

PROJECT ON JUSTICE IN TIMES OF TRANSITION

Inaugural Meeting

Salzburg, Austria

March 7-10, 1992

Introduction

Recent political changes in Eastern and Central Europe, the Soviet Union and Latin America have led to the collapse of a number of totalitarian and authoritarian regimes. While the political, social and economic consequences of these transformations differ significantly from country to country, each of the new democracies in these regions faces a common and pressing problem: how to deal with individuals who served the former oppressive regimes. The question of responsibility--in its moral, legal and political dimensions--for the abuses of the prior regimes is one which emerging democracies must address in order to allow society to move forward. The two key issues in this regard are acknowledgement--whether to "remember" or "forget" the abuses--and accountability--whether or not to prosecute the perpetrators.

The Project on Justice in Times of Transition was established in an effort to provide perspective, guidance and direction to the decision-makers currently grappling with the grave and complicated issues connected with transitional justice. The Project's inaugural meeting held in Salzburg, Austria, March 7-10, 1992, brought together almost 40 individuals who are directly involved at the decision-making level in dismantling the security apparatus of the former regimes and formulating policies to deal with implicated individuals in the countries of Eastern and Central Europe and the former Soviet Union. They were joined by senior political leaders, human rights experts, legal scholars, social scientists and journalists from Latin America, Western Europe and the United States. Together the group explored the moral, legal and political dimensions of transitional justice, seeking lessons from the past and present experiences of countries which have already attempted to address these issues.

Justice and the Transition to Democracy and Civil Society

Countries from Albania to El Salvador face a multitude of challenges as they begin to make the transition to democracy and open society. Decades of dictatorship virtually eradicated civil

society where it had once existed--and in many emerging democracies it never had. The citizens of these countries tend to be distrustful of government institutions because of their past complicity or impotence. Often there is little popular comprehension of what living under the rule of law means, when in the past the legal system may have been merely another agent of state control--and in some cases continues to be allied with the forces of repression. In many Latin American countries, the military, though officially out of power, still retains a powerful position in society, sometimes posing a real threat to civilian government. In all the emerging democracies, severe--and in some instances, crushing--economic problems further complicate the transition process.

Wiktor Osiatynski, advisor to the Polish parliament on drafting a new constitution, pointed out that there are three specific challenges that face any transitional government: 1) what to do with the former elites; 2) what to do with former lower-level officials; and 3) what to do with frustrated expectations. When crimes have been committed by the state and its agents, there is a psychological need in society for political justice to enable it to move forward. This, he said, requires taking into consideration the victims, criminal responsibility under the law for crimes committed, and the larger moral question of general responsibility.

According to Raul Alfonsin, who, as President of Argentina between 1983 and 1989, directed the country's transition from military rule to democracy, there are three options available to the new government regarding the crimes of its predecessor: 1) forget everything, either by enacting an amnesty or by doing nothing; 2) prosecute everyone implicated (though he pointed out the impossibility of actually doing this); or 3) prosecute selectively, condemning paradigmatic behavior in an effort to demonstrate that impunity does not exist and to deter the commission of similar violations in the future.

The conference participants agreed that the rule of law, providing equal protection to everyone, is the cornerstone of democracy. Fernando Rodrigo, Visiting Professor at Yale University from the Fundacion Ortega y Gasset in Madrid, remarked that democracy must be based on a broad, inclusive arrangement open to all segments of society and founded on procedures and institutions that protect the basic interests of all citizens.

According to Samuel Huntington, Director of the Olin Institute at Harvard, a society's approach to justice in times of transition depends on the type of transition process the society undergoes. He outlined three paradigms:

- o Transformation: the transition process is initiated and controlled by reformers within the regime (e.g., Chile, Hungary, Bulgaria).
- o Replacement: weak regimes collapse due to internal weaknesses and pressures (e.g., Argentina, German Democratic Republic).
- o Transplacement: the transition is negotiated by the authoritarian leaders and the opposition (e.g., Uruguay, Poland, El Salvador).

With transformation, the issue of dealing with past crimes hardly arises, even when, as in Chile and Brazil, substantial crimes have been committed. With replacement, great efforts are usually made to prosecute, though the success rate may vary. The key in this situation, according to Professor Huntington, is to address the issue of criminal prosecutions as soon as possible after the new government is in power before popular support for prosecutions loses momentum or is deflected. The categories of crimes and criminals should be defined as precisely as possible, and those who will not be charged (particularly members of the military and police) should be reassured. With transplacement, which results from a negotiated deal, the old regime may try to institute an amnesty for those who served it.

ACKNOWLEDGEMENT

Remembering vs. Forgetting

During the transition period from repression to democracy, political, social and legal obstacles may curtail or prevent criminal prosecution of crimes committed by the old regime. Yet the question still remains of whether or not to acknowledge the crimes. The conference participants agreed that there are three main reasons to tell the truth about the past: 1) to seek justice for the victims and help restore their dignity; 2) to facilitate national reconciliation; and 3) to deter further violations and abuses. As Roger Errera, member of the French Council of State, noted, "memory is the ultimate form of justice."

Laurence Weschler, staff writer at The New Yorker, emphasized that general knowledge of the crimes is not sufficient; what is necessary is some form of official recognition or sanctioning of the truth. Official pronouncements by heads of state and government and the work of historians are particularly important ways to acknowledge the truth, but memory can be served by writers and artists and other parts of society as well. The challenge is to remember in a way that allows the victims--and society as a whole--to move forward.

Ruti Teitel, Professor of Law at New York University, discussed restitution as one means of official acknowledgement of past wrongs. Financial compensation by the state, proportionally related to the degree of abuse suffered, constitutes a formal finding of individualized harm. The successor regime recognizes the existence of legal continuity and, taking on the guilt of the perpetrator, breaks the connection between the wrongdoer and the victim. Although the perpetrator may not be punished, the government has recognized the wrong done to the victim. Professor Teitel asserted that restitution represents a turn toward liberal democracy's concern for individuals, and that it underscores the particular status of political discrimination as harm. Even if it takes decades to institute a policy of restitution (as in the case of Japanese Americans who were interned by the U.S. government during World War II), such a policy recognizes and helps to restore dignity to the victims of abuse at the hands of the state or its agents. In addition, restitution does not preempt criminal prosecution.

Uruguay and Spain: The Decision to Forget

Despite the difficulties facing transitional governments, in the view of the international human rights community, amnesty laws are malignancies, license to repeat the same crimes, even under civilian governments. Instead of establishing reconciliation, amnesties may deeply divide civil society and pervert the rule of law. According to Robert Goldman, Professor of Law at American University, through "official forgetting," amnesties can make second class citizens of the victims by eliminating their legal recourse. The state should not have the prerogative to abolish or forget its own crimes, he said; that right, if it exists, belongs only to the victims themselves.

Nevertheless, amnesties have been enacted in many countries victimized by their leadership. Uruguay is one case in point. In 1984, after years of military dictatorship, Uruguay negotiated a return to democracy. The transition was codified in the so-called Naval Club Pact of 1984; however, the Pact did not address the military's responsibility for human rights violations committed under the previous government. According to Rafael Michelini, a deputy in the Chamber of Representatives in Uruguay, the military probably assumed that they would not be held accountable, whereas the people expected them to be prosecuted for their crimes. However, in 1986, under pressure from the military, the government enacted an amnesty law. Enormous popular indignation erupted over the law; the families of the victims wanted truth and justice and they launched a petition campaign for a plebiscite on the law. In spite of tremendous institutional opposition, the petition campaign was successful. However, by a narrow margin, the people of Uruguay voted to uphold the amnesty law. As a result of the outcome of the vote, there were no further investigations and all trials currently under way were cancelled.

The main argument given for upholding the amnesty law was that it was necessary for national reconciliation and to preserve the peace. Mr. Michelini admitted that in 1986 there did seem to be the possibility of a military revolt, but contended that Uruguay should have taken the risk and defeated the amnesty. He believed that the military could not have been able to oppose the popular will and international opinion. Today, he said, Uruguay has institutional stability, and the military is subject to civil authority, but the institutions of the military remain unreformed and the same leaders control the military. It is possible, he said, that many in the military may think they could take over again without fear of accountability.

Nonetheless, Uruguay's referendum campaign brought attention and sympathy to the victims and greater regard for human rights--no one, not even the defenders of the amnesty law, denied the existence of the crimes that had been committed. Mr. Michelini was hopeful that this heightened awareness poses some sort of obstacle to future authoritarian temptation.

In contrast, in Spain, the idea of an amnesty law received consensual support from all political parties and groups, and, according to Fernando Rodrigo, it has proved to be a very successful means of achieving national reconciliation.

In Spain's first democratically elected parliament after the death of Franco, all the political forces understood that parliament's first task must be, in the words of Mr. Rodrigo, "to liberate people from their past in order to promote reconciliation and partnership." During three years of bloody civil war fought on ideological grounds and over forty years of dictatorship, both sides had committed great violence in Spain. To allow the country to move forward and strengthen its fledgling forces of democracy, parliament passed a general amnesty law for all politically based crimes in October 1977. Although the main beneficiaries of this amnesty were individuals who had opposed the Franco regime, it also pardoned all the civil servants and police who had been in charge of repression under Franco. In addition, all police files from the Franco period were sealed indefinitely. Spain chose to forge ahead toward democracy without looking back to its bloody past.

Chile: The National Commission on Truth and Reconciliation

During the Pinochet regime in Chile, there was considerable public awareness of the human rights violations being carried out, and organizations existed that condemned these abuses and pursued criminal prosecutions against the perpetrators. However, as Roberto Garreton Merrino, Deputy Foreign Minister of Chile, pointed out, many obstacles to justice existed, such as the complicity of the judiciary with the military, passage of an amnesty law which ended many trials in progress, and the military court's jurisdiction over civilians.

The transition to democracy in Chile was dictated on the military's terms, and the political reality was such that it entailed acceptance of these terms and the consequent constitutional limitations. The conditions for the transformation included: maintaining the amnesty; accepting Pinochet's permanent irremovability; allowing Pinochet to name senators; and guaranteeing a percentage of parliamentary seats to the Right, thus ensuring that a majority able to undo these terms could never be achieved.

In the words of President Raul Alfonsin of Argentina, "the penalty is ultimately an instrument--but not the only or most important one--for the formation of a collective moral conscience." Recognizing the hindrances to criminal prosecutions for the crimes committed by the Pinochet regime, in early 1990 Chile's newly elected president, Patricio Aylwin, established the National

Commission on Truth and Reconciliation. The Commission's overarching purpose was to determine both individual and global truth about the abuses committed under the prior regime. Its membership was broadly drawn, even including people with links to the military, so that it could not be accused of bias. The Commission's mandate included:

- o Investigation of the most serious actions (detainments, forcible disappearances, summary executions, deaths resulting from torture).
- o Impartiality of investigation; i.e., not only government and military actions were investigated, but so were those committed by the opposition.
- o Confidentiality regarding the identities of individuals accused of human rights violations.
- o No imposition of sanctions or penalties since the Commission was not a court of law.

President Aylwin determined that there would be only a short period for accusations and investigations, but ample time to publicize this opportunity in advance.

The Commission's findings were presented in a two-volume Report. The Report presented an analysis of the political and doctrinal content of Chile's military dictatorship. It documented the acts of violence committed by both sides, and that torture and disappearances had a systematic, institutional character. According to this official truth, there was no internal war that justified the excesses of the Pinochet regime. On the level of individual truth, the Report documented the fate of each victim of the crimes covered by the Commission's mandate.

The Report of the Commission had a tremendous moral impact in Chile. It was widely disseminated within the country, given away for free. Families of the victims and human rights groups publically acknowledged it as the truth. However, the Right contended that the Report ignored the supposed internal war in Chile, and the Aylwin government continues to face great obstacles to trying members of the military. However, as Mr. Garreton remarked, truth is a part of justice, and in itself a form of redress.

ACCOUNTABILITY

Criminal Prosecutions

The most obvious reason for prosecuting state crimes is to punish the wrongdoers and restore dignity to their victims. However, according to Jaime Malamud-Goti, former Attorney General of Argentina, prosecution can also help to heal society as a whole by reestablishing a common reality that can serve as a basis for cooperation and moral rejuvenation, replacing the isolated, individual realities that had fractured social cohesiveness under the prior, repressive regime.

Jacques Rupnik, advisor to President Francois Mitterrand of France, said that trials can also help to legitimize the new government and help to prevent an outbreak of violence by providing a legal outlet for a social demand for justice. However, as several participants pointed out during the course of the conference, this justification for criminal trials is somewhat tenuous since justice--particularly political justice--is malleable. In some cases, prosecutions can exacerbate social divisions, or too vigorous or politically motivated prosecutions can devolve into a search for vengeance rather than justice. The Hungarian philosopher Gyorgy Bence pointed out that although utilizing judicial means for political ends does not necessarily imply the abuse of judicial means, there certainly is that risk. He emphasized that an element of discretion is critical in choosing which cases to try.

Samuel Huntington posed three types of crimes committed under authoritarian regimes: 1) crimes against the state; 2) crimes against individuals and violations of human rights; and 3) collaboration with the regime. He pointed out that the first type--treason--was rarely prosecuted, and that the last type, collaboration, while unethical, immoral and otherwise reprehensible, may not always be classifiable as a crime. Criminal trials usually focus on crimes against individuals, in part reflecting growing international concern for human rights.

Mr. Rupnik said that the nature of the transition--a sudden shift vs. gradual change--was an important factor in assessing the likelihood of criminal prosecution. The more dramatic the break with the past regime, the more likely there will be trials. The "degree of nastiness" of the crimes committed, and the degree of resistance society demonstrated under the repressive regime are also factors. He remarked that those who resisted the least, both among countries and within countries, tend to be most eager to prosecute.

Political expedience is also a factor in the decision to prosecute. It is often useful during the transition to democracy, especially when complicated by economic hardship, for the new government

to fix responsibility for past disasters. For example, in some post-communist countries, calls for de-communization are often linked with the argument for acceleration of economic reforms; the purpose of this linkage is to emphasize that there has been a radical break with the previous regime. Addressing the abuses of the communists can also be employed to discredit or delegitimize the liberal Left if it resists prosecutions or other sanctions against communists.

Mr. Rupnik also pointed out that the legal culture inherited from the old regime may also be a factor in the decision of whether or not to pursue criminal prosecutions. In some countries, such as Hungary, the legal profession had a degree of autonomy and was not entirely compromised under the old regime; in most others, however, the legal system and its institutions were tools of the state. Kurt Biedenkopf, Minister President of Saxony in the Federal Republic of Germany, noted two related problems: first, what he termed "illegal laws," or laws enacted by a repressive government that violate human rights; and second, the perversion of justice for political purposes, i.e., the misapplication or selective application of laws as reprisals for undesirable activities. These points highlight the complexities stemming from the continuity that exists within the legal system inherited from the prior regime (the former German Democratic Republic is the only real exception in this regard).

Herman Schwartz, Professor of Law at American University and Co-Chair of the Project, cautioned that criminal prosecutions of old crimes pose many problems, such as the difficulty of operating on the presumption of the defendant's innocence when the public is clamoring for justice--or revenge. He highlighted the risk of victor's justice, particularly in terms of treason, because the definition of the crime can change--making punishable today what was sanctioned and perhaps even lauded in the past. In many instances, the legal institution itself may present problems, such as a shortage of lawyers or a paucity of impartial or uncompromised tribunals.

Kurt Biedenkopf pointed out the difficulties in determining criminal responsibility. The higher in the old regime's hierarchy one looks, the more difficult it becomes to say who was actually responsible for criminal actions. In many cases, orders may have been destroyed, or they may have been given orally and not documented. In other cases, lower-level officials may have acted in anticipation of what they thought their superiors would want, but without their request or legal sanction.

Professor Schwartz also cited evidentiary problems when victims and witnesses may be long dead, or their memories may have faded. However, he was countered by Roger Errera, Member of the French Council of State, who pointed out that sometimes the passage of time allows better evidence to surface, particularly as official archives become available.

The Role of the International Community

Should international law address issues of transitional justice, or leave it to each society? According to Diane Orentlicher, General Counsel for the International League for Human Rights, the point of international human rights law is to oblige states to protect the rights of their citizens; if a state does not punish those who violate human rights, she said, it is failing in its duties as a government. However, not every case needs to be prosecuted; rather, Professor Orentlicher emphasized, a deterrence rationale can be established through effective, selective prosecutions that demonstrate that abuses are subject to punishment and offenders subject to the rule of law. The pressure of international law can make the difference in getting countries to prosecute, she said, particularly in situations where the balance of power between old and new regimes is fluid. The force of international law can help empower the new government, give it legitimacy and help ensure prosecutions. Claudio Grossman, Professor of Law at American University, also pointed out that third parties do not have to accept the validity of amnesties; the international community can continue to press a country to prosecute human rights violators.

Hungary: The Treason Law

Andras Sajó, Legal Advisor to President Arpad Góncz of Hungary, discussed the Hungarian parliament's recent attempt to pass a law that would eliminate the statute of limitations on murder and treason during the communist period. The argument for the law was that these were crimes at the time of their commitment, but were not prosecuted then for political reasons. The law was based on the premise that there had been no government qualified to prosecute these crimes during the communist period.

Mr. Sajo called the Hungarian law an attempt to create "a bridge across history" at the expense of the rule of law. If it had passed, he asserted, it would have fed political battles rather than contribute to constructive dialogue. President Goncz refused to sign the law and submitted it to Hungary's Constitutional Court, which struck the law down because the Court was not willing to sacrifice the rule of law for the sake of political justice. The Court ruled that the law was vague in its discussion of non-prosecution for "political reasons," and that the law could be manipulated due to the fluid definition of treason. The Court recognized full continuity of the Hungarian legal system inherited from the communist period; there had been no rupture within system, and thus the argument for reinstating the statute of limitations on murder and treason was unjustified. The right to punish is a special right of the state, but not a natural right, the Court said, and thus it is subject to certain limits which should always apply.

Institutional Obstacles to Prosecution: The Special Case of Germany

The situation of post-unification Germany is unique, since one state, the German Democratic Republic (GDR), ceased to exist and was absorbed by another already existing state, the Federal Republic of Germany (FRG). As a consequence of this merger, the legal order of the FRG was extended to eastern Germany, and is now the legal order of all Germany (with some few exceptions related to the transition period). The main legal institution for this consolidation process is the Treaty of Unification, which went into effect in October 1990.

Whereas other countries undergoing the transition to democracy must make compromises in dealing with the practical issues of ensuring continuity of basic institutions and of the legal system, in Germany the institutions of the GDR have been replaced by those of the FRG, and individuals who served the former GDR can be easily replaced by individuals "imported" from western Germany. As Gyorgy Bence pointed out, because the FRG is rich in both financial and human resources, Germany is "making the transition in laboratory conditions."

According to Kurt Biedenkopf, eastern Germans tend to view the legal implications of unification with distrust, not understanding that the legal system is designed to ensure their rights and protect them from encroachment by the state. Also, because so many judges and lawyers have been

"imported" into eastern Germany from the western part of the country, many eastern Germans perceive themselves to be subject to judgment by foreigners who do not understand the experience of life under dictatorship.

Under the terms of the Treaty on Unification, the federal criminal code was amended to address crimes committed in the former GDR before unification as follows: a defendant first must be judged according to old GDR laws, then judged by FRG laws, then a comprehensive comparison of the two laws must be made and the milder judgment applied. According to Helmut Steinberger, a former justice of the FRG Constitutional Court, this becomes more complicated in certain situations. For example, federal law penalizes crimes committed outside FRG only if committed by Germans against Germans, or against German state interests. Before unification, crimes committed by East Germans against West Germans were not considered crimes of Germans against Germans--but now they are. Double jeopardy is also of issue for eastern Germans accused of committing crimes that have not exceeded the FRG statute of limitations.

Mr. Biedenkopf maintained that it was not likely that there would be many criminal trials of the former East German communist elite or Stasi agents. There are no federal criminal codes that cover the abuses of which these former elites are accused, and the Federal Constitution prohibits retroactive legislation in criminal law. As a result, tribunals have been formed in eastern Germany to investigate and expose crimes of the GDR state and party structures; however, they have no power to punish.

One exception to this situation was the recent trial of former East German border guards accused of killing individuals attempting to flee from the GDR. According to GDR law, use of weapons by border guards was only allowable if a serious crime was involved. However, if someone attempted an illegal crossing alone, unarmed and without endangering the lives of others, this could not be considered a serious crime. Nevertheless, Erich Honecker, the former head of the GDR, had given shoot-to-kill orders to border guards since at least 1974, constantly reiterating them in subsequent years; these orders served as the accused border guards' defense. However, the Federal Supreme Court rejected the guards' claim that they were just following orders, for even under GDR law the guards acted without justification. Honecker's shoot-to-kill order, the intention of which was

to enforce the GDR's totalitarian regime, suppressed the fundamental human right of free movement. Mr. Steinberger asserted that the court's decision avoided the retroactivity problem by applying the milder penalty and relying on fundamental human rights and natural human law rather than unjust positive law.

Disqualification of Former Elites

Barring former elites from holding influential public positions is often presented as necessary to hasten the transition from a repressive regime to democracy. Allowing the old elites, torturers or collaborators with the previous regime to maintain their positions, or to prosper when others are enduring economic hardship, is extremely offensive to many members of society. However, the process can become counterproductive if it undermines social cohesion and the forward movement of society. Disqualification proved to be the most contentious issue discussed during the initial meeting of the Project on Justice in Times of Transition.

In the view of Adam Michnik, Editor in Chief of Gazeta Wyborcza and member of the Polish Parliament, disqualification efforts reveal both a type of retributive justice as well as the rebirth of a variety of bolshevism. The desire to settle accounts is understandable--that those who worked for years for the oppressors should not go unpunished--and impunity for them would be injustice, Mr. Michnik said. But there is the risk of inequality under the law, the risk that a group of citizens will be deprived of certain rights enjoyed by everyone else. Mr. Michnik said that he would prefer "letting a few bastards go unpunished rather than punishing huge numbers of innocents." He described a nightmare scenario in which all the communists would be sent to Siberia, and what would remain would be communism without communists--just the mechanisms. Mr. Michnik declared that he did not want to live to see the day when he would have to defend communists as he once defended dissidents.

Victor Navasky, Editor of The Nation, concurred with Mr. Michnik's views, pointing to the bitter legacy of McCarthyism in the United States, which undermined traditional U.S. constitutional rights and the national sense of community. A number of participants agreed that individuals should

be punished for crimes they have committed, but not for their political beliefs. Nonetheless, the question of moral responsibility for past abuses persists.

Czechoslovakia: The Lustration Law

In October 1991 the Czechoslovak Federal Assembly passed a law that prohibits high functionaries of the communist party, members of the State Security Agency (StB), the People's Militia (the party's private army) and other specified organizations, as well as their collaborators, from holding senior administrative positions in the government, the military, the police, the intelligence service, the state-owned media and state-owned enterprises for five years. The StB files are the basis for determining who knowingly served as collaborators.

Critics of the so-called lustration law point to the following defects:

- o The law is based on the principle of collective rather than individual guilt, considering whole categories of people guilty.
- o The law is based on the presumption of guilt rather than innocence.
- o The law does not distinguish among varying degrees of guilt; it covers everyone from active police agents to those who have studied at certain academies in the former Soviet Union.
- o The law does not provide citizens proper protection by the judiciary, contradicting the Czechoslovak Charter of Fundamental Rights and Freedoms which ensures this right to everyone regardless of political or other beliefs.
- o The law contradicts international covenants on discrimination.

The lustration law's supporters counter with the argument that for more than years the communist regime discriminated against Czechoslovak citizens on the basis of political, social and religious grounds. The intent of the lustration law, they maintain, is not to punish party members, StB agents and collaborators, but to prevent them from holding key positions within the state and state-owned concerns. According to Pavel Bratinka, a member of the Czechoslovak Federal Assembly, the lustration law does not determine guilt in a criminal sense; rather, the main thrust of the law is to express the moral disgust of society toward the communist regime and its collaborators. According

to Vojen Güttler, a justice on the Constitutional Court of Czechoslovakia, the law's supporters believe that "people who were collaborators with repressive organs of the communist regime certainly do not possess the qualifications needed for the development of a democratic state." Further, supporters assert that citizens do have proper judicial protection under the lustration law because they are entitled to ask for a review of the findings of the screening committee. Finally, they also maintain that since many former and present functionaries of the communist party still hold influential positions in the state, only their removal will gradually allow equal access to public functions. The Hungarian philosopher Gyorgy Bence remarked that discrimination should not be employed to rectify prior discrimination.

Karel Schwarzenberg, Federal Chancellor of Czechoslovakia, emphasized that while some citizens are obvious victims and others are clear perpetrators, the vast majority of the Czechoslovak population is compromised, simultaneously victims and collaborators. He suggested that in this context, perhaps it would be better to view justice not as a criminal problem but as a medical problem, with actions needed to prevent future infection. In his view, although flawed, the lustration law is a step in this direction.

Jan Urban, a journalist for Lidove noviny, said that the debate on lustration in Czechoslovakia is indicative of the "absolute immaturity and inability of the new democratic regime to face openly its own past. It's just a substitute for the truth...." He criticized those who call for lustration for seeking political revenge, saying that it is their "substitute for the real fight--those grey, cowardly people were not able to fight in the past. And now, when the other side is not in power any more, they rush to prove that they are the winners."

The conference participants remained divided on the subject of disqualification; as Adam Michnik noted, lustration--like abortion and the death penalty--is a question of personal beliefs, which all but precludes any sort of consensus.

Opening State Security Files

In seeking the truth about the past, especially regarding criminal actions and collaboration, using the files of the state security apparatus of the prior regime poses numerous problems.

Repressive regimes maintain personal dossiers primarily for the purpose of recording compromising or damaging information on individuals; it is difficult to determine to what extent they contain distortions or lies. After the repressive regime falls, many files may be destroyed or stolen.

Stephen Holmes, Professor of Political Science at the University of Chicago, remarked that, on the one hand, employing state security files in the search for justice is backward-looking and socially divisive, and the files continue to abet the manipulation of society through fear. On the other hand, he said, individuals have a psychological need to know what happened to them and why, and society as a whole needs to come to terms with the past, and in this regard the files can be extremely revealing.

In using the files to expose criminals and collaborators, the burden of proof must not be allowed to shift from the accuser to the accused. Because of the vast numbers of cases, there may be pressure for summary justice as well. A crucial distinction must be made between knowledge and vengeance, between justice and retribution.

In Germany, before the files of the GDR state security agency, or Stasi, were officially opened, there was a black market for files stolen by former Stasi agents and the KGB (which had copies of them). Files were used for blackmail, extortion and fomenting public disturbances. Kurt Biedenkopf pointed out that there had actually been a price list for files--and the media were among the most interested buyers.

A law on the Stasi files that went into effect on January 1, 1992, established a new agency, the mandate of which is to make the Stasi data available for legal, political and historical disclosure in the effort to come to terms with the past. The files contain two types of information: reports on individuals, and records of who passed this information on to the Stasi. However, prosecution based on the files may be extremely difficult since most of the acts recorded in them are not criminal. In some cases the files may demonstrate cause for disqualification, if they show that by collaborating with the Stasi, a given individual caused harm to others. The burden of proof lies with the accuser, who must prove that the accused knowingly collaborated. Claus Offe, Professor of Political Science at the University of Bremen, pointed out that the files leave some important questions unanswered:

Under what conditions did people become informers? What might be possible exonerating factors for this behavior?

In Russia, the issue is not whether or not to open the KGB archive, but how to acquire control over the archive. Arseny Roginsky, a member of the Board of "Memorial," said that the KGB continues to act as an agency of collection and analysis of information for the leadership of the country--thus retaining a certain degree of influence over national policy. Although there is a committee on security issues in the Russian parliament, the parliament has no control over the KGB; indeed, the committee is headed by a deputy head of the KGB. In Mr. Roginsky's view, the organization remains a danger to individuals and Russian society as a whole. Beyond some personnel changes at the top, the KGB remains unreformed, and in his view, it cannot be reformed. There are as of yet no laws on secrets or on the KGB archives, and currently two parliamentary committees have only partial access to the archives--criminal records may be seen, but not personal dossiers.

In Czechoslovakia, the Ministry of Interior is presently in charge of the StB files; thus, as Jan Urban pointed out, the state still controls the past and retains the right to judge people on the basis of their beliefs and associations. In his view, everyone in Czechoslovakia is still "ideology-addicted," and the country's focus on the lustration law and the StB files reflects a paralyzing fascination with the past that hinders progress and reconciliation.

Mr. Urban advocated a dual process of de-politicization and de-etatization, urging that the whole question of files be removed from both the political process and the hands of the state. He proposed the establishment of an independent, non-governmental commission of historians and prominent figures to control the StB files, following the examples of Chile and Argentina. The commission could use the files to document and analyze the modus operandi of the old regime, and the files could be accessed for use as evidence in the due process of criminal trials. After an appropriate period of time, he suggested that the files should be sealed for at least 30 years.

CONCLUSIONS

Moving Forward

Although the scope of abuses committed under the former repressive regimes in Latin America, Central and Eastern Europe and the former Soviet Union varied considerably, there was a consensus that in the transition to democracy the rule of law should take precedence over political justice. Nevertheless, the victims of the previous regime should not be brushed aside and forgotten.

Arunas Degutis, a member of the Lithuanian parliament, stressed the need for mutual compromise to end the cycle of recriminations that characterize what he called the "post-Soviet nightmare." Whereas many participants had stated that the victims of communism were also complicit, Mr. Degutis pointed out that the perpetrators were victims of the system as well, that all of society had been harmed in one way or another by communism. He recommended compromising for the sake of the future, as a way to move forward.

The Europeans in particular learned some important lessons from the Latin American experience with transitional justice. Jozef Szajer, a member of the Hungarian parliament, pointed to the more flexible approach to justice evident in Latin America, where many sectors of society--not just the legal system--have been involved in efforts to reveal the truth about past crimes. He supported encouraging similar approaches in the formerly communist countries.

Chile's National Commission on Truth and Reconciliation was an appealing model to many of the Europeans, with its emphasis on truth-telling as a form of justice. The Commission seemed to have enabled Chile to put the past to rest without forgetting what had happened. Establishing similar commissions in the fledgling democracies of Eastern and Central Europe, the Baltic states and the former Soviet Union is one of several areas in which the Project on Justice in Times of Transition could be particularly helpful.

The group agreed that further dialogue between Project members and policy-makers in the emerging democracies of both Europe and Latin America would be extremely useful, and several members made specific requests for meetings in their own countries.

Mary Albon
Rapporteur

The Charter 77 Foundation - New York

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