



**Assemblée parlementaire  
Parliamentary Assembly**

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**Measures to dismantle the heritage of former communist totalitarian systems**

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**REPORT**[\[1\]](#)

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*Summary*

The report is based on a two-pronged approach. Firstly, it attempts to show why it is so important that the heritage of former communist totalitarian regimes be dismantled, and how it can be done. Secondly, it raises the problem of how to achieve justice without violating human rights. It also outlines solutions to this problem, including concrete guidelines on how to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law, which hopefully will be acceptable to a wide audience.

It is hoped that this report will be a contribution to central and east European countries currently in the unique transition process from former communist totalitarian regimes to democracy, and a guideline for the west European countries and the Council of Europe on how to help these countries to successfully overcome their totalitarian heritage without violating human rights.

**I. Draft resolution** [Link to the Adopted text](#)

1. The heritage of former communist totalitarian systems is not an easy one to handle. On an institutional level this heritage includes (over)centralisation, the militarisation of civilian institutions, bureaucratisation, monopolisation, overregulation; on the level of the society, it reaches from collectivism and conformism to blind obedience and other totalitarian thought-patterns. To re-establish a civilised, liberal state under the rule of law on this basis is difficult — this is why the old structures and thought-patterns have to be dismantled and overcome.
2. The goals of this transition process are clear: to create pluralist democracies, based on the rule of law and the respect of human rights and diversity. The principles of subsidiarity, freedom of choice, equality of chances, economic pluralism and transparency of the decision-making process all have a role to play in this process. The separation of powers, the freedom of the media, the protection of private property and the development of a civil society are some of the means to attain the goal, as are decentralisation, demilitarisation, demonopolisation and debureaucratisation.
3. The dangers of a failed transition process are manifold. At best, oligarchy will reign instead of democracy, corruption instead of rule of law, and organised crime instead of human rights. At worst, the result could be the "velvet restoration" of a totalitarian regime, if not a violent overthrow of the fledgling democracy. The key to a successful transition process lies in striking the delicate balance of providing justice without seeking revenge.
4. A democratic state based on the rule of law must thus, in dismantling the heritage of former communist totalitarian systems, apply the procedural means of such a state. It cannot apply any other means, since it would then be no better than the previous totalitarian regime which is to be dismantled. A democratic state based on the rule of law does have sufficient means at its disposal to ensure that the cause of justice is served and the guilty are punished — it cannot, and should not, however, cater for the desire for revenge instead of justice. It must instead respect human rights and fundamental freedoms, such as the right to due process and the right to be heard, and it must apply them even to those people who, when they were in power, did not apply them themselves. But a state based on the rule of law can also defend itself against a resurgence of the communist totalitarian threat, since it has ample means at its disposal which do not conflict with human rights and the rule of law, using both criminal justice and administrative measures.
5. The Assembly recommends that member states dismantle the heritage of former communist totalitarian regimes by restructuring the

old legal and institutional systems, a process which should be based on:

- i. the principle of demilitarisation, to ensure that the militarisation of essentially civilian institutions, such as the prison administration or the Ministry of the Interior, which is typical of communist totalitarian systems, comes to an end;
- ii. the principle of decentralisation, especially on the local and regional levels and within state institutions;
- iii. the principle of demonopolisation, which is central to the construction of some kind of a market economy and of a pluralist society;
- iv. the principle of debureaucratisation, which should reduce communist totalitarian overregulation and transfer the power back from the bureaucrats to the citizens.

6. This process must be twinned with the transformation of mentalities (a transformation of hearts and minds) which should have as the main goal to change any fear of undertaking responsibilities, disrespect of diversity, extreme nationalism, intolerance, racism and xenophobia, that are also a part of the heritage of the old regimes. All this should be replaced by democratic values such as tolerance, respect of diversity, subsidiarity and accountability.

7. The Assembly also recommends that criminal acts committed by individuals during the communist totalitarian regime be prosecuted and punished under the regular criminal code. If the criminal code provides for a statute of limitations for some crimes, this can be extended, since it is only a procedural, not a substantive matter. Passing and applying retroactive criminal laws is, however, not permitted. On the other hand, the trial and punishment of any person for any act or omission which, at the time when it was committed, did not constitute a criminal offense according to national law, as long as it was criminal according to the general principles of law recognised by civilised nations,<sup>[2]</sup> is permitted. Moreover, where a person clearly acted in violation of human rights, the claim of having acted under orders excludes neither illegality nor individual guilt.

8. The Assembly recommends that the prosecution of individual crimes goes hand-in-hand with the rehabilitation of people who were convicted of "crimes" which in a civilised society do not constitute criminal acts, and for those people who were unjustly sentenced. In the opinion of the Assembly, material compensation should also be extended to these victims of totalitarian justice, and it should not be (much) lower than the compensation accorded to those unjustly sentenced for ordinary crimes now.

9. The Assembly welcomes the opening of secret service files for public examination in some former communist totalitarian countries. It advises all countries concerned to enable persons affected to examine, should they wish to do so, the files kept on them by the former secret services.

10. Furthermore, the Assembly advises that property which was illegally or unjustly seized by the state, nationalised, confiscated or otherwise expropriated during the reign of communist totalitarian systems in principle be restituted to its original owners *in integrum*, if this is possible without violating the rights of current owners who acquired the property in good faith or the rights of tenants who rented the property in good faith, and without harming the progress of democratic reforms. In cases where this is not possible, just material compensation should be awarded. Controversies and conflicts relating to individual cases of property restitution should be decided by the courts.

11. Concerning the treatment of persons who did not commit any crimes that can be prosecuted in accordance with paragraph 7, but who nevertheless held high positions in the former totalitarian communist regimes and supported them, the Assembly notes that some states have found it necessary to introduce administrative measures, such as lustration or decommunisation laws. The aim of these measures is to exclude persons from exercising governmental power if they cannot be trusted to exercise it consistently with democratic principles, as they have shown no commitment to or belief in them in the past and have no interest or motivation to make the transition to them now.

12. The Assembly stresses that, in general, these measures can be compatible with a democratic state under the rule of law if several criteria are met. Firstly, guilt, being individual, not collective, must be individually proven — this highlights the need for the individual, and not collective, application of lustration laws. Secondly, the right of defence, the presumption of innocence until proven guilty, and the possibility of a proper judicial review of the decision taken must be guaranteed. Revenge may never be a goal of such measures, nor should political or social misuse of the resulting lustration process be allowed. The aim of lustration is not to punish people presumed guilty — this is the task of prosecutors using criminal law — but to protect the newly-emerged democracy.

13. The Assembly thus suggests the following guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law, and focus on threats to fundamental human rights and the democratisation process. Please see the guidelines below, as a reference text.

14. Furthermore, the Assembly recommends that employees with accrued financial benefits, such as pension rights, who are discharged from their position on the basis of lustration laws should not lose their financial rights in principle. In exceptional cases, where the ruling elite of the former regime awarded themselves higher pension rights than to the ordinary population, these could be reduced to the ordinary level.

15. The Assembly recommends that the authorities of the countries concerned verify that their laws, regulations and procedures comply with the guidelines suggested, and revise them, if necessary. This would help to avoid complaints on these procedures to the control mechanisms of the Council of Europe under the European Convention on Human Rights, the Committee of Ministers' monitoring procedure, or the Assembly's monitoring procedure under Order No. 508 (1995) on the honouring of obligations and commitments by member states.

16. Finally, the Assembly calls on all consolidated democracies to step up their aid and assistance, and to intensify their co-operation with former communist totalitarian countries, in particular as far as the support for the development of a civil society is concerned.

#### **Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law**

To be compatible with a state based on the rule of law, lustration laws must fulfil certain requirements. Above all, the focus of lustration should be on threats to fundamental human rights and the democratisation process; revenge may never be a goal of such laws, nor should political or social misuse of the resulting lustration process be allowed. The aim of lustration is not to punish people presumed guilty — this is the task of prosecutors using criminal law — but to protect the newly-emerged democracy.

*a.* Lustration should be administered by a specifically created independent commission of distinguished citizens nominated by the head of state and approved by parliament;

*b.* Lustration may only be used to eliminate or significantly reduce the threat posed by the lustration subject to the creation of a viable free democracy by the subject's use of a particular position to engage in human rights violations or to block the democratisation process;

*c.* Lustration may not be used for punishment, retribution or revenge; punishment may be imposed only for past criminal activity on the basis of the regular Criminal Code and in accordance with all the procedures and safeguards of a criminal prosecution;

*d.* Lustration should be limited to positions in which there is good reason to believe that the subject would pose a significant danger to human rights or democracy, that is to say appointed state offices involving significant responsibility for making or executing governmental policies and practices relating to internal security, or appointed state offices where human rights abuses may be ordered and/or perpetrated, such as law enforcement, security and intelligence services, the judiciary and the prosecutor's office;

*e.* Lustration shall not apply to elective offices, unless the candidate for election so requests — voters are entitled to elect whomever they wish (the right to vote may only be withdrawn from a sentenced criminal upon the decision of a court of law — this is not an administrative lustration, but a criminal law measure);

*f.* Lustration shall not apply to positions in private or semi-private organisations, since there are few, if any, positions in such organisations with the capacity to undermine or threaten fundamental human rights and the democratic process;

*g.* Disqualification for office based on lustration should not be longer than five years, since the capacity for positive change in an individual's attitude and habits should not be underestimated; lustration measures should preferably end no later than 31 December 1999, because the new democratic system should be consolidated by that time in all former communist totalitarian countries;

*h.* Persons who ordered, perpetrated, or significantly aided in perpetrating serious human rights violations may be barred from office; where an organisation has perpetrated serious human rights violations, a member, employee or agent shall be considered to have taken part in these violations if he was a senior official of the organisation, unless he can show that he did not participate in planning, directing or executing such policies, practices, or acts;

*i.* No person shall be subject to lustration solely for association with, or activities for, any organisation that was legal at the time of such association or activities (except as set out above in sub-paragraph *h*), or for personal opinions or beliefs;

*j.* Lustration shall be imposed only with respect to acts, employment or membership occurring from 1 January 1980 until the fall of the communist dictatorship, because it is unlikely that anyone who has not committed a human rights violation in the last ten years will now do so (this time-limit does not, of course, apply to human rights violations prosecuted on the basis of criminal laws);

*k.* Lustration of "conscious collaborators" is permissible only with respect to individuals who actually participated with governmental offices (such as the intelligence services) in serious human rights violations that actually harmed others and who knew or should have known that their behaviour would cause harm;

*l.* Lustration shall not be imposed on a person who was under the age of 18 when engaged in the relevant acts, in good faith voluntarily repudiated and/or abandoned membership, employment or agency with the relevant organisation before the transition to a democratic regime, or who acted under compulsion;

*m.* In no case may a person be lustrated without his being furnished with full due process protection, including but not limited to the right to counsel (assigned if the subject cannot afford to pay), to confront and challenge the evidence used against him, to have access to all available inculpatory and exculpatory evidence, to present his own evidence, to have an open hearing if he requests it, and the right to appeal to an independent judicial tribunal.

## II. Explanatory memorandum

by Mr SEVERIN

### Contents

A.	Introduction	paragraphs 1-9
B.	The aim: building up a democratic society	paragraphs 10-20
C.	The method: dismantling communist totalitarian systems	paragraphs 21-41
1.	Principles	paragraphs 21-22
2.	Criminal justice	paragraphs 23-27
3.	Administrative measures	paragraphs 28-32
4.	Institution-building	paragraphs 33-38
5.	Society	paragraphs 39-41
D.	The problem: achieving justice without violating human rights	paragraphs 42-68
1.	Guidelines	paragraphs 42-48
2.	Albania	paragraphs 49-56
3.	Bulgaria	paragraphs 57-60
4.	The Czech Republic	paragraphs 61-65
5.	Germany	paragraphs 66-68
E.	The possible contribution of the consolidated democracies	paragraphs 69-71
F.	Conclusions and recommendations	paragraphs 72-76

### A. Introduction

1. The motion for a recommendation on measures to dismantle communism (Doc. 6615) of 7 May 1992 was referred to the Committee on Legal Affairs and Human Rights on 30 June 1992 (Reference No. 1787). The motion asks for the examination of laws and regulations adopted in a number of countries of central and eastern Europe under the general heading of measures to dismantle communism, to find out whether some of them may be inconsistent with the provisions of the European Convention of Human Rights (ECHR).

2. Mr Espersen (Denmark, Socialist Group) drafted a report to the Assembly (Doc. 7209), which was referred back to committee without debate on 3 February 1995. I will write my report on the background of the previous report and comments received thereon, but I will base myself mainly on the discussion papers by Mr Sandor (Director of the Centre for Political Studies and Comparative Analysis in Bucharest, Romania) on the general question, by Prof. Dr. Schuller (Professor at the University of Konstanz, Germany) on dismantling the past in Germany, and by Dr. Cepl (Judge on the Constitutional Court of the Czech Republic) on the transformation of hearts and minds in eastern Europe.<sup>[3]</sup>

3. I will also take into account the committee hearing on measures to dismantle communist totalitarian systems held on 11 December

1995 in Zurich with the participation of these three experts. Of the literature made available to me I want to mention only the most outstanding, the three-volume book *Transitional Justice — How emerging democracies deal with former regimes*, edited by Neil J. Kritz.

4. The report will be based on a two-pronged approach. Firstly, I want to show why it is so important that the heritage of former communist totalitarian regimes be dismantled, and how it can be done. Secondly, I intend to raise the problem of how to achieve justice without violating human rights. I will also outline solutions to this problem, which I hope will be acceptable to a wide audience. It is not my aim to attack any particular ideology, be it communism or any other; what I am attacking is totalitarianism. The heritage of former totalitarian regimes of the fascist persuasion has been dismantled in this century in several countries, including Germany, Italy and Spain, but since the former totalitarian regimes of the communist persuasion fell only in 1989 or later, Europe is dealing with this particular problem for the first time. I hope that my report will be a contribution to central and eastern European countries currently in this unique transition process, and a guideline for the western European countries and the Council of Europe on how to help these countries to successfully overcome their totalitarian heritage without violating human rights.

5. This process of overcoming the heritage of former communist totalitarian systems, also called "decommunisation", can be defined as dismantling totalitarian legislation, institutions, ruling methods and policies, old mentalities and personal structures (the nomenclature). This is a very complex process which cannot be achieved in a day, but can take years, even decades to fully implement.

6. After five to seven years of "decommunisation" in the countries of central and eastern Europe, it has come to light that a liberal constitutional state under the rule of law is not always in the best position to punish the guilty. This can lead to profound disappointment, especially amongst the victims of the former regime. On the other hand, the fading away with time of the negative images of the totalitarian past have let a certain nostalgic attitude emerge in many of these countries. People wish for — and sometimes, elect back into office — such "values" as equality (unconditional equality instead of equality of chances), collectivism, paternalist protectionism, stability without progress (stagnation), a preordained certain future and other trappings of the conformism specific to the communist totalitarian model.

7. The reason for this nostalgia for the past, for this apparent failure of transition, can be found — amongst other reasons — in the inability of post-communist governments to manage the people's expectations. These governments should have explained, for example, that democracy is not an easy process, that wealth will not be acquired automatically, etc. The peoples of central and eastern Europe would have suffered their current hardships better if they had expected them.

8. As a result, in some former communist totalitarian societies, the initial consensus for change is collapsing, and the old system is becoming an alternative again, against which the ideals of democracy must compete. This cannot be right; especially when one considers the crimes that were committed under the former regimes, some of them as horrific as those committed by the nazis during the second world war, it must be clear that a communist totalitarian system cannot be an alternative. However, in the long run democratisation can only be secured if not only the regime changes, but people's attitudes, behaviour and ways of thinking change as well. This is what we must work for.

9. Nevertheless, measures to dismantle communist totalitarian structures must be applied in such a way as to avoid a split in the society. Such a split would be possible if the former political elite would have grounds to fear revenge or rejection on the part of the new society. It could be dangerous to marginalise this elite, who might then challenge the democratic foundations of the new state. Those members of the former elite who are willing and able to integrate into and support the new democratic society should be given a fair chance to do so.

#### **B. The aim: building up a democratic society**

10. The communist parties in central and eastern Europe destroyed the previously existing states and societal structures and assumed their place, refashioning the most important institutions and staffing them with new or re-indoctrinated personnel. The legal system was also refashioned, to accommodate the communist ideology and its consequences (for example in the prison, or rather gulag system).

11. The purpose in 1989 thus had to be — and still must be — to re-establish a civilised, liberal state under the rule of law. No vacuum must be left: The old structures should be dismantled, but new ones must be built up in their place, so as to allow no room for the phenomenon Mr Sandor has termed the "ghost of communism". A possible repetition of the nightmare whole peoples lived through for decades must be avoided. The dangers that lurk if the heritage of former communist totalitarian systems is not overcome can be described as oligarchy instead of democracy, corruption instead of rule of law, and organised crime instead of human rights.

12. This can only be achieved if there is a mentality change. No residual structures of the old regime should be allowed to survive in political life, the economy, nor in individual and collective behaviour. Totalitarian entities such as communist political organisations or parties, or the secret services, must not be allowed to reintegrate into the new pluralist societies, as long as they use democracy only as a vehicle for their coming back to power and make no contribution to the progress of democracy. Otherwise a "velvet restoration" as a historical trap becomes more than just a possibility.

13. The aim must thus be to create and/or foster institutions of parliamentary democracy on local and on national level. Universal, free, fair and secret elections to these institutions should be held. In fact, all levels of government and society should be democratised. In this framework, the traditional separation of powers between the legislative, the executive, and the judiciary is important. The role of parliament, which is legitimatised by a popular vote, is pivotal: It must control the executive. The principles of accountability and transparency must be

introduced into the administration. But it is also important that the people — the electorate — are given ample opportunity to participate actively in politics and the building up of the new democratic society.

14. It is also very important that the pre-eminence of the state over the citizen, one of the primary features of communist totalitarian systems, is abolished. It is necessary to establish institutions which will be able to defend the individual against the state, for example, administrative courts (in which decisions of the executive can be challenged), human rights ombudsmen, and other such institutions.

15. In the same vein, a demilitarisation of the state and its institutions is necessary. In particular, the troops of the Ministry of the Interior specific to the communist totalitarian systems should be abolished, and the police, the judiciary and the prison administration should be demilitarised. In most countries, dismantling communist totalitarian bureaucracies will also be vital. This can be achieved by deregulation, and by decentralising the administration.

16. The electorate, so as to be able to make informed decisions, must have access to unbiased and factual information. Independent institutions of a democratic society, such as a free press and autonomous research centres and universities, play a vital role in this respect. An independent media can even be seen as the fourth power in the balance-of-power make-up of a state based on the rule of law.

17. The development of a democratic legal and judicial system cannot be underestimated in its significance. Respect for and the safeguarding of human rights are essential: in this context, accession to international legal instruments and integration into multilateral organisations can help to secure the democratisation process. The rule of law must be established internally. Here, a start can be made with the adoption of new democratic constitutions. In most cases, the whole — formerly communist — legal and judicial system needs to be reformed; new laws, especially, for example, in the criminal and the administrative law field, need to be passed and implemented. The independence of the judiciary must be guaranteed.

18. Building up a democratic society should go hand-in-hand with the construction of some kind of a market economy. Old command-economy structures must be dismantled, allowing for free competition. Privatisation and land reform, often on the basis of restitution, have proved fairly successful in the last few years, also as a method of jump-starting the economy. Legally speaking, foundations for these measures must be laid through the recognition and protection of property, the guarantee of freedom of economic activity, of association, and of contract.

19. As far as the economy is concerned, de-monopolisation is of paramount importance. If these monopolies are not dismantled, or are allowed to recreate themselves, the establishment of an economic and financial oligarchy becomes likely — an oligarchy which might be based on corruption, or be the source of corruption.

20. On a more psychological, but no less important level, dealing with the communist totalitarian past implies changing value-systems: tolerance must be fostered and the individual must be given (and taught to use) increased autonomy. People have to learn to accept responsibility for their own actions and end their blind obedience to higher bodies. Above all, they must become more active in all realms of life. This is one of the main aims in overcoming communist totalitarian systems and making sure they never return.

### **C. The method: dismantling communist totalitarian systems**

#### **1. Principles**

21. A democratic state based on the rule of law must, in dismantling the heritage of former communist totalitarian systems, apply the procedural means of such a state. It cannot apply any other means, since it would then be no better than the previous totalitarian regime which is to be dismantled. As I have already mentioned in the introduction, many people feel that a democratic *Rechtsstaat* (a state based on the rule of law) does not have sufficient means at its disposal to ensure that the cause of justice is served and the guilty are punished. However, understandable as it is, this attitude may often stem more from a desire for revenge than for justice. A true *Rechtsstaat* must respect human rights and fundamental freedoms, such as the right to due process and the right to be heard, and it must apply them even to those people who, when they were in power, did not apply them themselves.

22. I think it is important to underline in this context that a democratic state based on the rule of law can defend itself against a resurgence of the communist totalitarian threat. The old totalitarian structures are not stronger than fledgling democracies, as long as these democracies are mobilised. A democratic state based on the rule of law has ample means at its disposal which do not conflict with human rights and the rule of law, using both criminal justice and administrative measures. In the following I will give an overview of the possible measures to be applied.

#### **2. Criminal justice**

23. Criminal acts committed by individuals during the communist totalitarian regime should be prosecuted and punished under the regular criminal code. Some people advocate "wiping the slate clean", by issuing a general pardon for all the crimes committed under the former regime. I do not agree with this approach: It seems to me to be very unfair to the victims of those crimes. Besides, a general pardon could even de-stabilise the new society, if victims or their families should decide to take justice in their own hands. Thus it seems clear that crimes should be prosecuted and punished. If, for example, a former judge allowed judicial murders, or a prison guard tortured a prisoner, he should be brought to trial and sentenced, provided he is found guilty.

24. As I have pointed out, it is important that the regular criminal code is applied. This is necessary, since — in a state based on the rule of law — passing and applying retroactive criminal laws is not permitted. This principle is even included in the European Convention on Human Rights, in Article 7, paragraph 1. There are two common problems that crop up in connection with this rule: first, is it allowed to extend the statute of limitations, and second, does this rule even hold when the crime committed was obviously a crime in reality, even though it was not formally on the statute books?

25. Concerning the first question, the German Constitutional Court has ruled that an extension of the statute of limitations is only a procedural, not a substantive matter, and thus possible in a state based on the rule of law. I agree with this interpretation. Concerning the second question, even the European Convention on Human Rights allows the trial and punishment of any person for any act or omission which, at the time when it was committed, did not constitute a criminal offense according to national law, as long as it was criminal according to the general principles of law recognised by civilised nations (Article 7, paragraph 2). Behaviour which was obviously in violation of human rights is thus punishable, regardless of contrary regulations (which existed, for example, in the German Democratic Republic).

26. However, it still remains difficult sometimes for a state under the rule of law to treat brutal mass executions and other crimes against humanity which were committed in the framework and under the conditions of a totalitarian apparatus like ordinary crimes. In particular, the problem of acting under orders is often raised. The solution is that in cases where the person clearly acted in violation of human rights, even the claim of having acted under orders excludes neither illegality nor individual guilt. This solution has been applied, for example, in Germany, to the guards who shot dead refugees on the GDR-border.

27. The prosecution of individual crimes has to go hand-in-hand with the rehabilitation of people who were convicted of "crimes" which in a civilised society do not constitute criminal acts, and for those people who were unjustly sentenced. It is questionable whether each person unjustly sentenced should have to apply to have his judgment individually overturned in a special proceeding, or whether specific types of politic-judicial ruling should be generally overturned. I would opt for the latter option, but this is open to debate. Material compensation should also be extended to these victims of totalitarian justice, and it should not be (much) lower than the compensation accorded to those unjustly sentenced for ordinary crimes now.

### **3. Administrative measures**

28. The main debate on measures to dismantle communist totalitarian systems is being waged on the admissibility of administrative measures. For example, in the American zone after the second world war, former nazis were habitually excluded from their professions, or their right to vote was withheld. Many central and eastern European countries have been tempted to apply similar administrative measures. However, most countries have found that it would be contrary to the spirit of a constitutional state based on rule of law to deny former Communist Party members the right to vote or to stand for election, or hold elective office.

29. Instead, most countries have opted for some kind of lustration. The aim of lustration is to exclude persons from exercising governmental power if they cannot be trusted to exercise it consistently with democratic principles, as they have shown no commitment to or belief in them in the past and have no interest or motivation to make the transition to them now. Thus lustration is meant to create a breathing space for democracy, where it can lay down roots without the danger that people in high positions of power will try to undermine it. However, lustration is not designed for dealing with criminals (people who manifestly violated human rights under the former regime) — these should be dealt with according to criminal laws and procedures — and not for inactive bystanders, either — who should be presumed innocent until proven guilty and should have a fair chance of participating in the new democratic regime.

30. Lustration still raises a lot of sensitive problems, which will be discussed in the following chapter. In general, it can be said that lustration is only compatible with a democratic state under the rule of law if several criteria are met: First, guilt, being individual, not collective, must be individually proven — this highlights the need for the individual, and not collective, application of lustration laws. Second, the right of defense, the presumption of innocence until proven guilty, and the possibility of a proper judicial review of the decision taken must be guaranteed (more exact guidelines are drawn up in paragraph 46).

31. In this framework it should be added that, while it is not possible to pass and apply retroactive criminal laws, there is a possibility of passing and applying retroactive regulations added to administrative measures, provided they do not impose a disproportionate disadvantage. It has proved generally acceptable, for example, that people who held important posts in the ruling party and its repressive apparatus, or whose participation in repressive acts is proven, are subsequently banned from public service (although their receiving a pension should not automatically be precluded).

32. Another possibility for parliament or government to become active in this field lies in the adoption of a declaration condemning the former regime's crimes. This might be able to counter some of the nostalgia for the communist past which is creeping in some countries, by making the communists' crimes very clear to everyone. The establishment of an investigative committee on the history of communist dictatorship (as in the German Parliament) can also be beneficial.

### **4. Institution-building**

33. Perhaps the parliament is the most important institution in a post-communist society. Based on popular vote, the parliament represents the people, and has the very important role of controlling the executive. The parliament's main "weapon" in this field is the

budget. For this reason it is very important that budgetary procedures be as transparent as possible.

34. On the level of institution-building, decentralisation is a key word. Communist totalitarian systems were necessarily highly centralised. This is not to say that centralised states have to be totalitarian or communist (France is a very good counter-example), but in general it can be said that a more decentralised structure devolves more power to the people and can provide a bulwark against the return of totalitarian communists to power.

35. In this context, support for grass roots civic initiatives and non-governmental organisations can help decentralising "hearts and minds" in central and eastern Europe, to use the metaphor of Dr. Cepl. The independent expression of cultural and ethnic identity can also further the transition from the figure-head protection specific to the communist system (with its characteristics of the maintenance of dependency and subordination to the leading political force) to stimulating social protection that supports the active adaptation to the transition and the development of autonomy for individuals and communities.

36. A reform of the educational system should also be attempted in the long-run. Communist educational systems were based on children learning facts off by heart; facts which were often manipulated to fit the reigning ideology. A reform of the educational system should thus encourage children to think more for themselves, and to develop the ability to critically evaluate so-called facts.

37. The repressive apparatus was central to the remainder in power of the communist totalitarian regimes. Thus the restructuring of the secret services must be of a very high priority. The secret services should be integrated in the structures of the state as a democratic institution, responsible for maintaining national security and not for spying on the population and its beliefs and behaviour. This institution should be fully, and regularly, controlled — preferably by parliament. This control should, in any case, extend to the budget of the secret services.

38. Some countries have opened their secret service files for public examination. The best example is perhaps Germany, where an office has been created for this purpose. Affected persons can examine the files kept on them there, should they wish to do so. Thus it is difficult to use rumours on alleged collaboration with the secret services against political opponents in election campaigns, for example, which contributes to the stability of the newly emerged democratic society.

## 5. Society

39. On the level of the society as a whole, the consolidation of the social protection system can be a strategic guarantee of insuring civic support for the democratisation process. The re-birth of the middle class, of private initiative and entrepreneurship should be supported, so that the virtues and talents that were characteristic of the communist totalitarian era, such as discipline, submissiveness and obedience (which are neither conducive to change nor adapted to a democratic free market system) are slowly replaced.

40. It is also important that a value-system is fostered which centres on democratic values such as tolerance, human rights and the rule of law. This is perhaps the biggest challenge, since one cannot — and should not — brainwash whole generations of the totalitarian communist ideology and value-system. But once people learn to think for themselves, they might slowly throw off the shackles of the communist ideology of their own accord.

41. In this respect it is vital that the people develop a respect of diversity. The majority can thus not rule unchecked: its policies have to be based also on the protection of various minorities (national, linguistic, sexual and social).

### D. The problem: achieving justice without violating human rights

#### 1. Guidelines

42. This chapter will deal with what I will call "decommunisation", or lustration laws. These laws aim at dismantling the communist totalitarian system by keeping their former proponents from influential positions in one way or another, using administrative measures. (I want to emphasise here that I will not be dealing with criminal law measures in this context — as pointed out in chapter C.2 I am all in favour of taking a firm attitude towards criminals and violators of human rights, who should be prosecuted in accordance with the normal Criminal Code). Many human rights organisations have voiced their concerns on lustration laws, based on their often collective nature, their contrariness to the presumption of innocence and their retroactive effect. Varying degrees of guilt, such as mitigating circumstances, are also often not foreseen in the laws, so that former secret service agents will be treated no more severely than people who were coerced into collaborating with or informing for the secret police.

43. Most people would agree that people who committed crimes or human rights abuses under totalitarian regimes should not be left in positions of power where they can undermine the difficult and delicate transition to democracy. However, criminal offenders are not the only people implicated: many people simply went along with the regime, because they did not have the courage to defy the regime and thus lose all hope of a successful career and a normal life. And who can cast the first stone on them? As Vaclav Havel said in his New Year's Address on 1 January 1990, "All of us are responsible, each to a different degree, for keeping the totalitarian machine running. None of us was merely a victim of it, because all of us helped to create it together".

44. But what degree of complicity in the former regime is to debar people from taking responsible positions in the new democratic

society? If membership alone in a party or organisation, or in the administrative apparatus of the old regime, is enough to disqualify a person, is this not a form of collective punishment and guilt by association which is incompatible with "*Rechtsstaat*" principles and human rights? Lustration laws, especially, are in danger of being misused to win political battles or settle old scores, producing witch-hunts against left-leaning or other political opponents of the current government. Since it is not possible or practical to act against more than relatively few people, some people may also be penalised while others who are no less guilty are left alone. The reliability of secret service files, on the basis of whom many such laws rest, has also been called into question.<sup>[4]</sup>

45. On a different track, purging the former elites of a communist country may cost these countries much of their scarce administrative, managerial and scientific talent, which they can badly afford to lose. In a recent report issued by the Science and Human Rights Program of the American Association for the Advancement of Science,<sup>[5]</sup> the impact of lustration on scientific and academic communities in Bulgaria, the Czech Republic and Germany has been highlighted. While the authors of the report emphasise that those targeted for dismissal had often gained their positions as a result of political favouritism, so that their dismissal served to open up jobs and responsibility for those better qualified professionally who may have been unfairly treated in the past, they underline the threat lustration has posed to the ability of the scientific and academic communities to operate on an independent basis,<sup>[6]</sup> and the threat to scientific freedom in general. The report also criticised the manner in which many allegedly "tainted" scientist were treated, which in many cases lacked due process protection and thus reproduced many of the types of repressive features commonly used under the totalitarian regime itself.

46. To be compatible with a state based on the rule of law, lustration laws must fulfil certain requirements. Above all, the focus of lustration should be on threats to fundamental human rights and the democratisation process; revenge may never be a goal of such laws, nor should political or social misuse of the resulting lustration process be allowed. The aim of lustration is not to punish people presumed guilty — this is the task of prosecutors using criminal law — but to protect the fledgling democracy. Herman Schwartz has defined certain lustration principles,<sup>[7]</sup> the most important of which I will loosely base myself on here to develop a yardstick against which existing laws and regulations can be measured:

*a.* lustration should be administered by a specifically created independent commission of distinguished citizens nominated by the head of state and approved by parliament;

*b.* lustration may only be used to eliminate or significantly reduce the threat posed by the lustration subject to the creation of a viable free democracy by the subject's use of a particular position to engage in human rights violations or to block the democratisation process;

*c.* lustration may not be used for punishment, retribution or revenge; punishment may be imposed only for past criminal activity on the basis of the regular Criminal Code and in accordance with all the procedures and safeguards of a criminal prosecution;

*d.* lustration should be limited to positions in which there is good reason to believe that the subject would pose a significant danger to human rights or democracy, that is to say appointed state offices involving significant responsibility for making or executing governmental policies and practices relating to internal security, or appointed state offices where human rights abuses may be ordered and/or perpetrated, such as law enforcement, security and intelligence services, the judiciary and the prosecutor's office;

*e.* lustration shall not apply to elective offices, unless the candidate for election so requests — voters are entitled to elect whomever they wish (the right to vote may only be withdrawn from a sentenced criminal upon the decision of a court of law — this is not an administrative lustration, but a criminal law measure);

*f.* lustration shall not apply to positions in private or semi-private organisations, since there are few, if any, positions in such organisations with the capacity to undermine or threaten fundamental human rights and the democratic process (lustration is not a tool to fight against oligarchic structures);

*g.* disqualification for office based on lustration should not be longer than five years, since the capacity for positive change in an individual's attitude and habits should not be underestimated (even sentenced criminals are given the chance of parole for good behaviour, so a person who has not committed any crimes should at least be given the same chance); lustration measures should preferably end no later than 31 December 1999, because the new democratic system should be consolidated by that time in all former communist totalitarian countries;

*h.* persons who ordered, perpetrated, or significantly aided in perpetrating serious human rights violations may be barred from office; where an organisation has perpetrated serious human rights violations, a member, employee or agent shall be considered to have taken part in these violations if he was a senior official of the organisation, unless he can show that he did not participate in planning, directing or executing such policies, practices, or acts;

*i.* no person shall be subject to lustration solely for association with, or activities for, any organisation that was legal at the time of such association or activities (except as set out above in sub-paragraph *h*), or for personal opinions or beliefs;

*j.* Lustration shall be imposed only with respect to acts, employment or membership occurring from 1 January 1980 until the fall of the communist dictatorship, because it is unlikely that anyone who has not committed a human rights violation in the last ten years will now do so<sup>[8]</sup> (this time-limit does not, of course, apply to human rights violations prosecuted on the basis of criminal laws);

*k.* Lustration of "conscious collaborators" is permissible only with respect to individuals who actually participated with governmental offices (such as the intelligence services) in serious human rights violations that actually harmed others and who knew or should have known that their behaviour would cause harm (this would not apply, for example, to persons who had tried to deliberately mislead the security services, while pretending to be co-operating);

*l.* Lustration shall not be imposed on a person who was under the age of 18 when engaged in the relevant acts, in good faith voluntarily repudiated and/or abandoned membership, employment or agency with the relevant organisation before the transition to a democratic regime, or who acted under compulsion;

*m.* In no case may a person be lustrated without his being furnished with full due process protection, including but not limited to the right to counsel (assigned if the subject cannot afford to pay for counsel), to confront and challenge the evidence used against him, to have access to all available inculpatory and exculpatory evidence, to present his own evidence, to have an open hearing if he requests it, and the right to appeal to an independent judicial tribunal.

47. The question of financial rights is a very tricky one. In principle, the withdrawing of financial rights such as pension rights can be classified as punishment, and would thus not be admissible. However, there are cases in which the ruling elite in former communist totalitarian countries awarded themselves much higher pension rights than the ordinary population, for example in East Germany sometimes double or three times the normal amount. In these cases, it would seem justified that the pensions of the former "nomenclature" be reduced to the ordinary level. However, employees with accrued benefits who are discharged from their position under the decommunisation laws should not lose their financial rights completely.

48. At this point I intend to make case studies of the different "decommunisation" laws adopted in the various countries, taking Albania, Bulgaria, the Czech Republic, and Germany (in alphabetical order) as examples.<sup>[9]</sup> I will analyse their scope (limited to people employed by the state, for example in the state administration, or also affecting candidates for election to parliament or journalists), their definition and treatment of collaborators, the composition and character of the body taking the decision (a commission, and/or a court), and their treatment of financial rights (granting or withdrawing of pension rights, for example). I will also make clear to what extent these laws are compatible with the principles of a democratic state under the rule of law, basing myself on the general principles enunciated in the two previous chapters, principles which — as members of the Council of Europe — I hope we can all agree upon.

## 2. Albania

49. In the last few months, two laws which can be classified as "decommunisation laws" were adopted and entered into force in Albania: the law on genocide and crimes against the population committed in Albania during the communist regime for political, ideological and religious reasons (of 22 September 1995), and the law on verification of official figures and other individuals related to the protection of the democratic state (of 30 November 1995). I will rely heavily on the observations of the rapporteurs on the honouring of obligations and commitments by Albania, Mr Columberg, Lord Finsberg and Mr Ruffy,<sup>[10]</sup> in my evaluation of these laws.

50. The Albanian decommunisation laws, which are said to be modelled on the Czech law (but actually are not modelled on the currently applicable Czech law, which takes the amendments of the Czechoslovak Constitutional Court into account), proscribe that persons standing for high office — the President of the Republic, parliamentarians, members of the government, high-level administrators, judges, prosecutors, officers of the judicial police, high-level policemen, officers in the army, directors and editors of Albanian radio or television, persons holding leading positions in state insurance and financial institutions, as well as in state banks, rectors and directors of universities and schools of higher education, etc. — are not allowed to have held certain functions during the period of 28 November 1944 and 31 March 1991. A provision which included journalists and employees with higher positions in newspapers with a circulation of over 3 000 copies was struck down by the Constitutional Court on 31 January 1996.

51. These functions are, amongst others, members and candidates of the Political Bureau, secretaries and members of the Central Committee of the Party of Labour of Albania in the districts and analogous levels, ministers, deputies of the People's Assembly, members of the Presidential Council, presidents of the supreme courts, general prosecutors, and employees of the state security services. People registered in the State Security files as collaborators (informers, denounciators, agents, owners of apartments who allowed them to be used by the secret services, witnesses in political trials) are also ineligible for high office. The laws are to stay in force until 31 December 2001.

52. Several Albanian opposition parties, as well as Albanian journalists and international non-governmental organisations have criticised the decommunisation laws. The most important and recurrent criticism concerns the fact that the Albanian laws debar candidates for parliament from election. This could not only be a violation of a right guaranteed under Albania's constitutional provisions — the right to be elected, which can only be withdrawn from the mentally handicapped and from imprisoned convicts, but it might also be a measure which is incompatible with a state based on the rule of law for similar reasons.

53. The composition and character of the commission which will verify whether a candidate for election is "tainted", and thus whether

he may run or not, has also been open to criticism. The commission is alleged to be entirely in the hands of the present government, because the majority of its members are appointed by different ministries. The chairman of the commission has been appointed by parliament (with the votes both of the ruling and the opposition parties), which is a good sign. However, the vice-chairman and one member of the commission have subsequently been appointed by the Council of Ministers (the government), and one member each by the Ministry of Justice, the Interior Ministry, the Ministry of Defence and the National Information Service (the secret service). The commission's neutrality thus seems far from guaranteed.

54. The competencies of the commission, which confer upon it a court-like character, have also been severely criticised. The commission has the right to investigate and to call persons for questioning, and in case of refusal to testify or false testimony, persons shall be criminally liable under the Criminal Code. The Speaker of the Albanian Parliament, Mr Arbneri, has pointed out, though, that the commission as an administrative body cannot itself order such penalties, but has to apply to a court to have such penalties imposed (which has, apparently, not yet happened). Nevertheless, these rights of the commission are not matched by corresponding rights of the accused, such as the right to be heard, the right to get acquainted with the file, or the right to be defended by a lawyer. A similar provision originally included in the Czechoslovak lustration law was struck down by the Constitutional Court (see paragraph 62).

55. The possibility of appeal to the Cassation Court limits the power of the commission somewhat. Mr Arbneri has assured the Committee on Legal Affairs and Human Rights that no candidate will be barred from taking part in the elections until the verdict of the Cassation Court is received, provided the candidate has made an appeal to that court.

56. To become compatible with the principles of a democratic state under the rule of law, the Albanian law would have to be changed in several respects in accordance with the guidelines given in paragraph 46. I will mention only the most important here:

a. scope: the application of the law should be limited to people employed by the state in sensitive positions where they could harm human rights, for example in the state administration, the army, the security services; it should not affect candidates for election to parliament; it should be limited to acts, employment or membership occurring from 1 January 1980 until the collapse of the totalitarian regime;

b. method: the possibility of inaccurate or false files of the security apparatus should be provided for in lustrating "conscious collaborators"; the possibility of persons acting under compulsion should be taken into account;

c. the commission: the composition of the commission should be changed to exclude any possibility of bias (that is to say close relationships of the commissioners to the government, the opposition, or political parties should be avoided).

### 3. Bulgaria

57. The Bulgarian Parliament adopted a lustration law on 9 December 1992, called "Additional Requirements Toward Scientific Organisations and the Higher Certifying Commission". This so-called "Panev" law (named after its author) on the temporary introduction of some additional requirements for the members of the executive bodies of scientific institutions and for the Higher Certifying Commission, was upheld by the Constitutional Court on 11 February 1993, unlike two other Bulgarian lustration laws (one involving banking and the other affecting pensioners), which were struck down by the Constitutional Court. The law ceased to be valid on 3 April 1995, following a decision of parliament to abolish it, but I will mention it here nevertheless as a good example.

58. According to the "Panev" law, all members of (or candidates for election for) governing bodies of universities and research institutes, as well as the Higher Testimonial Commission (a central academic body, with the function, amongst others, of examining and approving the award of academic and scientific degrees) had to submit a written declaration, certifying that they met the new requirement provided for in the law — not having been a former member of the communist "nomenclature" (for example, a former functionary of the Bulgarian Communist Party on top or medium level, an employee or informer of the secret services, or a lecturer in "ideological" subjects). A refusal to sign such a declaration was considered equal to admission that the person in question did not meet this requirement. The requirements were to be applied for a period of five years from the day the law came into effect.

59. The main problem with the "Panev" law was that it did not provide for examination of individual cases by an independent body, nor allowed for a judicial review. It appears likely that some fundamental rights were thus violated by the law, notably the right to due process and the right to be heard. The law was criticised to this effect in the 1993 annual report of the United States State Department on the human rights situation in the world and the 1993 annual report of the International Helsinki Federation for Human Rights.

60. Since the scope of the law was relatively limited, its implementation is said to have affected only about 3 000 people, none of whom had been dismissed from their teaching posts. The main consequence has been that new academic governing bodies have been elected following the new legal provisions in force. Despite the violations of due process protection by the "Panev" law, it can thus be classed as a relatively mild example, because it affected only a small group of people — scientists — and its consequences were not harsh (unlike in Albania, the Czech Republic or Germany, the lustrated persons were not dismissed from their jobs). However, to comply with the guidelines set out in paragraph 46, the law would have had to be modified to:

a. create an independent commission to oversee implementation of lustration;

- b. include full due process protection, including the right to appeal to a court.

#### 4. The Czech Republic

61. One of the most far-reaching measures, and the model for many proposals elsewhere, is the Czechoslovak lustration law, which is now — with the amendments made by the Czechoslovak Constitutional Court — applicable in the Czech and Slovak Republics.<sup>[11]</sup> The law was adopted in October 1991 by the Czechoslovak National Assembly and was meant to stay in force until 31 December 1996, but it has recently been prolonged until 31 December 2000 in the Czech Republic.

62. The scope of the Czech law is rather broad, but more limited than the Albanian one. The Czech law applies to people employed by the state in high positions, for example in the state administration, the army, the state broadcasting corporation and press agency, and state enterprises; it does not affect either candidates for election to parliament, nor journalists, nor managers of private economic enterprises. People who held certain state or Communist Party positions, or who were members of the Security Police or the People's Militia (amongst certain other categories) are banned from holding the above-mentioned posts. Originally, the Czechoslovak law included "conscious collaborators" with the Security Police in the category of people banned, but the Czechoslovak Constitutional Court struck down this provision on 26 November 1992, due to difficulties in proving without doubt that somebody had been a conscious collaborator of the Security Services (because of the unreliability of Secret Service files).<sup>[12]</sup>

63. The Czechoslovak Constitutional Court also struck down all the articles of the lustration law establishing a special commission which was meant to investigate claims that the Ministry of the Interior — responsible for drawing up the "clearance certificates" — had wrongly certified people as "conscious collaborators" of the Security Police. The court held that such a commission would not be an independent body, nor could it have judicial competencies, and thus opened the possibility of redress in the ordinary court system instead.<sup>[13]</sup> The Constitutional Court drew particular attention to the fact that, "as the commission is an administrative body, the provisions of the Code of Criminal Procedure (...) cannot be applied to the proceedings before it and it cannot combine these proceedings with criminal law consequences (...)".<sup>[14]</sup>

64. The International Labour Organisation (ILO) severely criticised the law in its decision of 28 February 1992. It stated that the lustration law had diverged from its original intended purpose of removing from public institutions persons who took part in suppressing human rights, basing exclusions from public service instead on political and ideological opinions. The reaction to the success of the lustration experience was equally mixed: While a leading Czech newspaper, *Lidove Noviny*, called the lustration law "a brilliant example of legal incompetence", the application of which was "completely dependent on (...) the arbitrariness of individual institutions", relying on inaccurate files, in April 1993, Dr. Cepl, Judge at the Czech Constitutional Court, defended his country's record to the committee in December 1995.

65. In general, the Czech lustration law seems to fulfil the conditions outlined in paragraph 46, except that the law should be modified to:

- a. limit lustration to acts, employment or membership occurring between 1 January 1980 and 31 December 1989;
- b. end by 31 December 1999 (in actual fact, disqualification for office based on lustration should not be longer than for five years, which might be reached in the Czech Republic before that date for some persons lustrated between 1991 and 1994).

#### 5. Germany

66. Lustration measures in Germany were based on the unification treaty between the German Democratic Republic (GDR) and the Federal Republic. The treaty established that GDR civil servants could be deemed unfit for employment by the unified German civil service, if they had violated the principles of human rights and the rule of law or had formerly worked for the Ministry of State Security *Stasi*, and if — for this reason — the continuation of their work in their present positions seemed untenable.<sup>[15]</sup> On this basis, questionnaires were sent out to all state employees of the former GDR; in them, various questions were posed on subjects such as membership in political parties or mass social organisations, or orders and decorations received from the GDR. On its basis, a large portion especially of teachers were dismissed (reportedly up to 50 000), although they were compensated by pensions. According to Mr Wolfgang Novak, State Secretary for Education of the eastern German *Land* of Saxony, in his *Land* alone some 13 500 teachers and administrators have been dismissed in the period between 1991 and 1993 on this basis. Few East German judges have been allowed to remain in office.

67. The lustration process in Germany did include — to some extent — examination of evidence by lustration committees, in which the lustrated civil servants were permitted to present defences, including testimony by reliable witnesses to prove that they did not serve or support the regime. Furthermore, the responsible departments had to grant the affected persons full legal hearing in the examination process, during which the truthfulness of the *Stasi* files' contents could also be contested. Access to the court system for a judicial review of the decisions of dismissal was also guaranteed.

68. The German practice is thus comparable to the Czech one, that is to say the scope of people affected in Germany is wider than in Bulgaria, but less wide than in Albania. To be compatible with the guidelines presented in paragraph 46, Germany would have to amend its practice to:

- a. limit lustration to acts, employment or membership occurring from 1 January 1980 through 31 December 1989;
- b. take into account the possibility of inaccurate or false files of the *Stasi* more; questionnaires might also not be the most appropriate method of lustration to provide for the possibility of persons acting under compulsion;
- c. end the effects of lustration by 31 December 1999 (which might admittedly be difficult in cases where civil servants were dismissed that were close to retirement age, but should be attempted with younger ones).

#### **E. The possible contribution of the consolidated democracies**

69. "Decommunisation" is often seen in the West as a problem of the central and eastern European countries. However, the fall of the Berlin wall and the enlargement of Europe's democratic institutions, such as the Council of Europe, have removed the ideological confrontation that once divided Europe. While western European countries used to be able to define themselves by contrasting their system with that of the countries of central and eastern Europe — as "anti-communist", "anti-command-economy", "anti-totalitarian" — this is no longer possible. The consolidated democracies have had to learn to define themselves in positive terms instead, as democratic countries, based on the rule of law, with free-market economies. Filling these positive terms with real meaning has often proved no easier for consolidated western democracies than for the new democracies of central and eastern Europe.

70. The consolidated democracies have to realise that they are in the same boat with the new democracies of central and eastern Europe now: the Berlin wall might not exist in reality any more, but it continues to survive in the hearts and minds of many westerners, who do not pay enough attention to what is going on in "that other part" of Europe. The problems the countries in transition are going through are seen as childhood diseases of democracy, and thus not paid particular attention to. Childhood diseases, if untreated, can prove fatal, though. The danger of a "velvet restoration" of totalitarian regimes in central and eastern Europe (of any colour and ideological persuasion) is real enough, and it is in the West's own interest to make sure a repetition of the cold war is avoided.

71. Thus the consolidated democracies have to get involved, as well. Co-operation and assistance programmes on the intergovernmental level, as implemented by the Council of Europe, the European Union, and other international institutions, are important, and this "democratic development aid" should be stepped up by all means. But it should not be forgotten that the dismantling of the heritage of the former communist totalitarian regimes also includes the transformation of hearts and minds, something that cannot be achieved on the intergovernmental level. The consolidated democracies must help their fledgling cousins to build up a functioning civil society, starting on the grass-roots level. This is where the aid of western European countries can really make a difference.

#### **F. Conclusions and recommendations**

72. It can thus be concluded that the heritage of the former communist totalitarian systems, including (over)centralisation, the militarisation of civilian institutions (such as the prison system, the prosecutor's office or the Ministry of the Interior), bureaucratisation, monopolisation and overregulation, must be dismantled and overcome. The goal must be to create pluralist democracies, based on the rule of law and respect of human rights and diversity, applying the principles of subsidiarity, freedom of choice, equality of chances, economic pluralism and transparency of the decision-making process. The separation of powers, the freedom of the media, the protection of private property and the development of a civil society are some of the means to attain that goal.

73. In dealing with the heritage of the former communist totalitarian regimes, justice has to be accorded to all: both to the victims of the former regime, and to the former ruling elite. The failure to strike the right balance between providing justice and compensation to the victims and giving — non-criminal — members of the former ruling elite a fair chance to integrate into the new democratic society can threaten the foundations of the new state, by respectively disappointing and alienating the victims or by eroding the human rights, basis of the new regime.

74. A democratic state must thus, in dismantling the heritage of former communist totalitarian systems, apply procedural means based on the rule of law. It cannot apply any other means, since it would then be no better than the previous totalitarian regime which is to be dismantled. A democratic *Rechtsstaat* (a state based on the rule of law) does have sufficient means at its disposal to ensure that the cause of justice is served and the guilty are punished — it cannot, and should not, however, cater for the desire for revenge instead of justice. A true *Rechtsstaat* must respect human rights and fundamental freedoms, such as the right to due process and the right to be heard, and it must apply them even to those people who, when they were in power, did not apply them themselves. But a state based on the rule of law can also defend itself against a resurgence of the communist totalitarian threat, since it has ample means at its disposal which do not conflict with human rights and the rule of law, using both criminal justice and administrative measures.

75. In chapter C I have outlined in detail the criminal justice, administrative, institution-building and societal measures to be applied. In chapter D, I have paid particular attention to "decommunisation" or lustration laws, and I have drawn up specific guidelines as to what such administrative measures should look like with a view to achieving justice without violating human rights. I do not want to repeat all this here. My recommendation to those countries of central and eastern Europe who are implementing — or are planning to adopt — such lustration laws or similar administrative measures would be to check whether they comply with the guidelines suggested, and to revise them, if necessary. This will avoid complaints on these procedures to the control mechanisms of the Council of Europe under the European Convention on Human Rights, the Committee of Ministers' monitoring procedure, or the Assembly's monitoring procedure under Order No. 508 (1995).

76. I would also encourage all affected countries to implement the institution-building and other measures suggested in chapter C. The consolidated democracies, in accordance with the ideas set out in chapter E, should also consider stepping up their "democratic development aid", and focusing their aid programmes more specifically on non-governmental and grass-roots activities, to help build up the civil society without which the new democracies overcoming the heritage of former communist totalitarian systems might not survive.

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Reporting committee: Committee on Legal Affairs and Human Rights.

Budgetary implications for the Assembly: none.

Reference to committee: Doc. 7209 and Reference No. 1995 of 3 February 1995.

Draft resolution adopted unanimously by the committee on 20 May 1996.

Members of the committee: Mr *Hagård* (Chairperson), Mr *Schwimmer*, Mrs *Err* (Vice-Chairpersons), Mrs *Aguiar*, MM. *Akçali*, *Alexander*, *Arbnori*, *Bartumeu Cassany*, *Berti*, *Bindig*, *Bobelis*, *Bu\_ar*, *Cimoszewicz*, *Cioni*, *Clerfayt*, *Columberg*, *Deasy*, *Dees*, *Deniau*, *Fenech*, *Filimonov*, *Fogaš*, *Frunđa*, *Fuhrmann*, *Fyodorov*, *Galanos*, Mrs *Gelderblom-Lankhout*, MM. *Grimsson*, *Guenov*, *Gürel*, Mrs *Holand*, MM. *Holovatiy*, *Hunault*, *Jansson*, *Jaskiernia*, *Jeambrun*, *Karas*, *Kelam*, *Kirkhill*, *Koschyk*, *Kovalev*, *La Russa*, *Loutfi*, *Maginas*, *Magnusson*, *Martins*, *Mészáros*, *Moeller*, *Németh*, *Pantelejevs*, *Poppe*, *Rathbone*, *Rhinow*, *Robles Fraga*, *Rodeghiero*, *Rokofyllos*, *Severin*, *Solé Tura*, *Solonari*, *Stretovych*, *Tahiri*, *Trojan*, *Weyts*, Mrs *Wohlwend*.

*N.B. The names of those members who took part in the vote are printed in italics.*

Secretaries to the committee: Mr *Plate*, Ms *Chatzivassiliou* and Ms *Kleinsorge*.

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[1]. By the Committee on Legal Affairs and Human Rights.

[2]. European Convention on Human Rights, Article 7, paragraph 1.

[3]. AS/Jur (1995) 49, AS/Jur (1995) 47 rev., AS/Jur (1995) 45.

[4]. The experience of the Czech Republic shows, for example, that intelligence officers sometimes earned bonuses by entering false names in the file, by attributing information from one person to three or four, or by continuing to register persons as "candidates for collaboration" even after they had refused to work with the secret service.

[5]. Morton H. Sklar and Krassimir Kanev, *Decommunization: A new threat to scientific and academic freedom in Central and Eastern Europe*, Washington D.C., September 1995.

[6]. According to this report, 3 000 Bulgarian scientists and university teachers (about 10% of the total) were excluded from participating in any policy-making activities for five years (page iii). In Germany, 50 000 teachers were dismissed, plus a large portion (up to 25%) of university professors; in the Czech Republic, the official dismissal rate among scientists and teachers reached only 5,6% (page iv).

[7]. Herman Schwartz, *Lustration in Eastern Europe*, Parker School of East European Law, Vol. 1, No. 2 (1994), pp. 141-171.

[8]. Indeed, some people who committed such violations many years ago have since repudiated such acts and the underlying beliefs, and have suffered for those repudiations.

[9]. Other former communist totalitarian countries have adopted — or are considering adopting — similar approaches, but the laws and regulations in these four countries can be seen as the most far-reaching and most rigorously implemented, which is why I have chosen them as examples.

[10]. AS/Jur (1996) 10, pages 10-13.

[11]. From the beginning, the lustration law was hardly applied in the Slovak part of the Czechoslovak Federation, and this pattern did not change following the velvet "divorce" of the two countries.

[12]. Much harm had been done by this provision in the meantime, since in the period preceding the parliamentary elections of June 1992, certain newspapers had illegally published lists of some 140 000 to 160 000 alleged former "collaborators". Many of the lists turned out to be inaccurate or simply false, but they were nevertheless used to fire and stigmatise people, even in private organisations to which the

lustration law did not apply.

[13]. The court of first instance is the regional court in these cases, not the district court.

[14]. Czech and Slovak Federal Republic Constitutional Court Decision on the Screening Law of 26 November 1992, reprinted in Neil J. Kritz, *Transitional Justice*, Volume III, p. 364.

[15]. The German Federal Ministry of the Interior, which has checked the accuracy of my information — for which I am very grateful — has emphasised in this context that the fact alone of having worked for the Ministry of the State Security is thus not a sufficient reason for termination of contract.