

MEMORY OF NATIONS

Democratic Transition Guide

[The Georgian Experience]



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CONTENTS

TRANSFORMATION OF THE POLITICAL SYSTEM	3
DISMANTLING THE STATE SECURITY APPARATUS	8
REGIME ARCHIVES	12
LUSTRATION	19
INVESTIGATION AND PROSECUTION OF THE CRIMES OF THE REGIME	28
REHABILITATION OF VICTIMS	31
EDUCATION AND PRESERVATION OF SITES OF CONSCIENCE	37
TIMELINE OF THE MAJOR EVENTS	40
SOURCES USED AND FURTHER READING	41

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LUSTRATION

GIORGI KLDIASHVILI

INTRODUCTION

In the 20th century, the administration of lustration started from the denazification of Germany after World War II by the decision of the Potsdam Conference. Lustration was carried out in the 90s in the states belonging to Central and Eastern Europe after the fall of the Soviet regime. In other words, lustration is carried out in order to make a switch from an antidemocratic regime to a political system with democratic political order and principles of rule-of-law.

Many of the post-communist states of Eastern Europe have chosen to enact a vetting procedure known as lustration to ban former secret police agents and their informants from holding public office. This practice is part of a global trend toward increasing accountability for human rights violations.¹

In some countries different laws on Lustration were adopted immediately or soon after the fall of the Eastern Block (Czech Republic – 1991, Baltic States – 1990–1995, Hungary – 1992); in some of them, this was done only after years of transformational change (Poland – 1997, Georgia – 2010, Ukraine – 2014). And in some countries, lustration was not adopted at all, like in the Russian Federation, Central Asian countries, etc. Lustration, the vetting of public officials in Central Europe for links to the communist-era security services, has been pursued most systematically in the Czech Republic, Hungary and Poland. Prior attempts to explain the pursuit or avoidance of lustration focused on the differing experiences of communist rule or transition to democracy. A closer examination finds that although the three countries in question had very different histories, there were identical demands for lustration in the early 1990s. These demands were translated into legislation at different times and varied considerably in the range of offices affected and the sanctions imposed.²

This article will try to review the lustration policy that was implemented in Georgia and analyze the implications of lustration for democratization and transitional justice.

First of all, the main reasons for lustration according to general principles and practical decisions in various countries similar to Georgia are:

- To disclose information with regard to secret officers, ones who assisted in the communist regime;
- Possibility to establish the principle of individual responsibility (mainly political);
- Removal from holding public posts of employees pertaining to former criminal regime;
- Initiation of criminal cases and criminal prosecution of persons guilty of mass killings and other crimes against humanity;
- To reveal and eliminate fascist/totalitarian symbols;
- Social and information functions.

Secondly, it has to be emphasized that the Parliamentary Assembly of Council of Europe, in its Resolution N1096 (1996) “On Measures to dismantle the heritage of former communist totalitarian systems” dated June, 27, 1996, grants the following:

- Firstly, guilt, being individual, rather than collective, must be proven in each individual case – this emphasizes the need for an individual, and not collective, application of lustration laws;
- Secondly, the right of defense, the presumption of innocence until proven guilty, and the right to appeal to a court of law 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.³

Georgia is obligated to fulfill the requirements and resolutions of the above resolution within the scope of the Association Agreement between EU and Georgia.

There are two major challenges in terms of lustration in Georgia. First, the lustration process in Georgia started too late, more than 20 years after the fall of the Soviet Union. Second, relevant documents about the staff, officers and former KGB related persons in Georgia are only partially available, making it difficult to find materials needed to ensure that the lustration process is carried out adequately. Unfortunately, the partial destruction of the former state security archive during the Tbilisi War of 1991–1992, as well as the reasonable suspicion that Moscow has taken the appropriate archival materials from Georgia, makes the full-scale lustration difficult. However, the Law of Georgia on Lustration (Law of Georgia Freedom Charter)⁴ is primarily aimed at dismantling of the totalitarian ideology and the recognition of the Soviet Union as a criminal regime, which is a necessary step towards reevaluating the past and recent history of Georgia.

DESCRIPTION OF THE TRANSITION AND CURRENT STATUS

The transition process varied in different states. The Latvian electoral law from 1992 required from all Parliamentary candidates to issue a written statement on the existence of, or lack of, their ties with the Soviet or other secret services. Since 1995, the law on elections of the Latvian Sejm prohibits the election of persons who were active in the Communist Party as well as a range of its partner organizations. Lithuanians created a special

1 Ryan Moltz, “Dealing with communist legacies: the politics of lustration in Eastern Europe”, University of Minnesota Ph.D. dissertation, 2014, <https://conservancy.umn.edu/handle/11299/162684>

2 Kieran Williams, Brigid Fowler, Aleks Szczerbiak, “Explaining Lustration in Central Europe: a ‘post-communist politics’ approach”, in *Democratization*, 2005, 12 (1), 22–43, https://www.researchgate.net/publication/248950483_Explaining_lustration_in_Central_Europe_A_'post-communist_politics'_approach

3 Paragraphs 12, 13 of the mentioned resolution.

4 Law of Georgia No. 1867, 25. 12. 2013, <https://matsne.gov.ge/ru/document/download/1381526/8/en/pdf>

parliamentary commission. Finally, in both abovementioned states former employees of foreign (Soviet or other) intelligence services may not stand for parliamentary elections.

In Hungary, according to the 1992 so-called “Zétényi-Takács law”, after fairly lengthy proceedings the Constitutional Court of Hungary arrived at a decision, the essence of which was as follows: the list of agents can be opened to society, if there is public interest in disclosing the past of the agents.

In Poland, when power changed from the communists to the opposition – “Solidarity” – the government guaranteed inviolability to former communists. The newly elected government announced that a “Thick Line” would be drawn between the past and present.⁵ But in 1997 the first Law “On Lustration” was adopted in order to check the connection of top executives with the security agencies from the communist period, and a fairly rigid model of lustration procedure has started. Since then, Poland checks all persons entering the civil service in terms of their involvement in the former communist regime in the country. The functions pertaining to such examination are entrusted to the Lustration Office of the Institute of National Memory. The corresponding procedure is applied to everyone starting from the President to the vice-principal of a higher educational establishment.⁶

Georgia was not able to adopt a law on lustration immediately after regaining independence. Although, in late 1980’s, and especially in early 1990’s, being a member of the KGB was a stigma in the society; and being accused of being an “agent of KGB” was the worst kind of insult. Open questions about the KGB and the persecution of its crimes have always stayed only on the level of rhetoric.

On April 9, 1991, after the re-establishment of independence by Georgia, during the short time of peaceful development and failed transition, which was due to the radicalization of political life and open confrontation between the radical opposition and the government of the elected president Zviad Gamsakhurdia, the reform of the state security system was forgotten. Moreover, during the escalation of the conflict, the new Georgian Ministry of State Security (based on the Georgian KGB) became a self-isolated and out of control body, refusing to comply with the President’s requests to provide information about secret informers of the KGB and blocking Lustration attempts, which later former high-ranking officials proudly remembered as a sign of professional ethic.⁷

Furthermore, members of the USSR intelligence service took a considerable part of the Archive of the Former Intelligence Committee to Moscow, and most of the remaining Archive was destroyed by a fire during the Tbilisi War. The former KGB’s central building caught fire during the Tbilisi Civil War of 1991–1992. According to the official version from the MIA, as a result of the fire, 210,000 archival files were destroyed – about 80% of the entire collection. The documents that survived were soggy, most of them suffered water damage from the efforts to put out the fire. War and fire affected MIA archives and a large portion of the collection was destroyed as well.⁸

Naturally, one can suppose that the complete content and capacity of these archives will remain unclear and may exceed official approximate numbers. In general, these archives give many reasons for speculation. According to alleged witnesses and participants of the process, some of the important documents from the archive were transferred to the special KGB depository in Smolensk, Russia. A group of Georgian KGB employees escorted the documents, probably in order to sort and then destroy them.

Witnesses claim that those were the documents on the line of intelligence developments, accounts and reports.⁹

After all of the failed attempts to initiate a law on lustration since Georgia regained independence in the 90s, public discourse about lustration law was relaunched in early 2000,¹⁰ after the country’s westernization process started following the “Rose Revolution” of 2003. Although officially the ruling political party the United National Movement supported the process, the draft law on lustration was presented to the Georgian Parliament on November 30, 2005 by the opposition. According to the draft, those who worked in the former Soviet special services, or held high positions in the Soviet Communist Party, or were serving as KGB agents would be banned from holding key positions in the Government, the President’s Administration, or the Defense and Interior Ministries. The list also included the Chair of the Soviet Georgian Television and Radio Broadcasting Committee.

Those wishing to run for elective office would have to disclose a full record of their past links with the Soviet authorities. Even if a candidate appeared to have collaborated with the ex-Soviet secret services, it would be up to the voters to decide whether to elect them.

But even the authors of the draft law admitted that it would be difficult to enforce this proposal, since documentation about those persons who were KGB agents, or collaborated with the secret services was not available in Georgia.¹¹

Although the law was not enacted in the Parliament, lustration became an active topic in political and public discussions.¹² Finally, a tangible lustration started in Georgia in October 2010, when a law on lustration (Freedom Charter) was initiated by Gia Tortladze, a minority MP, and was unanimously supported by the ruling United National Movement party.¹³ The Georgian Parliament adopted the law – Freedom Charter – in May 31, 2011. The Freedom Charter has three main tenets: strengthening national security, prohibiting Soviet and Fascist ideologies and removing any associated symbols, and creating a special commission to maintain a black-list for anyone suspected of collusion with foreign special forces. The law prohibits persons who were employed within the KGB of the USSR or were at the senior management level in the Communist Party of the Soviet Union from

5 Kieran Williams, Brigid Fowler, Aleks Szczerbiak, “Explaining Lustration in Central Europe: a ‘post-communist politics’ approach”, in *Democratization*, 2005, 12 (1), 22–43, https://www.researchgate.net/publication/248950483_Explaining_lustration_in_Central_Europe_A_'post-communist_politics'_approach

6 Volodymyr Goshovskiy, “The genesis of lustration in the world and its significance for the development of law-based society”, in *Leges Si Viata*, January 2017, 33.

7 Sandro Aleksidze, “Those, what happened secretly”, in *Sakartvelos Respublika* N163 (7808), 2. 9. 2015, 7.

8 The Archival Bulletin, N1, 2008, 6–8.

9 Documentary film “Lost History” [*Dakarguli Istoria*], 2014, <https://www.youtube.com/watch?v=5vYlBOxhBj4>.

10 David Paichadze, “Possibility of Lustration in Georgia”, in *RFE/RL*, 27. 9. 2012 <https://www.radiotavisupleba.ge/a/1523602.html>

11 Nino Khutsidze, “Opposition Pushes Law on Lustration”, in *Civil.ge*, 1. 10. 2005, <https://old.civil.ge/eng/article.php?id=11248>

12 “Georgia: ‘Architect Of German Lustration’ Discusses Georgian Archive”, in *Radio Free Europe / Radio Liberty*, 27. 3. 2007, <https://www.rferl.org/a/1075535.html>

13 George Topouria, “Georgia’s not so Freedom Charter”, Transparency International Georgia, 12. 7. 2011, <http://www.transparency.ge/en/blog/georgias-not-so-freedom-charter>

holding key positions in the state. The commission on lustration, established in accordance with this law, dealt with the issues of the eradication of communist symbols in Georgia, including the names of streets and squares, as well as the elimination of monuments, symbolizing the totalitarian past.

In 2011, the Parliament of Georgia unanimously adopted a law on lustration, which also forbade totalitarian socialist and Nazi symbols in public places. This law established work-related restrictions for the former employees of the intelligence agencies of the Soviet Union, as well as former public officials of the Communist Party and Komsomol (All-Union Leninist Young Communist League (AULYCL), or Komsomol). These people couldn't work in executive bodies and in judicial authorities. In addition, the above citizens were unable to hold positions as heads of higher education institutions.

According to Article 9 of the Freedom Charter, positional restrictions apply to those persons, who, from April 25, 1921 until April 9, 1991, served as:

- a/** Secret officials of the former Soviet Union's special services, from the day of Georgia's declaration of independence (April 9, 1991):
 - a/** Have refused to cooperate secretly with the special services of independent Georgia;
 - b/** Were dismissed from the office of secret officials for state security reasons;
 - c/** Broke off their relations with the special services of independent Georgia for unidentified reasons;
- b/** Officers of the former USSR State Security Committee, who, since the day of Georgia's declaration of independence (April 9, 1991), have refused to continue working with the special services of independent Georgia or who, for state security reasons, were refused work at the special services of independent Georgia;
- c/** Members of the Communist Party Central Committees of the former USSR and the Georgian SSR, as well as secretaries of district and city committees;
- d/** Members of the former USSR's and the Georgian SSR's Lenin Communist Youth Union Central
- e/** Committee Bureaus;
- f/** Chairman of the Georgian State Committee on Television and Radio Broadcasting.

The Freedom Charter restricts persons, listed in Article 9, from being elected or appointed to the following state positions:

- a/** "Members of the Georgian government, deputy ministers and ministry department heads, members of the National Security Council, members of Emergency Management Agency, members of Central Election Commission, government members of the Autonomous Republics of Abkhazia and Adjara, general auditor of the State Audit Office and his/her deputies, director of the National Archives and his/her deputies (Legal Entity of Public Law (LEPL) under the Ministry of Justice), head and deputy heads of the President's Administration, head and deputy heads of the Government Administration, head of the State Security Service, his/her deputies and department heads, extraordinary and plenipotentiary ambassadors, envoys, consuls, president and vice-president of the Georgian National Bank, representatives of executive authorities in administrative-territorial units (state trustee – governor), members of national regulatory bodies, executive director of LEPL National Statistics Office and his/her deputies.

- b/** Operational unit employees of the territorial bodies of Ministries of Defense and Internal Affairs, and the State Security Service.
- c/** Judges of the Constitutional and Common Courts of Georgia.
- d/** Rectors of higher education institutions, vice-rectors, deans and department managers; General Director of the Georgian Public Broadcaster, his/her deputies and board members."¹⁴

The list is quite long. The legislator tries to cover the entire political and educational field, which could affect the safety of the state and the future generation. This list partly draws from the experience of former socialist countries; however, it can be extended further to cover more unregulated areas, such as the prosecutor's office, public schools, and so forth. For example, Poland's lustration law also applies to prosecutors.

At the same time, the Charter guarantees the privacy of those persons who admit that they have secretly cooperated or had covert ties with the former Soviet special services. A similar approach is used in Lithuania, where, according to the lustration law, special service employees, who admit their connection with secret services, will be guaranteed confidentiality, but be prohibited from holding state positions.¹⁵

The belated adoption of the law was criticized by some scholars: As doctor of law science, Volodymyr Goshovskiy mentions in his article, as of 2010 neither revanche of communist regime nor influence of anti-democratic ideas associated with it constituted a significant threat. Instead, Georgia encountered a problem of direct armed aggression on the part of the Russian Federation. Why there was no focus on the removal from office of individuals who were involved in the promotion of carrying out actions against the territorial integrity and independence of Georgia by intelligent services of aggressor state on the basis of individual punishment and why the interim measures with regard to the removal of persons suspected of such actions were not introduced – is a rhetorical question.¹⁶

The implementation of the law was criticized by a local NGO, the Institute for Development of Freedom of Information (IDFI). In its article – "Failed Lustration Process in Georgia", authors underlined why the process had stayed "on paper".¹⁷ In order to realize the law's objectives, the Charter of Freedom entailed the creation of a special Commission. According to Article 7 of the law, a commission was to be created at the State Security Service of Georgia (which used to be under the Ministry of Internal Affairs at the time of the adoption of the law) that would collect data on people, who secretly collaborated with the special agencies of the Soviet Union, or on people who are believed to have collaborated with the Soviet agencies through information obtained by legal means. The composition of the Commission (except for members proposed by factions represented in the Parliament of Georgia) and its Code of Conduct shall be set out in regulations developed and approved by the head of the State Security Service of Georgia. The Charter promotes the participation of Members

14 Law of Georgia No. 4717, 31. 5. 2017, <https://matsne.gov.ge/en/document/view/1381526>

15 David Kosař, "Lustration and Lapse of Time: 'Dealing with the Past' in Czech Republic", Eric Stein Working paper No. 3/2008.

16 Volodymyr Goshovskiy, "The genesis of lustration in the world and its significance for the development of law-based society", in *Leges Si Viata*, January 2017, 34–45.

17 "Failed Lustration Process in Georgia", Institute for Development of Freedom of Information, 25. 1. 2016, <https://idfi.ge/en/failed-lustration-in-georgia>

of Parliament in the commission. It is not a legally binding provision for Parliament; however, it is clearly noted that MPs (one member per faction) have the opportunity.

Unfortunately, publicly available information suggests that factions in the existing Parliament (elected in 2016) have not used the opportunity to send their representatives to the Commission under the State Security Service. The composition of the Commission was most recently updated on May 25, 2018; new members included high-ranking officials from the State Security Service and the Ministry of Internal Affairs, with no mention of MPs as members.

On December 2, 2015, the IDFI contacted the Ministry of Internal Affairs and requested information about the creation of the commission and its activities prescribed by the Charter of Freedom. The IDFI wanted to collect data about the following: how many meetings the commission conducted, whether or not a register was created on secret collaborators and employees of the Soviet intelligence agencies (the ones who voluntarily revealed themselves), and how many people are registered there, etc. The Ministry of Internal Affairs forwarded the request to the State Security Service. On December 30, 2015, the IDFI received a response from the latter institution. According to the letter, the commission, based upon the demands of Charter of Freedom, has only met once on May 28, 2014, and the meeting discussed the mechanisms of creating the register required by the Charter. According to Order N167 (Adopted on February 28, 2014), Article 3, section 1, the commission was obligated to meet at least once every three months. The letter also noted that Order N167 that orders the creation of a commission and defines its provisions was annulled by Order N561 of the same Ministry on July 30, 2015. Therefore, taking into account the fact that the commission was created approximately 3 years after the Charter of Freedom entered into force, this means that the commission only existed for a year and 5 months and convened only once.

According to the Legislative Herald of Georgia, on December 21, 2015, the Head of the State Security Service adopted a new order (Order N115) on the creation of the Commission. On December 30, 2015, a new order was adopted (N122) that set May 1, 2016 as the date of the beginning of the work for the Commission. The regulation of minimal mandatory commission gatherings was also changed; this regulation no longer exists.

In January 2018, the IDFI received information¹⁸ from the State Security Service of Georgia indicating that in 2016–2017, the Commission had considered an unspecified number of appeals to look into candidates for high-level positions regarding their connection with Soviet authorities; the Commission did not find any violations of the law. In addition, in 2016, the Commission asked two entities to stop displaying communist totalitarian symbols, and provided requested information to three entities in 2017.

In order to conduct a real lustration process in Georgia, as it was conducted in other former Socialist countries, the IDFI believes it is necessary to recruit an effective commission, which will be interested in implementing the principles of the Charter of Freedom. As of today, the commission implemented on the basis of the law is not functioning and the State Security Service as well as the Parliament of Georgia cannot ensure the Charter's translation into practice.¹⁹

As it was indicated above, one of the main goals of the law is “to provide preventive measures against the principles of communist totalitarian and national socialist (Nazi) ideologies;

remove the symbols and names of cult buildings, memorials, monument, bas-reliefs, inscriptions, streets, squares, villages and settlements of the communist totalitarian regime, as well as prohibit the propaganda instruments and other means of communist totalitarian and national socialist (Nazi) ideologies.” Starting from 2013, Stalin monuments were erected in violation of the law in several places in Georgia by local citizens and soon afterwards many of them were vandalized using red paint.²⁰ Because of numerous similar cases and the division of public opinion towards the personality of Stalin, MPs Levan Berdzenishvili and Tamar Kordzaia initiated amendments. According to MP Berdzenishvili, there were several instances of the restoration of Stalin monuments and the need for such a process to be under the regulation of one particular commission.²¹ To make the law more practically effective, in late 2013, the Charter was amended, mainly with the following changes:

- 1/ Definitions of “Communist Totalitarian Ideology” and “Communist Totalitarian Symbols” were adopted.
- 2/ The following functions: “to ensure security and democratic development of the country, the secret employees of former USSR special services, registration of officials appointed by this Law, voluntary recognition and registry production, as well as prohibit communist totalitarian and fascist ideologies and propaganda, and other aims defined by the Law” were transferred from the State Security Agency to the Ministry of Internal Affairs.
- 3/ If, after a warning from the state commission, the provision banning the public display of totalitarian symbols is still violated, the action will carry a financial penalty of GEL 1,000.

In practice, there have been several cases in recent years when the State Security Service of Georgia warned both leftist (Non-commercial Legal Entity – Public Union Socialist Georgia)²² and neo-fascist groups (Georgia's National Unity)²³ in using totalitarian symbols in public places, there is no information if these organizations were fined according to the law.²⁴ One thing is certain; the work of the commission is far from effective. The commission assembled only once, and to this day there are streets in Georgia named, not only after Stalin but also, after numerous communist leaders and public figures that is contrary to the law.

18 Information received by IDFI on January 17, 2018 in response to the FoI request submitted to the State Security Service of Georgia.

19 “Failed Lustration Process in Georgia”, Institute for Development of Freedom of Information, 25. 1. 2016, <https://idfi.ge/en/failed-lustration-in-georgia>

20 Zaza Tsuladze, “50 Statuts of Stalin one needs to pay while alive”, in VOA, 11 February, 2013, <https://www.amerikiskhama.com/a/georgia-stalin-vandalism/1600958.html>

21 “Amendments Approved at Freedom Charter”, in RFE/RL, 25 December, 2013, <https://www.radiotavisupleba.ge/a/25212436.html>

22 Misha Meparishvili, “SSS warned ‘Socialist Georgia’ not to use Soviet Symbols on 9th of May”, in *NetGazeti*, 8 May, 2018, <http://netgazeti.ge/news/274696/>; Givi Avaliani, “SSS addresses MIA not to allow use of Soviet Symbols in Kakheti”, in *NetGazeti*, 3 August, 2016, <http://netgazeti.ge/news/132500/>

23 Misha Meparishvili, “SSS warned ‘National Unity’ not to use Fascist Symbols”, in *NetGazeti*, 18 May, 2018, <http://netgazeti.ge/news/278145/>; Thea Morrison, “Interior Minister: We Will Act against Fascist Groups”, in *Georgia Today*, 21. 5. 2018, <http://georgiatoday.ge/news/10348/Interior-Minister%3A-We-Will-Act-against-Fascist-Groups>

24 Thea Morrison, “The Banning of Soviet Symbols in Georgia”, in *Georgia Today*, 10. 5. 2018, <http://georgiatoday.ge/news/10215/The-Banning-of-Soviet-Symbols-in-Georgia>

CONSTITUTIONAL COMPLAINT – GEORGIAN CITIZEN NODAR MUMLAURI AGAINST THE GEORGIAN PARLIAMENT

On July 24, 2013, Georgian citizen Nodar Mumlauri filed a complaint with the Constitutional Court, stating that Article 9, Paragraph 1, Subparagraphs c) and d) of the Freedom Charter were contrary to the rights guaranteed by the Constitution. A Lawyer of the Institute for Development of Freedom of Information (IDFI), Davit Maisuradze, examined the decision and wrote an article in order to better understand the restrictions made by the Freedom Charter and the resolution part of the Constitutional Court ruling.

The Constitutional Court complaint was filed by Nodar Mumlauri against the Parliament of Georgia. In the constitutional claim, the applicant pointed out that on June 17, 2013, he participated in the competition for the vacancy of Governor of Telavi municipality, but was unjustifiably removed from the competition, and told that he would be unable to participate based on the above mentioned Article 1, Paragraph c) and d) of the Freedom Charter. The plaintiff indicated in the constitutional claim that he had been a member of the Central Committee Bureau of the Lenin Communist Youth Union of the Georgian SSR, and later worked as secretary of Telavi district committee of the Communist Party. In his constitutional claim the plaintiff pointed out that:

- The restriction on holding state positions prescribed by the disputed norms constituted an act of political retribution, which could be used repeatedly after any parliamentary elections.
- Persons who were restricted from holding state positions listed in the Freedom Charter held important state positions and made decisions prior to the adoption of the Freedom Charter (May 31, 2015).
- The disputed provisions impose the above restriction on persons based solely on the fact that they lived during the Soviet regime – a one-party state that did not leave individuals any alternatives.
- Instead of an absolute prohibition, persons applying for state positions should be examined in terms of their cooperation with Soviet secret services.
- The Freedom Charter did not specify a limitation period, and introduced a permanent ban on holding state positions.
- The Communist Party has not been banned by independent Georgia.
- The above restrictions could have been justified for a period immediately after the collapse of the Soviet Union.
- The disputed norms are contrary to Article 17, Paragraph 1 of the Constitution (the inviolability of a person's honor and dignity), since they do not differentiate between high and low level positions of Soviet Union secret services. Article 17 of the Constitution guarantees a person's right to be treated ethically and with dignity, which was being violated by the disputed norms.
- The disputed provisions contradict Article 14 of the Constitution (all people are born free and equal before the law regardless of race, color, language, sex, religion, political or other opinion, national, ethnic or social origin, property and title, place of residence) by treating individuals differently based on their political views and place of work, depriving them of the opportunity to hold specific state positions based on

their past political activities and the ability to contribute to the country's development. In other words, the disputed provisions were of a discriminatory nature.

- The disputed provisions created an unjustifiable barrier and violated Article 29, Paragraph 1 of the Constitution, according to which, every Georgian citizen has the right to hold any public office, if they meet the requirements set by the law.

The defendant, a representative of the Georgian Parliament, based their argumentation on Georgia's transition period after Soviet collapse, and stated that former party officials had a strong impact on domestic policy.

The respondent also pointed out that the contested provisions intended to prevent negative consequences rather than hold someone responsible, since state positions mentioned in the Freedom Charter are positions of the highest authority that are responsible for important decisions related to the country's internal and foreign policy.

The respondent argued that the plaintiff and other persons in similar circumstances held positions (described in the disputed provision) during the period of the former USSR and, therefore, were creators or supporters of the communist totalitarian regime. The actions or inactions of such persons made possible a regime that is unacceptable for everyone and deserves to be condemned.

The respondent also indicated that the archive data was artificially changed or destroyed, so there was no accurate list of persons who secretly collaborated with the special services of the Soviet totalitarian regime. Consequently, it was impossible to find out what additional work these people performed. According to the respondent, "in the fight against the Soviet totalitarian regime, it's important to take into consideration the whole system and not just individual".

The respondent noted that the disputed provisions were not contrary to Article 14 of the Constitution, since it differentiated between persons of different status. Persons mentioned by the disputed norms are subjects with a distinctive status that are connected to the communist regime and held state positions in the former Soviet Union. The defendant pointed out that the plaintiff had incorrectly understood the content of the first paragraph of Article 17 of the Constitution, since "the public opinion related to an individual is not protected by Article 17". The respondent pointed out that the disputed provisions are not contrary to Article 29 of the Constitution, since the right to hold a state position is not absolute, and must meet the requirements established by law.

The Constitutional Court ruling states that the defendant also referred to the legislation of the former Socialist Republics, which imposed restrictions on certain state positions.

The Constitutional Court ruled the following:

- 1/ The Constitutional Court was going to rule on whether the disputed provisions indefinitely banning certain individuals from holding state positions contradicted Article 17 of the Constitution.
- 2/ "The standing constitutional and legal order is established on diametrically opposed values of the communist system. The principle of the constitutional state, the rule of law, respect for human rights and equality are fundamental values of the Georgian state and its constitutional system."
- 3/ In view of recent history, the state may have a legitimate interest not to allow the recovery of the totalitarian regime in the country. However, this must be carried out by legal mechanisms that are based on rule of law and human rights.

If such mechanisms do not meet constitutional requirements, “the state itself will become like the regime that it is trying to suppress.”

- 4/ Article 17, Paragraph 1 of the Constitution guarantees basic human honor and dignity as essential attributes of social identity and natural rights. “Respect for human dignity means recognizing each human person, and its deprivation or restrictions is unacceptable.” However, the existence of regulations limiting rights protected by the Constitution does not lead to the violation of this right. In each individual case, the Constitutional Court, establishes the compliance of disputed provisions with rights guaranteed by the Constitution by considering the content, goal and intensity of restriction of a right.
- 5/ According to the plaintiff’s position, banning the ability to hold certain positions is a violation of one’s honor and dignity, since this equates the plaintiff to those Soviet intelligence officials, who refused to work for the security services of independent Georgia.
- 6/ It is possible that not all people holding managerial positions were directly involved in the activities of the Communist Party of the Soviet regime, and could have even fought against it, as was made evident in 1991–1992, when some of these officials fought for Georgian national interests and not for narrow party ideology. However, “the disputed norms restrict such persons’ right to occupy state positions.”
- 7/ “The disputed provisions establish a blanket ban without considering the scope of activities/authority/competence of those persons who set the internal/external ideological policies of the Communist Party, as well as on those individuals, who did not have the authority to change the situation and influence the decision-making process granted to them by law or practice.”
- 8/ The ban was also applied to persons who formally held the positions (for a short period of time) and did not have time to start performing their duties. Also, according to the disputed provisions, the decision to restrict a person from holding a state position does not have to be based on individual reviews of each person’s activities and functions. The restriction to hold state positions automatically applies to all persons who had previously held a party position.
- 9/ As time passes, the risks and challenges that served as the basis for adopting the disputed provisions, lose relevance. The disputed provisions prevent the plaintiff to hold a number of state positions without an assessment of how realistic the above threats are today, and to what extent is the plaintiff still the same threat to state security.
- 10/ The Court also considered it necessary to consider the social consequences of the disputed norms. The court stated that the disputed norms may lead to social exclusion of certain individuals or groups, therefore, the implementation of these regulations holds a risk of stigmatization.
- 11/ The permanent restriction to hold state positions was clearly conceived as a punitive rather than a resocialization measure. In addition, these measures could not serve as an effective means of preventing threats. The Law on Public Service provides for the possibility even for persons that have committed grave crimes to hold public service positions after serving their sentence.
- 12/ For certain individuals who had occupied high positions in the Communist Party, there may be legitimate public interest in prohibiting them to hold high state positions. However,

the risks coming from these few people cannot serve as constitutional-legislative grounds for a blanket ban.

- 13/ Through the disputed provisions the state has used individuals as a means of achieving its specific goal, and treated them as objects rather than subjects of law. “The state is using these people as the means for protecting national security and achieving the objective of overcoming the communist totalitarian ideology. Such treatment is not consistent with the constitutionally guaranteed right to dignity.”
- 14/ On the basis of all of the above, the Constitutional Court ruled that the disputed norms were contrary to Article 17 of the Convention.

The Constitutional Court also examined the compliance of the disputed norms with Paragraph 1 of Article 29 (“Every citizen has the right to hold any public office, if it meets the conditions established by law”) and Article 14 (all people are born free and equal before the law regardless of race, color, language, sex, religion, political or other opinion, national, ethnic or social origin, property and title condition, place of residence) of the Constitution.

Regarding Article 29, Paragraph 1 of the Constitution, the Constitutional Court noted that the article guarantees every Georgian citizen the right to hold an elected as well as appointed position. At the same time, the court pointed out that this right was not absolute, and that the Constitution provided for the possibility of introducing legislative restrictions on the basis of legitimate goals. The legislator may introduce special requirements for state positions. However, when restricting the right to hold state positions, the legislator is obligated to maintain the balance between the legitimate purpose and employed means.

The Constitutional Court noted in its decision that the “primary requirement of Article 29 of the Constitution is to determine reasonable, fair and non-discriminatory terms for holding any state position. At the same time, the legislation may determine different conditions for holding each specific position based on the nature of the position, its functions, and importance, since these positions are of special importance in terms of the country’s independence, stability and security.” Since the Freedom Charter aims to ensure national security and safety by overcoming communist totalitarian ideology, in certain cases, due to increased public interest, it is possible to limit Article 29 of the Constitution, which guarantees the right to hold state positions, and create a legal order, which will be conducive to achieving the legitimate aim by avoiding potential risks.

Due to the above-mentioned circumstances, the Constitutional Court found that the disputed provisions are not in contradiction with the requirements of Article 29 of the Constitution.

The Constitutional Court also reviewed compliance of the disputed norms with Article 14 of the Constitution (all people are born free and equal before the law regardless of race, color, language, sex, religion, political or other opinion, national, ethnic or social origin, property, title condition and birth, place of residence).

In particular, it is noted in the decision of the Constitutional Court that the Constitutional Court considers it important to separate political views and political activity. “Individuals have private political views whether or not they hold positions in a political party and/or are members of political unions. A person may have political views without joining any political organization as well. Political activity is considered to be a person’s involvement

in political unions, and/or agreeing with the ideology/worldview of a political union and being involved in trying to achieve its goals.”

The Constitutional Court noted that the disputed provisions do not provide different treatment on political grounds. The restriction set by the disputed norms applied to holding political leadership positions in the Communist Party mentioned in Article 8 of the Freedom Charter. Therefore, the Constitutional Court stated that the disputed provisions do not contradict Article 29 of the Constitution.

The Constitutional Court ruled invalid Article 8, Paragraph 1, Sub-paragraph c) and d) of the Freedom Charter, which the Court considered as contrary to Article 17, Paragraph 1 of the Constitution.

Therefore, positional restrictions were removed from those persons who were members of the Communist Party Central Committees of the former USSR and the Georgian SSR, secretaries of district and city committees, and members of the Lenin Communist Youth Union Central Committee Bureaus from February 25, 1921 until April 9, 1991.

The Constitutional Court ruling discussed above can have an important impact on contemporary Georgia.²⁵

LESSONS LEARNT

The Constitutional Court judges made the correct decision to impose a permanent restriction of holding state positions on certain individuals (listed in Article 9 of the Freedom Charter) without examining their functions and activities during the Soviet regime. A parallel can be drawn with Poland, where after adopting the lustration law people related to Soviet special services were prohibited from public service for a period of 10 years.

Also, it is important to differentiate working with the Communist Party, and cooperation with special services. All former Soviet Socialist Republics or socialist countries impose stricter regulations for those individuals who collaborated with security services. In several countries (e.g. Czech Republic, Poland, etc.) the list of these people is public and available to any interested person.

It is important that the Court did not consider these provisions incompatible with Article 29 and Article 14 of the Constitution. The court exhibited a positive position that restrictions made under the Charter do not lead to discrimination on political grounds, but rather is based on the activities or inactivity of certain individuals during the totalitarian regime, and that the right to hold state positions listed in the Charter cannot be more important than national security.

The Constitutional Court ruling discussed above also contains important recommendations that should be taken into account by Parliament. Specifically, changes should be made to the Freedom Charter so that persons listed in Article 9 are being examined in terms of their past work activities and functions prior to applying the prohibitions. Even though the Constitutional Court declared invalid Article 9, Sub-paragraphs c) and d) of the Freedom Charter, the basis for the decision was the blanket nature of the ban that prohibits members of the Communist Party Central Committees of the former USSR and the Georgian SSR, secretaries of district and city committees, and members of the Lenin Communist Youth Union Central Committee Bureaus

from February 25, 1921 until April 9, 1991 to hold state positions listed in Article 8 without individual evaluation. Moreover, the above restriction is permanent. Therefore, if the legislator introduces individual examination of the activities of these people, and makes the restriction temporary (e.g., a 10-year term, as it is in Poland), it will be possible to modify the invalidated norms and reintroduce them in the Freedom Charter. The blanket prohibition can still apply to former employees of Soviet special services that meet the requirements of Article 9 (the plaintiff stated that his low level position was being equated to an employee of special services, which was violating his dignity, since he was trying to distance himself from them), however, other officials should be subjected to individual examinations and the limitation period.

The Freedom Charter includes many other regulations that, for example, aim to combat fascist and Soviet symbols. This issue is extremely important due to the increased frequency of recent attempts to return Soviet monuments (e.g., statues of Stalin). There are many places remaining in Georgia that have streets named after totalitarian leaders (e.g., Stalin Street).

In addition, Article 11 of the Charter provides for the openness of information of those persons, who apply to the election commission to be registered as a candidate. If the election commission determines that the candidate is a person who has collaborated with former Soviet special services, it will address the election administration. If the electoral administration registers the candidate anyway, and the person does not withdraw their candidacy, the commission will publish the secret information about this person. The lustration laws of former socialist countries (for example, Hungary) also apply to persons who wish to hold electoral positions.

The Freedom Charter provides for setting up a Commission inside the State Security Service of Georgia, which also includes members nominated by parliamentary factions. Essentially, the charter implements its regulations through this Commission.

Having a fairly rigid model of lustration procedure can harm the interests of certain citizens and it will overshadow the full process of lustration. The process should be fully harmonized with Resolution 1096 (1996) “On Measures to Dismantle the Heritage of Former Communist Totalitarian Systems” of the Parliamentary Assembly of Council of Europe and its principles.

The biggest challenge facing Georgia is that the former KGB archives are still held by a country that is hostile towards it. It is not proven that these documents will be used as part of a political agenda and against Georgian politicians or public figures, but in the future, there is the risk that the Russian KGB, that according to recent research is a state retaliatory body, can use it for its own political reasons.

RECOMMENDATIONS

In case of Georgia, the following progress was made on the principles of lustration:

- To disclose information with regard to secret officers, ones who assisted in the communist regime – isn’t/can’t be fulfilled;

²⁵ Davit Maisuradze, “The Effects of the Constitutional Court Ruling of October 28, 2015 on the Freedom Charter of Georgia”, Institute for Development of Freedom of Information, December 2015, <https://idfi.ge/public/upload/Davit/court-ruling%20ENG.pdf>

- Possibility to establish the principle of individual responsibility (mainly political) – isn't/ can't be fulfilled;
- Removal from holding public posts of employees pertaining to former criminal regime – isn't/ can't be fulfilled;
- Initiation of criminal cases and criminal prosecution of persons guilty of mass killings and other crimes against humanity – isn't/ can't be fulfilled;
- To reveal and eliminate fascist/totalitarian symbols – is fulfilled;
- Social and information functions – is fulfilled partially.

The “Thick Line” policy that failed during the early 90’s in Poland will fail in other countries as well because there will always be people who will consider it as a lenient approach towards communist regime and an excuse for state criminals. Despite attempts to “forgive and forget” by the first two Polish governments, the issue of dealing with the communist past did not go away. Even though it was not officially declared, Eduard Shevardnadze’s government (1995–2003) in Georgia was following the same principle and the subsequent government delayed the process for 7 years.

Time is crucial in the process of restoring transitional justice. Delays only show the unwillingness of political actors and strengthen rumors that the process is being deliberately postponed.

The best way is to adopt best practices and success stories. Practical guidelines for the implementation of lustration should be implemented and strict principles should be approved.

In our point of view, the establishment of a proper institute for studying this issue is also very important. Examples include the Institute for the Study of Totalitarian Regimes and the Security Service Archives in the Czech Republic and Lustration Office of the Institute of National Memory in Poland.

Widespread access to previously secret documents about secret service agents is the most important point of the lustration process. Even though there was no possibility to adopt a law on lustration and fully examine crimes against citizens in Georgia immediately after regaining independence due to war and the burning of archives, the willingness to declare the Soviet State as a criminal regime is nonetheless crucial for Georgia’s road towards westernization democratic values.

The lustration process in Georgia generally failed and there are objective and subjective reasons: the lack of relevant documents, the delay in time, and the lack of a strong political will. Despite this, the law on lustration is still a very important step forward and a statement the country made in favor of eradicating totalitarian values and the recognition of the Soviet Union as a criminal regime. All of this is clearly necessary to re-evaluate modern history and the recent past.

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