter.[39] Therefore, 'those who fall into the "suspect positions" ... are *automatically* excluded or removed from the "protected position".'[40] As a result, the Czech Lustration Acts lack any form of individualisation.

Another important feature of the Czech Lustration Acts was their temporality. At the time of enactment, the Czech Lustration Acts were considered to be 'a provisional and only temporary legal method for protecting the new democratic regime.'[41] The Act was adopted in October 1991 initially for five years. In 1995[42] Parliament extended its validity for a further five years and in 2000 it repealed the time limitation altogether.[43] It is also worthy of mention that President Václav Havel vetoed the extension of the time limit both in 1995 and 2000 and returned the amendment to Parliament, arguing that 'the Act was only relevant for the "revolutionary phase", and that it was time to introduce normal rule-of-law conditions, which could permit no trace of collective guilt.'[44] However, Parliament in both cases disagreed with Havel and overrode his veto. More recently, when the Prime

[36] J. Meierhenrich, 'The Ethics of Lustration,' 20 *Ethics and International Affairs* (2006) p. 99 at p. 99.

[37] Přibáň 2003, *supra* n. 26, at p. 45.

[38] Arts. 2(3) and 3(2) of the Large Lustration Act (before the *Lustration I* decision) gave discretion to the Minister of Defence and Minister of the Interior to pardon members of the State Security Police for reasons of national security and 'opt them out' from the 'suspect positions'.

[39] Art. 1 of the Charter reads as follows: 'All people are free, have equal dignity, and enjoy equality of rights….' [author's translation]

[40] Gillis, *supra* n. 14, at p. 57.

[41] Přibáň 2003, *supra* n. 26, at p. 42.

[42] Act No. 254/1995 Coll., which amends the Large Lustration Act, of 27 Sept. 1995; and Act No. 256/1995 Coll., which amends the Small Lustration Act, of 27 Sept. 1995.

[43] Czech Republic, Act No. 422/2000 Coll., which amends the Large Lustration Act, of 25 Oct. 2000; and Czech Republic, Act No. 424/2000 Coll., which amends the Small Lustration Act, of 25 Oct. 2000.

[44] Šiklová, *supra* n. 13, at p. 252.

Minister (of the Czech Social Democrats) suggested the annulment of the Lustration Acts in 2005 he was met with staunch criticism from his colleagues and the media, who accused him of preparing the ground for a Government coalition with the Communist Party.

The Small Lustration Act

As to the Small Lustration Act, its structure, operation and (initial) temporal nature mirror the Large Lustration Act. It differs only in two major aspects. First, the 'protected positions' are specific to the *rationae materiae* of the Small Lustration Act and include high-ranking positions within the Police of the Czech Republic and several positions at the Ministry of the Interior. Secondly, the 'suspect positions' differ slightly from those in the Large Lustration Act, in particular for (potential) holders of a position within the 'Correctional Corps' of the Czech Republic.[45]

Constitutional lustration adjudication in the Czech Republic

Both the Large Lustration Act in its original wording, and the amendments repealing the time limit of the Czech Lustration Acts were challenged before the Federal Court and the Czech Constitutional Court respectively. As a result, both constitutional courts were obliged to address the 'lapse of time' phenomenon.

In the first decision, the so called *Lustration I* case,[46] the Federal Court stressed two crucial factors for the outcome of the case. First, it spelled out its perception of the material *Rechtsstaat*, which is generally considered a core of the decision:[47]

> In contrast to the totalitarian system, which was founded on the basis of the goals of the moment and was never bound by legal principles, much less principles of constitutional law, a democratic state proceeds from quite different values and criteria.
> (…)
> Each state, or rather those which were compelled over a period of forty years to endure the violation of fundamental rights and basic freedoms by a totalitarian regime, has the right to [en]throne democratic leadership and to apply such legal

[45] Art. 5 of the Small Lustration Act. The 'Correctional Corps' in Communist Czechoslovakia consisted of prison guards who acted as an extended arm of the Communist Party of Czechoslovakia and often brutally interrogated the opponents of the Communist regime.

[46] Pl. 03/92 *Lustration I*.

[47] Cf. Z. Kühn, 'České lustrační rozhodnutí – role srovnávacího práva a nedostatky v soudcovské argumentaci' [The Czech Lustration Decision – the Role of Comparative Law and the Deficiency of Judicial Argumentation], in O. Novotný (ed.), *Pocta Vladimíru Mikule k 65. Narozeninám* (Praha, ASPI Publishing 2002) p. 361 at p. 369.

> measures as are apt to avert the risk of subversion or of a possible relapse into totalitarianism, or at least to limit those risks.
> (…)
> As one of the basic concepts and requirements of a law-based state, legal certainty must, therefore, consist [of] certainty with regard to its substantive values. Thus, the contemporary construction of a law-based state, which has for its starting point a discontinuity with the totalitarian regime as concerns values, may not adopt [...] criteria of formal-legal and material-legal continuity which is based on a differing value system, not even under the circumstances that the formal normative continuity of the legal order makes it possible. Respect for continuity with the old value system would not be a guarantee of legal certainty but, on the contrary, by calling into question the values of the new system, legal certainty would be threatened in society and eventually the citizens' faith in the credibility of the democratic system would be shaken.[48]

Next to the material *Rechtsstaat* reasoning, the Federal Court relied heavily on the temporary nature of the Large Lustration Act and noticed that it 'shall apply only during a *relatively short time period* by the end of which it is foreseen that the process of democratisation will have been accomplished (by 31 December 1996).'[49] This two-fold reasoning left many questions unresolved. Most importantly, until the *Lustration II* case[50] it was not clear whether these two conditions operate separately or cumulatively, and whether the process of democratization is limited by a specific deadline or tied to the accomplishment of a specific aim.

In fact, the petitioners who in 2000 challenged the repeal of the time limitation of both Lustration Acts in the *Lustration II* case raised this issue and argued that as the time limitation of the Lustration Acts was repealed, the Acts failed to meet the conditions of constitutionality.[51] In other words, they asserted that the 'material *Rechtsstaat*' condition and the 'temporary nature' condition must be fulfilled cumulatively. The Czech Constitutional Court rejected this argument.[52] While it acknowledged the importance of the time factor, it also held that the 'short-time-period' argument in *Lustration I* was not the only justification for upholding the

[48] Unofficial translation of the Federal Court, available at <http://angl.concourt.cz/angl_verze/cases.php>, visited 17 Aug. 2008

[49] Id. [emphasis added].

[50] Pl. 09/01 *Lustration II*.

[51] The petitioners relied on Art. 1 of the Constitution (principle of rule of law), Arts. 1 (principle of equality), 4 § 2 and § 4 (protection of the core of the fundamental rights) and Art. 21 § 4 (right to access under equal conditions to elected and other public offices) of the Charter, Art. 4 of the International Covenant on Economic, Social and Cultural Rights and the International Labour Organization's Convention on Discrimination (Employment and Profession) of 1958 (No. 111).

[52] This paper leaves aside a lengthy elaboration on the relationship between the Federal Court and the Czech Constitutional Court with regards to the concept of *res iudicata*.

constitutionality of the Large Lustration Act in 1992. In other words, the Court decided that the 'material *Rechtsstaat*' argument and the 'temporary nature' argument apply separately and departure from the short time nature of the Lustration Acts does not in itself make these acts unconstitutional.

This was not the end of the story. The Czech Constitutional Court still had to decide whether the conditions for constitutionality of the Lustration Acts indeed existed eleven years after the Velvet Revolution. It approached this issue diligently, but it was clear from its reasoning that it was highly reluctant to 'overrule' the conclusions of the Federal Court in *Lustration I*. More specifically, it invoked the concept of a 'democracy capable of defending itself'[53] and left the decision to the legislature as to whether the Lustration Acts were still necessary.[54] One commentator found this part of the Court's reasoning so deferential that he referred to it as 'a form of "political question doctrine".'[55] But this is exaggerated. Even though the Court seemed to have shied away from annulling the Czech Lustration Acts for 'a lack of judicially discoverable and manageable standards',[56] given other factors[57] it is more appropriate to say that the Czech Constitutional Court exer-

[53] This concept of German origin (referred to as *wehrhafte* or *streitbare Demokratie*) empowers the democratic State to take measures to prevent the (re)occurence of the totalitarian regime and to curtail the rights of those who advocate for such regime. In the lustration context, it means that the State is entitled to require civil servants to be loyal to the constitutional principles on which it is founded. *See supra* excerpt from the *Lustration I* decision; cf. D. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd edn. (Durham, Duke University Press 1997), at p. 37-38 and 217-237; A. Sajó (ed.), *Militant Democracy* (Utrecht, Eleven International Publishing 2004); and ECtHR 26 Sept. 1995, Case No. 17851/91, *Vogt* v. *Germany*, §§ 54-59; ECtHR 16 March 2006, Case No. 58278/00, *Ždanoka* v. *Latvia* [GC], § 100; and ECtHR 13 Feb. 2003, Cases Nos. 41340/98, 41342/98, 41343/98 and 41344/98, *Refah Partisi (the Welfare Party) and Others* v. *Turkey* [GC], § 99.

[54] The relevant part of the reasoning of the Czech Constitutional Court reads as follows: 'The petition … brings many data which convincingly document that the development of democratic changes after 1992 is stormy and that … the "democratic process culminated." Nonetheless, the … Court considers it necessary to add to these data that determination of the degree of development of democracy in a particular state is a social and political question, not a constitutional law question. Thus, the … Court is not able to review the claim of "culmination" or, on the contrary "non-culmination" of the democratic process by the means which it has at its disposal ... However, it can … confirm that the public interest resting in the state's needs during the period of transition from totalitarianism to democracy have declined in intensity and urgency since 1992.' (Pl. 09/01 *Lustration II*, unofficial translation, available at <http://angl.concourt.cz/angl_verze/cases.php>, visited 17 Aug. 2008)

[55] Robertson, *supra* n. 9, at p. 89.

[56] *Baker* v. *Carr*, 369 US 186, at 217 (1962).

[57] Since there is no such concept as the 'political question doctrine' in Czech constitutional law, since the Charter contains a justiciable right to access under equal conditions to public offices (Art. 21 § 4) and since the Court struggled to provide further rationale for its position and left room for future challenges.

cised a significant self-restraint and gave a broad discretion to the legislator.[58] It simply lacked enough evidence (both empirical and juridical) to generate the constitutional legitimacy necessary to counter predominant political views *at the time when the Lustration II decision was taken*.[59] As David Robertson rightly observed, the 'world was judged not to have changed enough' to rebut other arguments in support of lustration endorsed by the Federal Court in 1992.[60]

Finally, the Czech Constitutional Court also engaged in a comparative analysis of the other lustration acts in the CEE region, which was met with scathing criticism for its selectivity, shallowness[61] and manipulation of the facts.[62] More interesting for the purpose of this paper is that the Court also noted that since 'no international court has *yet* issued a decision in the question of the compliance of lustration acts with international agreements, the [Czech Constitutional Court will] ... use other ... indicators.'[63] Therefore, we can reasonably infer that the Czech Constitutional Court is prepared to reconsider the *Lustration I* and *II* rulings in the light of non-conformity judgments of international courts. Here the jurisprudence of the ECtHR comes into play.

Before this paper proceeds to the analysis of the jurisprudence of the ECtHR on lustration and decommunisation, it will briefly outline the main grounds of criticism of the Czech Lustration Acts and their unique features. This outline is meant to put the Czech lustration law into a broader perspective within the CEE region and prepare the ground for distinguishing the Czech Acts from the other lustration acts that have already been challenged before the ECtHR.[64]

[58] For a German position *vis-à-vis* the 'political question doctrine' which is roughly similar to the Czech one, cf. D. Kommers, *supra* n. 53, at p. 153-164; or T.M. Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (Princeton, Princeton University Press 1992), at p. 107-125. On how the self-restraint and deference may operate within the test of proportionality, cf. J. Rivers, 'Proportionality and Variable Intensity of Review', 65 *Cambridge Law Journal* (2006), p. 174 at p. 195-207.

[59] Cf. R. Uitz, 'Constitutional Courts in Central and Eastern Europe: What Makes a Question Too Political', XIII *Juridica International* (2007) p. 47 at p. 53.

[60] Robertson, *supra* n. 9, at p. 89.

[61] The Czech Constitutional Court cited in support of its conclusion among others *Adler* v. *Board of Education*, 342 US 485 (1952), a rather outdated case, and, what is more, a precedent which was overruled only 15 years later by *Keyishian* v. *Board Of Regents*, 385 US 589 (1967). *See* Kühn, *supra* n. 47, at p. 376.

[62] Kühn, *supra* n. 47, at p. 376.

[63] *Lustration II*, § IX [emphasis added].

[64] For this reason. I will not contrast the Czech Lustration Acts with those lustration laws (such as the Hungarian Lustration Act of 1994) that have not been challenged before the ECtHR so far.

Specificities of the Czech Lustration Acts and main grounds of its criticism

As mentioned earlier, the Czech Lustration Acts have been met with sharp criticism since the very beginning of their existence. It is helpful to summarise briefly the grounds of this criticism. Since 1991, the following deficiencies of the Czech Lustration Acts have been raised: (1) it is overinclusive and at the same time underinclusive, as will be explained later on;[65] (2) it legalises collective guilt;[66] (3) it applies the presumption of guilt instead of innocence;[67] (4) it does not take into account individual circumstances of a particular case;[68] (5) it violates the principle of equality before the law;[69] (6) the State Security Police files are inaccurate and incomplete,[70] which 'often benefits individuals who may have dubious pasts but keep good contacts with communist secret police officers who now willingly testify in their favour before the courts;'[71] and (7) lustration has been abused for political motives and has led to witch hunts.[72]

These deficiencies also pinpoint the main characteristics of the Czech Lustration Acts that distinguishes them from their counterparts in Central and Eastern Europe.[73] First, in contrast to most of the lustration acts in the region, the Czech Lustration Acts after the 2000 amendments do not contain a time limit. Secondly, unlike in Poland[74] or Lithuania,[75] they foreclose the positively[76] lustrated persons from holding the 'protected positions' *indefinitely*.

[65] Šiklová, *supra* n. 13, at p. 254-55; Du Toit, *supra* n. 35, at p. 127.

[66] Schwartz, *supra* n. 10, at p. 142.

[67] Václav Havel (quoted in: Šiklová, *supra* n. 13, at p. 249). *See* Kühn, *supra* n. 47, at p. 367.

[68] Kühn, *supra* n. 47, at p. 376; arguing *a contrario* ECtHR 26 Sept. 1995, Case No. 17851/91, *Vogt* v. *Germany*, § 55.

[69] *See* F. Šamalík, 'Lustrace "lustračního zákona"' [The Lustration of 'the Lustration Law'], *Časopis pro právní vědu a praxi*, No. 3 (1994), p. 21.

[70] Skapska, *supra* n. 8, at p. 210.

[71] J. Přibáň, 'Oppressors and Their Victims: The Czech Lustration Law and the Rule of Law', in A. Mayer-Rieckh and P. de Greiff (eds.), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (New York, SSRN 2007) p. 309 at p. 336-337 (available also online at <http://www.ssrc.org/blogs/books/2007/05/08/justice-as-prevention/>, visited 17 Aug. 2008).

[72] *See* Rosenberg, *supra* n. 11; and Uitz, *supra* n. 59, at p. 53.

[73] There is a growing body of literature that rightly observes that a particular type of lustration selected in each post-communist country reflects its mode of transition and contrast 'round-table-talks scenario' in Hungary and Poland with the 'revolutionary scenario' in the Czech Republic and East Germany; *see*, e.g., S. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman, University of Oklahoma Press 1991) p. 228; or more recently A. Mayer-Rieckh and P. de Greiff (eds.), *supra* n. 71. However, this issue is beyond the scope of this paper.

[74] Where the persons can be barred from holding certain positions 'only' for 10 years. *See* Law on disclosing work for or service in the State's security services or collaboration with them between 1944 and 1990 by persons exercising public functions [Ustawa z 11 kwietnia 1997 o ujawnieniu pracy lub służby w organach bezpieczeństwa państwa lub współpracy z nimi w latach 1944-1990 osób pełniących funkcje publiczne] of 11 April 1997 (hereafter, 1997 Polish Lustration Act), sec. 30. Note that the 1997 Polish Lustration Act lost its binding force on 15 March 2007.

Thirdly, they do not contain any exoneration grounds for those who were intimidated and forced to collaborate or those who were enlisted only for a very short period of time. Similarly, and again unlike in Poland,[77] the Czech Lustration Acts bar the positively lustrated persons from holding the 'protected positions' *even if* they explicitly acknowledged that they held one of the other 'suspect positions' during the communist regime (e.g., their collaboration with State Security Police).

Fourthly, it is applicable both to the candidates for 'protected position' and those who are already holding this position. And, finally, the Czech Lustration Acts are generally considered to be very broad as to the 'suspect' and 'protected' positions, and they lack effective remedies against the accusation of being a collaborator with the former regime.[78] These specifics of the Czech Lustration Acts led foreign commentators to the labelling mentioned in the introduction.

On the other hand, it is necessary to overcome myths about the 'sweepingness' of the Czech Lustration Acts. While it can still be reasonably argued that the Czech Lustration Acts are *overall* 'the most sweeping', they are definitely not 'the most sweeping' in *all aspects*. For instance, the crucial distinction from the 1997 Polish Lustration Act lies in the fact that the Czech Lustration Acts do *not* apply at all to positions for which individuals are democratically elected. As I will argue below, there is a world of difference between the right to stand in the elections and the right to access to positions in the public service. Similarly, 'protected positions' in the Lithuanian KGB Act and 1997 Polish Lustration Act were much broader, since they included certain private sector jobs, which were, moreover, often framed in an ambiguous manner.[79]

[75] Law on the Evaluation of the USSR State Security Committee (NKVD, NKGB, MGB, KGB) and the Present Activities of Permanent Employees of the Organisation [*Istatymas dėl SSRS valstybės saugumo komiteto (NKVD, NKGB, MGB, KGB) vertinimo šios organizacijos kadriniu darbuotoju dabartinės veiklos*] of 16 July 1998 (hereafter, Lithuanian KGB Act), sec. 2.

[76] According to the Czech lustration terminology, '*positively* lustrated person' (and, analogously, '*positive* lustration certificate') refers to a person who *falls* within the 'suspect positions'. This may create certain confusion when reading ECtHR's cases since the ECtHR sometimes uses the term '*negative* security clearance' to refer to the same group. *See*, e.g., ECtHR 14 Feb. 2006, Case No. 57986/00, *Turek* v. *Slovakia*, §§ 11, 79, 83, 88, 91, 100-101, 110 and 117.

[77] The 1997 Polish Lustration Act obliged persons exercising public functions in Poland to disclose whether they had worked for or collaborated with the State's security services between 1944 and 1990. If a person discloses their collaboration, they are no longer barred from holding a 'protected position.'

[78] *See*, e.g., Kühn, *supra* n. 47, at p. 378.

[79] With regards to Lithuania, *see* Lithuanian KGB Act, sec. 2; and analysis of *Sidabras and Džiautas* v. *Lithuania infra*. As to Poland, *see* 1997 Polish Lustration Act (as amended in 1998), sec. 7 (1) item 10 (a); and analysis of *Bobek* v. *Poland infra*.

Furthermore, in contrast to Lithuania, the Czech Lustration Acts were adopted immediately after the Velvet Revolution, which buttresses its legitimacy. And finally, from the practical point of view, although the Czech Lustration Acts are one of the most long-lasting lustration statutes, they have never been directly challenged before the ECtHR by a Czech national.[80] This finding is surprising since, for instance in comparison with Poland, the Czech Lustration Acts seem to interfere more with the human rights of those who were 'positively lustrated'.

Recent jurisprudence of the ECtHR

Although the European Commission of Human Rights spelled out the argument of 'transition-to-democracy' as early as 1989,[81] the ECtHR has applied this argument rather seldom.[82] This does not, of course, mean that the cases with an element of 'dealing with the past' do not come before the ECtHR. On the contrary, there has been a significant case-load coming predominantly from the post-communist countries on a variety of 'transitional justice' issues, such as restitution,[83] rent (de)regulation,[84] conversion of money after German reunification,[85] or citizenship issues.[86]

But this was not the case with lustration. Only in 2004 did the ECtHR give its first lustration judgment on the merits, in a case against Lithuania.[87] Since 2004

[80] Note that there was a challenge on the basis of the Large Lustration Act from Slovakia; *see* discussion on *Turek* v. *Slovakia infra* and European Commission of Human Rights, 28 June 1995, Case No. 24157/94, *Matejka* v. *Slovakia* (dec.).

[81] European Commission of Human Rights, 7 Nov. 1989, Case No. 11798/85, *Castells* v. *Spain* (dec.). *See also* reflection of this argument in the Joint dissenting opinion of judges Frowein and Hall (§ 2) and Dissenting opinion of judge Martínez (§§ 15-16) in the merits stage (European Commission of Human Rights, 8 Jan. 1991, Case No. 11798/85, *Castells* v. *Spain*).

[82] Apart from lustration cases discussed *infra*, *see*, e.g., ECtHR 26 Oct. 2000, Case No. 30985/96, *Hasan and Chaush* v. *Bulgaria* [GC]; ECtHR 13 Feb. 2003, Cases Nos. 41340/98, 41342/98, 41343/98 and 41344/98, *Refah Partisi (the Welfare Party) and Others* v. *Turkey* [GC]; ECtHR 22 March 2001, Cases Nos. 34044/96, 35532/97 and 44801/98, *Streletz, Kessler and Krenz* v. *Germany* [GC]; ECtHR 14 Feb. 2006, Case No. 57986/00, *Turek* v. *Slovakia*; ECtHR 16 March 2006, Case No. 58278/00, *Žd*a*noka* v. *Latvia* [GC]; ECtHR 15 March 2007, Cases Nos. 43278/98 and others, *Velikovi and Others* v. *Bulgaria*; or ECtHR 8 July 2008, Case No. 33629/06, *Vajnai* v. *Hungary*.

[83] *See*, e.g., ECtHR 2 March 2005, Cases Nos. 71916/01, 71917/01 and 10260/02, *Maltzan and Others* v. *Germany* (dec.) [GC]; ECtHR 13 Dec. 2000, Case No. 33071/96, *Malhous* v. *the Czech Republic* (dec.) [GC]; or ECtHR 13 Dec. 2005, Case No. 17120/04, *Bergauer and Others* v. *the Czech Republic* (dec.).

[84] ECtHR 19 June 2006, Case No. 35014/97, *Hutten-Czapska* v. *Poland* [GC].

[85] ECtHR 15 Nov. 2001, Cases Nos. 53991/00 and 54999/00, *Honecker and Others* v. *Germany* (dec.).

[86] ECtHR 9 Oct. 2003, Case No. 48321/99, *Slivenko* v. *Latvia* [GC].

[87] ECtHR 27 July 2004, Cases Nos. 55480/00 and 59330/00, *Sidabras and Džiautas* v. *Lithuania*.

one more Lithuanian,[88] one Slovak,[89] one Latvian,[90] and two Polish[91] cases have been decided on the merits. It is somewhat paradoxical that the ECtHR only started to deal with lustration almost two decades after the change of regimes in Central and Eastern Europe took place.

Cases from the Baltic States

As said before, the first lustration case came from Lithuania.[92] Mr. Sidabras and Mr. Džiautas both worked for the Lithuanian branch of the KGB during the Communist regime. After Lithuania declared its independence in 1990, Mr. Sidabras worked as a tax inspector and Mr. Džiautas as a prosecutor. In January 1999, the Lithuanian KGB Act came into force. As a result of this Act, both applicants were dismissed from their posts and banned from applying for public-sector and various private-sector posts from 1999 until 2009. In short, the ECtHR held that the ban on the applicants' engaging in professional activities in various private-sector spheres such as banks, communication companies, jobs requiring the carrying of a weapon or practising as a lawyer until 2009 had affected their private life as protected by Article 8 ECHR.

However, the ECtHR did not did not find a violation of the applicants' right to private life taken alone. Instead, it found a violation of Article 8 ECHR, taken in conjunction with Article 14 (prohibition of discrimination). It did so in particular on three grounds:[93] (1) the applicants' employment prospects were restricted *not only* in the public sector, *but also* in various spheres of the private sector;[94] (2) the wording of 'protected positions' was vague;[95] and (3) the adoption of the Lithuanian KGB Act was belated.[96] As to the third ground, the ECtHR observed that 'the KGB Act came into force ... almost a decade after Lithuania had declared its independence ... [as a result of] which the restrictions on the applicants' profes-

[88] ECtHR 7 April 2005, Cases Nos. 70665/01 and 74345/01, *Rainys and Gasparavičius* v. *Lithuania*.

[89] ECtHR 14 Feb. 2006, Case No. 57986/00, *Turek* v. *Slovakia*.

[90] ECtHR 16 March 2006, Case No. 58278/00, *Ždanoka* v. *Latvia* [GC].

[91] ECtHR 24 April 2007, Case No. 38184/03, *Matyjek* v. *Poland*; and ECtHR 17 July 2007, Case No. 68761/01, *Bobek* v. *Poland*.

[92] ECtHR, *Sidabras and Džiautas* v. *Lithuania*, Cases Nos. 55480/00 and 59330/00, ECHR 2004-VIII.

[93] This paper to a large extent leaves aside ECtHR's highly questionable Art. 14 analysis. The ECtHR somehow forgot the 'similar situation' stage in the Art. 14 test. *See* partly dissenting opinions of Judge Loucaides.

[94] The ECtHR reiterated that 'the requirement of an employee's loyalty to the State was an inherent condition of employment with State authorities ... [but] there is not inevitably such a requirement for employment with private companies' (§ 57).

[95] *Sidabras and Džiautas*, § 59.

[96] Ibid., § 60.

sional activities were imposed on them thirteen years [*Sidabras*] and nine years respectively [*Džiautas*] after their departure from the KGB.'[97] It is not entirely clear whether it was only the cumulative effect of these three deficiencies that affected the outcome of this case, or whether one or two deficiencies might have sufficed.

In the second Lithuanian case, *Rainys and Gasparavičius* v. *Lithuania*,[98] the ECtHR relied heavily on its reasoning in *Sidabras and Džiautas*[99] and again stressed 'the very belated nature of the [KGB] Act.'[100] However, it also distinguished *Rainys and Gasparavičius* from *Sidabras and Džiautas* on the ground that the applicants, *Rainys and Gasparavičius*, were actually dismissed from existing employment in the private sector,[101] whereas applicants in *Sidabras and Džiautas* were dismissed from public service and thus subjected only to the 'hypothetical inability to apply for various private-sector jobs until 2009.'[102] In other words, the ECtHR found the applicants' complaints in *Rainys and Gasparavičius* even more substantiated and implicitly considered *dismissal* from certain private-sector jobs as a harsher encroachment upon the right to private life than the mere prevention from *access* to employment in that sector. The ECtHR thus again found violation of Article 14 taken in conjunction with Article 8.

The third case, a Grand Chamber judgment in *Ždanoka* v. *Latvia*[103] was not an Article 8 case. It involved the right to free elections (Article 3 of Protocol No. 1). The facts might be briefly summarised as follows. Pursuant to Latvia's Parliamentary Elections Act,[104] Mrs. Ždanoka was excluded from standing as a candidate for the 1998 parliamentary elections due to her activities in the Communist Party of Latvia (CPL) in 1991 after an unsuccessful coup d'état orchestrated by the CPL.[105] As to the merits, the ECtHR provided a thorough analysis of the right to free elections and historical and political circumstances of Latvia's restoration of independence, and finally concluded that Article 3 of Protocol No. 1 was not violated.[106] The ECtHR generally reaffirmed the legitimacy of the concept of a

[97] Id.

[98] ECtHR, *Rainys and Gasparavičius* v. *Lithuania*, Cases Nos. 70665/01 and 74345/01, 7 April 2005.

[99] Ibid., § 34-35.

[100] Ibid., § 36.

[101] Mr. Rainys was employed as a lawyer in a private telecommunications company and Mr. Gasparavičius was a practising barrister.

[102] *Rainys and Gasparavičius*, § 34.

[103] ECtHR 16 March 2006, Case No. 58278/00, *Ždanoka* v. *Latvia* [GC].

[104] Latvia, Parliamentary Elections Act [*Saeimas vēlēšanu likums*] of 25 May 1995, sec. 5(6).

[105] For a complicated factual background of this case which cannot be addressed here, *see* §§ 12-51 of the judgment.

[106] I will leave aside the issue that the ECtHR's ruling in *Ždanoka* seems to be inconsistent with its previous case-law since intrusion on to democratic elections is from a democratic point of view far more serious than dismissing a tax inspector or a corporate lawyer. The alternative view (but not

'democracy capable of defending itself',[107] but articulated one important principle that is relevant for the Czech Lustration Acts:

> [T]he Latvian Parliament must keep the statutory restriction under *constant review*, with a view to bringing it to *an early end*. Such a conclusion seems all the more justified in view of the greater stability which Latvia now enjoys, *inter alia,* by reason of its full European integration.... Hence, the failure by the Latvian legislature to take active steps in this connection may result in a different finding by the Court.[108]

As to the 'belated timing' element, the ECtHR distinguished *Ždanoka* from the Lithuanian lustration cases mentioned above on the ground that the Lithuanian KGB Act imposed 'much more far-reaching restriction of personal rights barring … access to various spheres of employment in the private sector'[109] and that the Lithuanian lustrations 'were introduced almost a decade after the re-establishment of Lithuanian independence.'[110] The four-year delay in adopting the Latvian Parliamentary Elections Act was found acceptable as 'a newly-established democratic legislature should need time for reflection in a period of political turmoil to enable it to consider what measures were required to sustain its achievements'[111] which was in this case buttressed by the presence of the Russian troops in Latvia until 1994.

Finally, the ECtHR in *Ždanoka* elucidated 'the-need-for-individualisation' requirement. While it observed that this requirement 'is not a pre-condition of the measure's compatibility with the Convention',[112] it stressed that '[t]he need for individualisation of a legislative measure alleged by an individual to be in breach of the Convention, and the degree of that individualisation where it is required by the Convention, depend on the circumstances of each particular case, namely the

elucidated by the ECtHR) is that it is the very significance of the position which justifies applying lustration to Mrs. Ždanoka. It thus seems that it was special historico-political circumstances (*see* §§ 115(c) and 121) of the restoration of Latvia's independence which was decisive for the outcome of the case.

[107] *See Ždanoka* [GC], § 100.

[108] Ibid., § 135 [emphasis added, citation omitted]. Note that the ECtHR in *Ždanoka* seems to have adopted a well-known strategy of many constitutional courts in Europe, i.e., to hold in favour of the Government but to warn it that it will decide the other way unless the Government acts to amend or repeal the law (for similar German practice cf. D. Kommers, *supra* n. 53, at p. 53).

[109] Ibid., § 131. However, this should operate rather against Latvia's Parliamentary Elections Act (*see supra* n. 106).

[110] Id.

[111] Id. The ECtHR cited the *Rekvényi* case (ECtHR 20 May 1999, Case No. 25390/94, *Rekvényi* v. *Hungary* [GC]) in support of its conclusion.

[112] Ibid., § 114.

nature, type, duration and consequences of the impugned statutory restriction.'[113] Most importantly, it distinguished the right to private life from (the 'passive' aspect of) the right to free elections since '[f]or a restrictive measure to comply with Article 3 of Protocol No. 1, a *lesser* degree of individualisation may be sufficient, in contrast to situations concerning an alleged breach of Articles 8-11 of the Convention'.[114] Thus, Article 8 not only requires more intensive review of its alleged infringement[115] but also a higher degree of individualisation than Article 3 of Protocol No. 1.

Slovak and Polish cases

The fourth case, *Turek* v. *Slovakia*,[116] did not directly tackle the issue of conformity of the Lustration Act with the ECHR, but dealt primarily with the length of proceedings and equality of arms.[117] More specifically, the applicant challenged solely the inclusion of his name on the list of State Security Police collaborators and argued that he was denied access to his file since it was categorised as a national secret. The ECtHR again confirmed that a positive lustration certificate may affect the private life of the person concerned, but in this case 'only' found a violation of Article 8 concerning the lack of a procedure by which the applicant could seek protection for his right to respect for his private life.

Half a year later, in the *Matyjek* case,[118] the first judgment in a case concerning the 1997 Polish Lustration Act, the ECtHR upheld its admissibility decision[119] and acknowledged that lustration triggers the criminal law head of Article 6. Mr. Matyjek, who had been a member of the Polish Parliament (*Sejm*), had declared that he had not collaborated with the communist-era secret services,[120] but the Polish courts found him a deliberate and secret collaborator with the secret services and that he had therefore lied in his lustration declaration. As a result, Mr. Matyjek was deprived of his mandate as a member of parliament and was banned from being a candidate in elections or from holding any other public office for the next 10 years.[121] The ECtHR held that the lustration proceedings against the ap-

[113] Ibid., § 115(d).

[114] Id. [emphasis added].

[115] *A contrario* ibid., § 115(c).

[116] ECtHR 14 Feb. 2006, Case No. 57986/00, *Turek* v. *Slovakia*.

[117] One could even ask if this should really qualify as a lustration case, seeing Slovakia does not actually apply their own lustration law, thus nobody there is excluded from office.

[118] ECtHR 24 April 2007, Case No. 38184/03, *Matyjek* v. *Poland*.

[119] ECtHR 30 May 2006, Case No. 38184/03, *Matyjek* v. *Poland* (dec.), §§ 48-59.

[120] For consequences of such a declaration, *see supra* n. 74.

[121] Having been found to be a 'lustration liar' entails dismissal from public function exercised by the person concerned and prevents her from applying for the protected provisions for a period of

plicant, taken as a whole, violated Article 6(1) taken together with Article 6(3) ECHR.[122]

The *Matyjek* case to a large extent resembles the *Turek* case, since it also focuses on the access to the classified materials and equality of arms[123] and because the ECtHR again avoided taking a clear stance on the Lustration Acts as such. Nevertheless, there are two *dicta* which are worthy of mention. On the one hand, the ECtHR recognised that '*at the end of the 1990s* the State had an interest in carrying out lustration in respect of persons holding the most important public functions',[124] but at the same time it stressed that 'if a State is to adopt lustration measures, it must ensure that the persons affected thereby enjoy *all procedural guarantees* under the Convention in respect of any proceedings relating to the application of such measures.'[125]

The most recent case, *Bobek* v. *Poland*,[126] is to a large extent a follow-up to *Matyjek*. Ms. Bobek was an advocate, who made a declaration under the provisions of the 1997 Polish Lustration Act that she had never secretly collaborated with the communist secret service, and subsequently was found to be a 'lustration liar'. She alleged a violation of her right to fair trial since she had not had access to the file to an extent sufficient to ensure the fairness of the proceedings and since the motivation of the judgments had never been served on her or made accessible to the public.

The ECtHR relied heavily on the judgments in *Matyjek*, *Turek*, *Sidabras* and *Rainys and Gasparavičius*. It reiterated that 'the State-imposed restrictions on a person's opportunity to exercise *employment in a private sector* for reasons of a lack of loyalty to the State in the past could not be justified from the Convention perspective ... in particular in the light of the *long period which had elapsed* since the fall of the communist regime'[127] and that 'if a State is to adopt lustration measures, it must ensure that the persons affected thereby enjoy all the procedural guarantees of the Convention'.[128] It added that some state documents might be kept confidential, but given the *considerable time which has elapsed* since the documents were created, this must be only exceptional.[129] As a result, the ECtHR had no reason to depart

10 years. For further details, *see supra* nn. 74 and 77, and A. Czarnota, 'The Politics of the Lustration Law in Poland: 1989-2006', in A. Mayer-Rieckh and P. de Greiff (eds.), *supra* n. 71, p. 222.

[122] Interestingly, Mr. Matyjek did not invoke the right to free elections before the ECtHR.

[123] Albeit in contrast to *Turek*, the ECtHR did so on the Art. 6, and not on the Art. 8, ground.

[124] *Matyjek*, § 62 [emphasis added]. Interestingly, the ECtHR did not address the 'belated timing' argument, although the 1997 Polish Lustration Act was adopted only two years prior to the Lithuanian KGB Act.

[125] Id. (quoting *Turek* , § 115) [emphasis added].

[126] ECtHR 17 July 2007, Case No. 68761/01, *Bobek* v. *Poland*.

[127] *Bobek*, § 63 (quoting *Rainys and Gasparavičius*, § 36) [emphasis added].

[128] Ibid., § 69 (quoting *Turek*, § 115; and *Matyjek*, § 62).

[129] Id.

from *Matyjek* and again found a violation of Article 6(1) taken in conjunction with Article 6(3) ECHR.

Summary of ECtHR's principles applicable to lustration cases

In sum, the ECtHR jurisprudence stipulates seven principles that are applicable for any lustration act. First, a positive lustration certificate may amount to a violation of one's private life, especially when a person does not have access to classified materials relevant to his lustration file. Second, a lustration act must distinguish between the public and private sectors. It is not entirely clear whether exclusion from positions in the private sector is prohibited at all,[130] but applicability of the lustration act to private jobs is surely an aggravating factor.[131] Third, the 'belated timing' is relevant to the overall assessment of the proportionality of the lustration acts[132] even though this element does not seem to be in itself conclusive.[133] Fourth, there is a distinction between access to the 'protected positions' and dismissal from 'protected positions'. Pursuant to consistent case-law of the ECtHR, the states must provide weightier reasons in case of dismissal. However, the ECtHR has not explicitly broadened this principle (at least not in the lustration context) to any of the posts within the public service and thus it is not clear whether it applies equally to the positions in the public and the private sector.[134] Fifth, since the *Matyjek* case, the ECtHR made clear that lustration acts may trigger the criminal part of Article 6 (right to fair trial). Sixth, a person affected by lustration must enjoy all procedural guarantees in the subsequent proceedings, including a sufficient degree of individualisation. Finally, although the transition-to-democracy rationale of the acts under challenge generally allows for a wider margin of appreciation, lustration acts are inherently temporary measures and must be under constant review. This principle creates a significant problem for lustration acts that have been adopted for an indefinite period of time or the time limits of which were repealed.

[130] This is a position of the Polish Constitutional Court. *See* Judgment of the Polish Constitutional Court of 11 May 2007, No. K 2/07; and also M. Safjan, 'Transitional Justice: The Polish Example, the Case of Lustration', 1 *European Journal of Legal Studies* (2007), No. 2, p. 18.

[131] In fact, the factor that lustration laws apply to important public functions is what justifies the intrusion represented by lustration.

[132] Slovak politicians do not seem to be aware of this factor when proposing the reintroduction of lustration in Slovakia; *see* I. Petranský (Interview), 'Proti zavedení lustrací bych nebyl' [I wouldn't say no to the introduction of lustration], *Hospodářské noviny*, 7 Feb. 2007, p. 9.

[133] This principle might be stricter as more time lapses from the moment of transition to democracy.

[134] This paper does not suggest that the Convention contains the right of access to the civil service (*see infra*).

(How long) can the Czech Lustration Acts survive the scrutiny of the ECtHR?

Let us now examine the Czech Lustration Acts in light of the seven principles of the ECtHR jurisprudence. The second and third principles can be easily rebutted. Unlike in Lithuania, the scope of 'protected positions' envisaged by the Czech Lustration Acts is limited to public service positions and specific arms-related trade licences. Moreover, they were adopted immediately after the Velvet Revolution and therefore were not belated, unlike in Lithuania, and arguably also unlike the 1997 Polish Lustration Act.[135] It should be also remembered that the ECtHR made it clear that 'belated timing' does not seem in itself decisive.[136]

The remaining principles represent a bigger challenge to the Czech Lustration Acts. But as I will show, it is still possible to distinguish the Lustration Acts from their foreign counterparts. To this end, I will address these five principles one by one. As to the first principle, the Czech Lustration Acts allow for full access to State Security Police files before the court (*a contrario Turek*). Moreover, in *Sidabras* the ECtHR refused to consider whether there had been a violation of Article 8 taken alone[137] (i.e., not in conjunction with Article 14). This refusal thus still arguably leaves the outcome of the challenge on the conformity of the Lithuanian KGB Act *as such* open.

As to the fourth principle, the access/dismissal distinction, it can be reasonably argued that the importance of this distinction as elaborated in *Rainys and Gasparavičius* v. *Lithuania* is limited only to private-sector jobs and not to employment in public service. Put differently, from the *Rainys* holding that the dismissal from private-sector jobs is a harsher encroachment than the mere prevention from access to employment in *that sector*, it is not possible to infer *per analogiam* that the dismissal from a public-service job is also a harsher measure than the prevention of access to the public service.[138]

[135] And definitely unlike the 2006 Polish Lustration Act [Ustawa z 18 X 2006 o ujawnieniu informacji o dokumentach organów bezpieczeństwa państwa z lat 1944-1990 oraz treści tych dokumentów, Dz.U.No 218, poz.1592] of 18 Oct. 2006. However, the main part of the 2006 Polish Lustration Act was repealed by the Judgment of the Polish Constitutional Court of 11 May 2007, No. K 2/07. *See also* M. Safjan, *supra* n. 130.

[136] *Sidabras and Džiautas*, § 60.

[137] But *see* Concurring opinion of Judge Mularoni and strong dissenting opinions of Judge Loucaides and Judge Thomassen (ibid.).

[138] But cf. ECtHR 28 Aug. 1986, Case No. 9228/80, *Glasenapp* v. *Germany* (rejection of Mrs. Glasenapp's appointment as a secondary school teacher found in conformity with the Convention) on the one hand; and ECtHR 26 Sept. 1995, Case No. 17851/91, *Vogt* v. *Germany* (dismissal of Mrs. Vogt from her post as secondary school teacher found in violation of the Convention) on the other. Both cases involve review of conformity of the 1972 Decree on the Employment of Extremists in the Civil Service (also referred to as the 'Civil Loyalty Decree') with the ECHR. For further details,

To be clear, this paper does not put forth the argument that the Convention contains the right of access to the public service. On the contrary, the ECtHR has since *Glasenapp*[139] consistently held that there is no such right enshrined in the Convention and it is highly unlikely that it will change its mind. But the ECtHR also added that 'this does not mean … that a person who has been appointed a civil servant cannot complain on being dismissed if that dismissal violates one of his or her rights under the Convention'[140] and thus the application of Article 8 of the Convention to the lustration cases remains open. Furthermore, the ECtHR might also choose to adopt an autonomous meaning of the notion of 'public service' and interpret this notion narrowly.[141] Nevertheless, as long as the ECtHR does not take a clear stance in the lustration cases on the access/dismissal dichotomy, at least as to some of the public-sector posts within the 'protected positions', one may argue that this dichotomy is not applicable to the Czech Lustration Acts, since they do not include private-sector jobs. Hence the Czech Lustration Acts survive the fourth principle.

The fifth principle may arguably be set aside on the ground that the holding of the ECtHR that the lustration acts trigger the criminal law part of Article 6 is limited to the 1997 Polish Lustration Act and that the Czech Lustration Acts can still be distinguished from it. First, the Czech Lustration Acts lack strong criminal connotations since they do not use the Code of Criminal Procedure subsidiarily and the course of the Czech lustration proceedings is not based on the model of the Czech criminal trial.[142] Secondly, while the Czech lustration is also directed to a broad group of individuals, the nature of the 'offence' is different from typical criminal offences and, most importantly, the purpose of the Czech lustration is not to punish but to prevent former employees of the communist-era secret services from taking up employment in public institutions and other spheres of activity vital to the national security of the State.[143] Finally, the severity of the employment restrictions applied to those who held one of the 'suspect positions'

cf. D. Kommers, *supra* n. 53, at p. 229-234; or G. Braunthal, *Political Loyalty and Public Service in West Germany: The 1972 Decree against Radicals and its Consequences* (Amherst, University of Massachusetts Press 1990).

[139] ECtHR 28 Aug. 1986, Case No. 9228/80, *Glasenapp* v. *Germany*.

[140] ECtHR 26 Sept. 1995, Case No. 17851/91, *Vogt* v. *Germany*, § 43.

[141] Note that the list of 'suspect positions' is rather long and includes also posts in the universities and state media which involve neither security risks nor the exercise of the sovereign state authority. The ECtHR thus might decline to consider these posts as public offices in the strict sense which call for more deferential review (cf. ECtHR 19 April 2007, Case No. 63235/00, *Vilho Eskelinen and others* v. *Finland*, §§ 57 and 62). Such a judgment would be capable of eroding the Czech Lustration Acts as such.

[142] *A contrario Matyjek* (dec.), §§ 48-51.

[143] Ibid., §§ 52-53 and 56.

under the Czech Lustration Acts is not such as to bring the issue into the 'criminal' sphere.[144] Moreover, the *Turek* judgment did not find the criminal limb applicable to the (Czechoslovak) Large Lustration Act and the *a contrario* argument may be inferred.[145] Hence, the *Engel* criteria[146] for the criminal law part of Article 6 are presumably not met.[147]

However, the availability of procedural guarantees is not limited to Article 6 and thus even if the criminal law part of Article 6 is inapplicable, the sixth principle ('a person affected by lustration must enjoy all procedural guarantees in the subsequent proceedings') still applies on account of the procedural aspect of Article 8.[148] In fact, as I mentioned earlier, it has been argued that the Czech Lustration Acts lack effective remedies and instead of considering the individual circumstances of a particular case, rely merely on the formalistic criteria – inclusion or non-inclusion of the name in the State Security Police files.[149] Therefore, the sixth principle poses a significant threat to the Czech Lustration Acts.

But it is the seventh principle of 'constant review of lustration acts' that is most difficult to tackle, since the 2000 Amendment to both Lustration Acts repealed the time limit altogether. The only way to contest the applicability of this principle is to argue that it was the right to stand for election to the national parliament which was at stake in *Žd*anoka, and that the scrutiny of an alleged violation of Article 3 of Protocol No. 1 is more searching than in Article 8 cases, which the ECtHR rejected and held to the contrary.[150] However, the ECtHR in the end did not find a violation of the right to stand for election in *Žd*anoka and one may only guess whether the Czech Lustration Acts would meet a heightened Article 8 scrutiny. Notwithstanding this ambiguity, the effort to dismiss the applicability of the seventh principle is quite a stretch, in particular when we take into account the fact that the transition to democracy in the Czech Republic was very different

[144] Ibid., §§ 54-55; *see also Žd*anoka [GC], § 122 and ECtHR 1 July 2003, Cases Nos. 55480/00 and 59330/00, *Sidabras and Džiautas* v. *Lithuania* (dec.).

[145] *See also* European Commission of Human Rights, 28 June 1995, Case No. 24157/94, *Matejka* v. *Slovakia* (dec.), where the Commission held that the issue of the positive lustration certificate under the 'Large Lustration Act' cannot be regarded as a criminal charge within the meaning of Art. 6 of the Convention.

[146] These three criteria are the legal classification of the offence in question in national law, the very nature of the offence and the nature and degree of severity of the penalty (ECtHR 8 June 1976, Cases Nos. 5100/71 and others, *Engel and Others* v. *the Netherlands*, § 82); *see also Matyjek* (dec.), §§ 43-47.

[147] Note that a recent shift in the case-law of the ECtHR on the applicability of Art. 6 on the civil servants (cf. ECtHR 19 April 2007, Case No. 63235/00, *Vilho Eskelinen and others* v. *Finland*, § 62), opens the route for challenging the lustration laws also on the 'civil law' limb of Art. 6.

[148] *Turek*, §§ 111-112.

[149] Kühn, *supra* n. 47, at p. 377.

[150] *Žd*anoka [GC], § 115(c) and (d).

from Latvia's 'close-to-civil-law scenario' in 1991 and the special circumstances resulting therefrom in the mid-1990's.

However, one should not conclude too hastily that the Czech Lustration Law does not survive the scrutiny of the ECtHR. On the contrary, one must admit that the absence of clear deficiencies in the Czech Lustration Acts makes it possible to reconcile them with the standards of the ECtHR as they now stand. In the terminology of the ECtHR, the Czech Lustration Acts might still be within the 'margin of appreciation'. But as Bob Dylan sings, 'the times they are a-changing' and, in the case of lustration, they are indeed changing very rapidly. Put differently, the circle is closing and distinguishing the Czech Lustration Acts from their counterparts in Central and Eastern Europe and the ECtHR's jurisprudence becomes more and more difficult. This conclusion is all the more the case if we consider the *cumulative effect* of all seven principles stemming from the ECtHR's jurisprudence (especially the requirement of 'constant review' in conjunction with 'lack of individualisation' argument) and not one by one.

Should the Czech Lustration law be annulled by the Czech Constitutional Court?

The previous section concluded that the Czech Lustration Acts would probably still pass the scrutiny of the ECtHR. At the same time, the ECtHR requires that the lustration laws are under 'constant review' on the *national* level. Therefore, the question is *how long* the Czech Lustration Acts can survive this scrutiny. The exact number of years in cases like these is difficult to determine. For instance, in a different context (now former) Justice Sandra Day O'Connor in *Grutter*[151] held that 'we expect that 25 years from now [i.e. from 2003], the use of racial preferences will no longer be necessary to further the interest approved today [in obtaining the educational benefits that flow from the diverse student body].'[152]

In contrast, the Czech Constitutional Court did not spell out the exact number of years in the *Lustration II* case.[153] But I would argue that there are strong indicators that 17 years after the adoption of the Czech Lustration Acts (and almost two decades after the Velvet Revolution), the political situation has changed to such an extent that these Acts should be annulled. State institutions have been purified to a large extent and the risk of subversion or a possible return of totalitarianism is no longer realistic, in particular after joining NATO in 1999 and the European

[151] *Grutter* v. *Bollinger*, 539 US 306 (2003).

[152] Ibid., 337 (2003). But note that it is disputable whether this statement is a *ratio decidendi* or merely an *obiter dictum* of O'Connor's opinion.

[153] *See supra* n. 54.

Union in 2004.[154] Under these circumstances the deficiencies of the Acts, that have not been addressed by the ECtHR due to jurisdictional bars, outweigh the benefits.

These deficiencies can be easily explained by the examples mentioned in the introduction to this paper. First, high-ranking managers in the state-owned companies or in the public media can easily evade lustration (and subsequent revelation) by moving to positions that are not enumerated in the 'protected positions' of the Large Lustration Act (provided that they enjoy political backing).[155] Secondly, many files of the State Security Police (including the file of the current President Václav Klaus) have been shredded and the information contained therein either is found by accident and often incomplete in a different file (as in the case of a famous singer mentioned in the introduction) or disappeared forever (as in case of one of the files of Václav Klaus). And finally, in view of the nature of the high-ranking positions held during the Communist era, many important figures most likely collaborated with the State Security Police without being mentioned in the State Security Police files.[156] The former Prime Minister who served during communism as the adviser to the president of the State Bank of Czechoslovakia is a prime example.

More in general, whole groups fall outside the scope of the Czech Lustration Acts. It is a well-known fact that the ordinary members of the Communist Party, holders of other important positions not enumerated among the 'suspect positions' in the Large Lustration Act, or simply family members shielded by the people belonging to the previous two groups, did not have to sign the declaration of cooperation with the State Security Police and still enjoyed privileged status in the communist regime. We may collectively refer to these groups as the 'lucky guys'.

In complete contrast to these privileged groups stand those 'unlucky' individuals who were subjected to extortion and/or forced to collaborate. As I have argued earlier, due to the formalistic criteria of the Czech Lustration Acts (the sole decisive criterion for the biggest category of 'suspect positions' is whether a particular name appears in the State Security Police files) these people are positively lustrated, even though they did not provide the State Security Police with any valuable information and irrespective of their motivation or subsequent

[154] Cf. *Ždanoka* [GC], § 135.

[155] A top manager in the Czech Television mentioned in the introduction first moved from the position of programme director of the Czech TV to the position of financial director in Feb. 2007 and only eventually in Nov. 2007 he handed in his notice and thus left the Czech TV entirely (*see Lambert jde z televize* [Lambert Leaves TV], Respekt, No. 47/2007, p. 6).

[156] Since by the very nature of their positions they did not have to sign the declaration of cooperation with the State Security Police.

behaviour.[157] With a touch of cynicism, one may refer to them as the 'collateral damage' of the Czech Lustration Acts.[158]

The Czech Lustration Acts thus are both overinclusive and underinclusive. Underinclusive since they do not cover many important positions in the communist regime and individuals whose State Security Police files were shredded (or they managed to have them shredded). Overinclusive since they cover persons who co-operated with the State Security Police under duress while there are no grounds for exoneration or time limits. These two major deficiencies are exacerbated by the fact that the State Security Police files are incomplete and unreliable.

As a result, the substantive justice provided by the Czech Lustration Acts is highly selective. This conclusion stands irrespective of what we understand under 'substantive justice' of lustration.[159] The Czech Lustration Acts certainly provided no justice to victims of Communism (meaning 1), which is clear from the critical reactions of many dissidents. If we look at the experiences of the former Prime Minister and a top manager of the Czech Television (that are only a tip of the iceberg), justice as retribution or punishment for wrongdoing (meaning 2) failed as well, notwithstanding the fact that supporters of lustration would vigorously deny this rationale for the Czech Lustration Acts. Finally, if we understand justice of lustration as a necessary forward-looking prophylactic measure (meaning 3), this argument lacks empirical basis (in fact, it is debunked by the latest presidential elections in the Czech Republic) and its strength diminishes with time.

It may be also plausibly argued that repeal of the Czech Lustration Acts will have more prophylactic effect than its preservation. In fact, the Lustration Acts put the issue of 'dealing with the past' under the carpet since those with a negative lustration certificate are considered 'crystal clear' and those with a positive lustration certificate become so stigmatised that they refrain from speaking out. The repeal of the Lustration Acts would thus trigger the open debate on the 'dealing with the past' and challenge the black-and-white picture of the life under Communism in the former Czechoslovakia.

[157] This is not intended to trivialise or justify the weakness and wrongdoings of those who 'merely' signed (or were forced to sign) the co-operation agreement with the State Security Police, but did not subsequently provide the State Security Police with any information (or provided information of no value). This paper just puts forth the argument that these people often caused *lesser* harm to their fellow citizens during the communist regime than certain groups of individuals mentioned above who are not included within the 'suspect positions.' Hence, it is on this ground that their treatment is blatantly unjust.

[158] *See also* Přibáň 2007, *supra* n. 71, at p. 333 ('The[se persons] were sacrificed so that the vast majority of society loyal to the previous regime for decades could feel morally purified and label all those responsible for their own "suffering".').

[159] I draw the following meanings of substantive justice freely from J. Meierhenrich, *supra* n. 36, at p. 102-103.

Furthermore, the Czech Lustration Acts feed behind-the-curtain coercion of key public servants since it allows those who are in possession of the appropriate State Security Police files to use a person's political past for the purpose of blackmail. This is not paranoia but a serious issue that has not been fully addressed in the Czech Republic.[160] In fact, according to the Polish Constitutional Court, the main aim of the 1997 Polish Lustration Act was to make this coercion impossible.[161] It is thus high time to bring down the curtain and disentangle these bonds.

Coming back to the impact of 'lapse of time', borrowing the language of Justice Jackson from his concurrence in *Youngstown*,[162] we may conclude that any transitional-justice argument is most compelling immediately after the democratic revolution. Its strength diminishes as time lapses and once the state reaches a considerable degree of stability (evidenced, among others, by integration in the supranational entities such as NATO and/or the EU) it is at its lowest. The Czech Republic has clearly reached the third stage.

What does that mean for the Czech Lustration Acts? Before we can answer this question, we must point out the differences between the Czech Charter of Fundamental Rights and Basic Freedoms and the Convention. First, in contrast to the accessory character of the prohibition of discrimination guaranteed by Article 14 ECHR, the Charter contains a self-standing right not to be discriminated against.[163] Secondly, while the Convention does not include the right of access to the public service, the Charter does[164] and the Czech Constitutional Court found it justiciable.[165] As a result, many jurisdictional bars that in the previous chapter saved the Czech Lustration Acts from being a violation of the ECHR are not applicable to the challenge under the Charter. However, the principles distilled from the ECtHR's jurisprudence do apply since pursuant to the consistent case-law of the Czech Constitutional Court the Convention has constitutional status.[166]

[160] It is a recurring theme for the Czech press to speculate who is in possession of the 'lost' State Security Police files and what influence these individuals can exercise on the key decision-making of the Czech State.

[161] Judgment of the Polish Constitutional Court of 10 Nov. 1998, No. K 39/97.

[162] *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 US 579, 635-638 (1952) (Jackson concurring).

[163] Art. 3(1) of the Charter which reads as follows: 'Everyone is guaranteed the enjoyment of her fundamental rights and basic freedoms without regard to gender, race, colour of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, or other status' [author's translation]. *See also* a general principle of equality stipulated in Art. 1 of the Charter, *supra* n. 39.

[164] Art. 21(4) of the Charter which reads as follows: 'Citizens shall have access, on an equal basis, to any elective and other public office' [author's translation].

[165] *See,* e.g., Decision of the Czech Constitutional Court No. II. 53/06 of 12 Sept. 2006. Furthermore, the Czech Constitutional Court interpreted the right of access to the public service on an equal basis broadly so as to encompass also the dismissal from public office (id.).

[166] The 2000 Amendment to the Czech Constitution abolished a specific group of international human rights treaties that were accorded constitutional status. However, the Czech Constitutional

This is a deadly mix for the Czech Lustration Acts. Given the considerable lapse of time and the joining of supranational organisations such as NATO and the EU, the transitional-justice argument leaves the contaminated past far behind. Thus, the restraint exercised by the Czech Constitutional Court in 2001 is no longer justifiable. As said, the Czech Lustration Acts are both overinclusive and underinclusive and they do not allow for any individualization of a particular case. Moreover, the Czech legislature failed to keep these Acts under 'constant review'. Against the backdrop of ECtHR case-law, the argumentation put forward by petitioners in the *Lustration II* case would be sufficient in 2008. This does not mean that the Czech Republic cannot protect itself against people who might wish to subvert it by require loyalty to the democratic principles from applicants for public service. It must do so on the basis of a statute which is fully compatible with the rule of law.[167]

Conclusion

The Czechoslovak Parliament enjoyed legitimacy to adopt and prolong the Lustration Acts. The courts correctly upheld them in 1992 (*Lustration I*) and 2001 (*Lustration II*). They were more deferential to the legislature than for instance the Hungarian Constitutional Court,[168] which gave priority to legal certainty and privacy concerns.[169] The Czech solution might be criticised but it has also had irrefutable positive effects. Most importantly, it preserved the 'substantive justice' so needed after the Velvet Revolution and, in contrast to Poland or Hungary, it forestalled all attempts to broaden the scope of the Czech Lustration Acts.[170]

On the other hand, the Czech approach is demanding and requires what the ECtHR refers to as 'constant review'. This paper argues that the departure from

Court opined that it is not possible to lower the existing procedural standard of the protection of human rights and thus retained the constitutional status of, among others, the ECHR; *see*, among others, Decision of the Czech Constitutional Court No. Pl. 36/01 of 25 June 2002, available in English at <http://angl.concourt.cz/angl_verze/cases.php>, visited 17 Aug. 2008.

[167] This was supposed to be the Act on State Service (Act No. 218/2002 Coll., on the service of state employees in administrative agencies and on the remuneration of these employees and other employees in administrative agencies of 26 April 2002), which should have replaced the Czech Lustration Acts. But the Czech legislators missed the opportunity to adapt the Czech Lustration Acts to the demands of the rule of law and left them untouched.

[168] Decision of the Hungarian Constitutional Court of 24 Dec. 1994, No. 60/1994 AB. For details of these two contrasting positions, *see* Robertson, *supra* n. 9.

[169] *See* Robertson, *supra* n. 9, or E. Barrett, P. Hack and Á. Munkácsi, 'Lustration as Political Competition: Vetting in Hungary', in A. Mayer-Rieckh and P. de Greiff (eds.), *supra* n. 71, p. 259.

[170] It might suggest that even though the Czech Lustration Acts were in certain aspects very comprehensive, its 'settings' were better adjusted to the needs of Czech society than were the comparable Acts in other central and eastern European countries to their societies.

the standard rule-of-law principles is no longer justified since the unique circumstances of the transition to democracy in the Czech Republic that existed in 1991 and the following years have disappeared. Although the Acts probably still pass the ECtHR's scrutiny, they now violate the Charter and should therefore be annulled.[171] What is more, the repeal of the Czech Lustration Acts would contribute to the maturation of democracy in the Czech Republic.

[171] This paper focuses predominantly on the *judicial* review of lustration laws, but there is still an option (and from the democratic point of view an even more desirable one) that the Czech Lustration Law will be reviewed and repealed by Parliament. However, this scenario is highly unlikely since no democratic political party wants to be labelled as 'pro-communist'. Any attempt to repeal the Czech Lustration Law is also blocked by the immediate media outcry that reflects the symbolic value of lustration for a significant (or just loud?) part of Czech society.