Transitional Injustice? Criteria for Conformity of Lustration to the Right to Political Expression

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In order to promote democratic consolidation, countries undergoing the transition from repressive regimes often attempt to address past injustices and launch deep institutional reforms. These measures may include personnel changes which seek to replace members of the repressive apparatus and high officials of the old regime in the state administration and security forces. In Central and Eastern Europe this is usually conducted under the ‘lustration law’ (screening, vetting law).

For the purpose of this article ‘lustration’ means the examination of certain public officials to determine whether they had been members of or collaborators with the secret police, or held any other listed positions in the repressive apparatus of the totalitarian regime. The lustration law is the law which regulates the process of these examinations. The first lustration law was enacted in Czechoslovakia in 1991, followed by Lithuania in the same year, Bulgaria in 1992, Hungary in 1994, Albania in 1995, Poland in 1997 and Serbia in 2003.

Recent socio-legal inquiry into the reality of post-communist countries suggests that an absence of lustration law, or its poor enforcement, allows people who were closely connected to the old regime to continue exercising influence upon the new democracy and capitalise on their social capital. Research shows that officials of the old regime often employ their networks, which span a large part of the companies designated for privatisation, banks, mass media, security agencies, public administration and the judiciary system, in a massive power conversion process: they seek to exchange political power for economic assets and then use the latter to regain political influence, undermining the integrity of the state and its key organs. Personnel changes are supposed to eliminate corruption and power abuses, which were typical for regimes lacking the rule of law, and contribute to the establishment of a loyal administration and armed forces. Pursuing an adequate lustration policy, some authors suggest, is associated with the consolidation of democracy in Central and Eastern Europe.

However, lustration laws have also generated serious concerns about new human rights violations echoed at the domestic as well as international level. Lustration laws were challenged in the constitutional courts of the respective countries, which cancelled some of their provisions but upheld the laws in their substance.
quently, a few cases may be brought against the Czech Republic, Poland and Hungary, which have recently reconfirmed the validity of their lustration laws, to the European Court of Human Rights.

Internationally, scholars, inter-governmental organisations and human rights groups have directed criticisms at lustration laws. Many of them, such as the Parliamentary Assembly of the Council of Europe, recognise the importance of personnel changes but do not agree with the method of their implementation. The International Labour Organisation alleges that the Czech lustration law discriminates on the basis of political opinion. Several other human rights groups allege that the law violates the right to expression, the right to association, the right to be free from discrimination and the right to participate in public life, as well as some criminal law principles.

The assessment of conformity of lustration laws to international human rights standards is central to this study. This requires an examination of existing lustration laws, a review of the criticisms levelled at them and an assessment of public employment law cases heard in various judicial bodies. This article therefore examines the alleged interference of lustration law with the right to political expression and its extension to the right to association, which has led to the most contested ramifications, including the issue of collective guilt. Can loyalty requirements attached to democratic public service take precedence over the right to association? Can exclusion of members of any political group ever be justified?

In order to pursue its objective, this article draws on the experience of implementation of the Czech lustration law, which has served as a model for other countries in the region. It utilises previous research on the motives behind the approval of the law and historical records on the groups listed in the law. Since most previous studies on the Czech lustration do not take into account the current version of the law, which reflects its constitutional review in 1992, the dissolution of Czechoslovakia in 1993, and its amendment approved in 2000, the article briefly examines its characteristics. The major sections of the law are then tested against international human rights standards which are applied in countries and international bodies that voiced criticisms against lustration laws. The standards of the International Labour Organisation and the European Court of Human Rights that dealt with similar issues brought against Germany complement the analysis of the jurisprudence of the United States’ Supreme Court. The review of public employment cases heard by these bodies provides sets of principles for the examination of the vertical and horizontal categories of lustration laws. Horizontally, we examine first the non-political and then the political categories in the Czech lustration law. The next section analyses the vertical issues in order to determine the distinction, if any, between membership and leadership. The final section summarises the findings, which, we believe, can serve as a reference point for reviewing lustration or similar laws or measures adopted in other countries.

Lustration law as a mirror of the repressive apparatus

The worries expressed by lustration critics are genuine. Lustration laws may be problematic because of possible violation of political rights. However, this article argues that many of these criticisms are not accurate because they have not
Horizontal and vertical axes divide the pyramidal organisation of the repressive apparatus into four major clusters. The validity of the hypothetical divide is to be tested against human rights standards.

FIGURE 1. HORIZONTAL AND VERTICAL DIMENSIONS OF THE REPRESSIVE APPARATUS.

sufficiently differentiated between seemingly homogeneous categories of the past repressive apparatus. Ideally, the examination of each category could clarify the boundaries within which its conclusions are valid. However, such a detailed analysis, though useful for the re-examination of the criticism, would in any case require ex post clustering of various positions. Making the lessons drawn from the case study transferable requires distinguishing between major sections of the past repressive apparatus and testing the validity of such groupings against international human rights standards.

Every lustration law contains substantive and procedural provisions. The substantive provisions contain two lists of positions: one forward-looking and one backward-looking. The forward-looking list concerns the positions in the new democratic system. The backward-looking list specifies which members of the totalitarian repressive apparatus may not automatically fill democratic posts. Every totalitarian society, and particularly its repressive apparatus, is hierarchically organised as a military unit. Each part of the apparatus, with the exception of the top and the bottom, is in a commanding and at the same time in a subordinate position to others. Instead of examining each category, functional criteria are applied to group similar categories into a few clusters. Since the lustration laws mirror the pyramidal organisation of the totalitarian apparatus, it is possible to distinguish its horizontal and vertical dimensions (see Figure 1).

At the horizontal level, we draw a line between political categories and non-political categories. This reflects a widely accepted distinction between lustration and de-communisation. The exact criterion of the distinction is membership of a political party, which differentiates between a group of party members and a group of non-members. The application of the criterion goes beyond nominal definitions in the law, especially when the question is raised of whether membership of the Communist Party in otherwise non-political categories was in reality required or not. For example,
one did not need to be a party member to become a collaborator with the secret police, whereas the People’s Militias of the Czech Republic included only members of the Communist Party. The questions asked are thus what kind of association is protected by the right to political association and what kind of past associations, if any, may justify dismissal from the democratic administration.

The second criterion classifies lustration categories according to an individual’s position in the power hierarchy of the totalitarian regime. Thus the major line in the vertical dimension is drawn at the lowest level possible in order to address the issue of guilt by association or collective guilt, which remains one of the most common reservations against lustration laws. The first cluster therefore contains rank and file members of any organisation listed in the lustration law. It consists of the largest categories, which, if grouped together, would fill the bottom of the repressive apparatus. The second, a residual category, includes all positions above mere membership. These are usually specified categories of leading or commanding posts. The important questions are whether any level of association with totalitarian groups signifies a lack of loyalty to the new democracy and where to draw a line to separate those in leadership positions from other members.

The Czech lustration law

The first lustration law was approved in Czechoslovakia on 4 October 1991. President Havel criticised the bill but did not exercise his veto; Alexander Dubeck, the then head of the Federal Assembly, refused to sign the bill. In 1992 a group of federal deputies submitted a petition to the Constitutional Court requesting its review. The court abrogated several provisions but upheld the law in its substance on 26 November 1992. Although the law was not enforced in Slovakia after the break-up of the Federation at the end of 1992, it was twice extended in the Czech Republic, on 27 September 1995 and 25 October 2000. The second extension is not limited. President Havel tried to veto the extensions but the Chamber of Deputies overruled both attempts. In 2001 a group of deputies again sought the annulment of the law at the Czech Constitutional Court. On 5 December 2001 the court upheld the law and its extension.

The Czech lustration procedure can be broken down into the following steps: an individual who holds or applies for a position specified by the law is required to submit a certificate issued by the Ministry of the Interior about his or her work for, or collaboration with, the secret police at the levels listed in the law. In addition to this, the individual has to submit an affidavit that he or she did not belong to other groups specified by the law. If the person belonged to groups specified in the law, his or her superior has to terminate his or her employment or transfer him or her to a position which is not regulated by the law.

Although the procedure is primarily administrative, both the issue of the positive lustration certificate and disqualification from listed public posts are subject to judicial as well as constitutional review. Everybody can object to the termination of his or her employment at a second-level regional court instead of the first-level district court and can appeal against the decision to the High Court. According to the Czechoslovak Supreme Court, the truthfulness of the certificate issued by the Ministry of the Interior
can be challenged on the basis of Civil Procedures. Other legal protection in this area is guaranteed by the Civil Code’s protection of the personality clauses. Afterwards an individual can submit a constitutional complaint if his or her rights are infringed.

The forward-looking list includes leading or high-ranking positions in the following bodies: the state administration; the Czech Army and the Ministry of Defence; the Security and Information Service, the Police and the Corps of the Castle Police; the offices attached to the constitutional departments (e.g. the offices in the Presidency of the Republic and the Supreme Court); and the public media (Czech Radio, Czech TV and the Czech Press Agency). The requirements also apply to the CEOs and their deputies in state enterprises, organisations and joint ventures where the majority shareholder is the state; senior academic officials and the Presidium of the Czech Academy of Science; state-related legal professions (judge, assessor, prosecutor, investigator, state notary and candidates for these professions) and some security-sensitive concession-based trade. Every individual older than 18 years of age is entitled to apply to the Ministry of the Interior for a lustration certificate. Under the 2000 amendment citizens born after 1 December 1971 are exempted from the process.

Backward-looking provisions are the main focus of this study. The law covers seven categories of organisations, groups and networks of the repressive apparatus. It includes members of the State Security (officers of the secret police), its collaborators at specified levels, high Communist Party officials at the district level and above, members of higher party departments in the political management section of the Corps of National Security, members of People’s Militias, members of purge committees and trainees at the specified Soviet KGB and other political-security universities. Their functions can be classified pursuant to the proposed framework into two horizontal and two vertical groups (see Figure 2).

**Non-political categories**

The ILO Report alleges that the lustration law discriminates on the basis of political opinion, prohibited by Article 1 of the ILO Discrimination Convention. The ILO Report also alleges that the criterion of exclusion does not fall within the exceptions of the general anti-discriminatory requirement (Article 1.2) nor within the scope of the specific security exception (Article 4) because it applies ‘only to persons who are actually engaged in, or justifiably suspected of, activities prejudicial to the security of the state’. Exclusions based on the past record ‘of persons for their association or collaboration with the former political regime are not therefore regarded as measures within the meaning of Article 4 of the Convention’.

The Memorandum, submitted by several human rights groups, follows the ILO objections that the law impairs the right to expression of political opinion guaranteed by the European Convention. Furthermore, it maintains that none of the legitimate restrictions of the right, such as the protection of national security, public order, rights of others or morals, is applicable in this case. The Memorandum holds that the European Convention allows only those restrictions which are consistent with democratic society, and that the lustration law does not fit the criterion because it is based
Notes:

A resident, an agent, a holder of a rental apartment, a holder of a conspiratorial apartment, an informer or an ideological collaborator with the State Security. Promotion to such a level of collaboration was impossible without the so-called 'binding act' of collaboration and a regular systematic evaluation of results by superior officers; see P. Zacek, Prisne tajne: Odhalena fakta o cinnosti StB (Praha, Votobia, 2001), pp. 27–51. Lower ranks of secret collaboration, which included confidential affiliates, secret collaborators in confidential contact and candidates for secret collaboration, were cancelled by the Constitutional Court in 1992.

b The Dzerzinsky University, the University of the USSR Ministry of the Interior and the Higher Political School of the USSR Ministry of the Interior. The universities provided selected experts with a special training. Although many held positions already included in the lustration law, such as in the Ministry of the Interior or the secret police, others were employed/deployed in other state departments, such as the Ministry of Foreign Affairs, mass media etc.

c Also includes members of the CP Central Committee and members of the committee for management of party work, with the exception of those who held these positions only during the period from 1 January 1968 to 1 May 1969.

d Purge committees facilitated broad arbitrary exclusions of hundreds of thousands of people from their jobs after 1948 and 1968. Membership of the committees was not conditional upon membership of the Communist Party.

e The People’s Militias was a paramilitary wing of the Communist Party consisting exclusively of party members.

FIGURE 2. CLASSIFICATION OF BACKWARD-LOOKING LUSTRATION PROVISIONS.

on the principle of collective guilt. A recent criticism of the lustration law reiterates these allegations.30

These arguments, however, are not accurate, if critics treat the backward-looking categories in the same manner. The first criterion of classification distinguishes between members and non-members of the Communist Party. This section analyses the latter, which include members of the State Security and its collaborators, members of purge committees and trainees at the KGB and other Soviet political-security universities. Can these groups be considered as associations of people based on their political opinions? Can an affiliation with these groups be deemed a form of political expression? Answers to these questions require a distinction between the notions of ‘political’ and ‘political expression’. Although they overlap with each other, not everything that is related to politics falls within the scope of ‘political expression’.

Although the tasks of these groups differed slightly, they had similar objectives. They were employed and trained to exercise repression and to report on their fellow citizens. These groups destroyed the post-war renewed democracy, facilitated the
communist takeover in 1948 and held the monopoly of the Communist Party until its very end in 1989. Some of them performed subversive activities to undermine the new democratic system even after 1989. It seems at the outset that the disqualification of people who held positions in this part of the past repressive apparatus from certain positions in the democratic system cannot be considered a violation of the right to hold and express political opinions because of the very nature, aims and acts of these groups. Past membership in the repressive apparatus can hardly imply the kind of political opinions, such as advocating fundamental changes in the institutions of the state, which would be protected by ILO standards.

One of the key questions here is whether the lustration law targets past political opinions. What, for example, were the objectives that the lawmaker wanted to achieve? The legislator seems to think that the threat to the democratic system was not based on the people’s political opinions expressed in the past or at present. If that were the intention of the legislator, many other people would probably be excluded. For instance, the law does not include former propagandists of Marxism–Leninism in schools, enterprises or the army. It does not target former prominent journalists as the professional fabricators of truth. It does not target those who signed the so-called Anti-Charter, a petition against the Charter 77 signatories. If the law were to target these groups it would be backward-looking rather than forward-looking, and punitive rather than preventative.

If the law were to target political opinions expressed at present, it could have followed countries such as Germany to take measures to protect the public administration from members of extremist political organisations. However, the law does not include members or leaders of the Communist Party of Bohemia and Moravia, which is at the edge of democracy, or the Communist Party of Czechoslovakia, which programmatically exceeds the limits of democratic contestation. This would be the logical consequence of the principle of the German Der Materiale Rechtstaat and the principle of ‘militant democracy’, which sprang from a similar experience of a totalitarian regime and became the cornerstone of Central European constitutions.

It appears that the lawmaker had a different objective: the sections under scrutiny were not drafted to target past and current totalitarian political opinions. The expression of political opinions, though propagandist and false, was not considered as risky as membership of the repressive apparatus. The danger to democracy was found in the perpetuation of the activities of the repressive units, not the continuation of the expression of totalitarian views. It seems that the lawmaker assumed that internal activities designed to undermine newly established public institutions constituted a higher threat to the democratic system than external criticisms. The parliament was aware of the possibility of people in leading public positions being subjected to blackmail because of their past. Those who had informed on their fellow citizens or had been involved in the criminal activities that characterised the communist regime were particularly vulnerable in this respect. The legislator sought to prevent the maladministration, information leakage and abuse of power that were entrenched in the past regime, its masters and collaborators.

The very presence of members of the defined categories may undermine people’s trust in the institutions of the new democratic state, especially in the judiciary, administration and police. The particular motive of the parliamentary majority was to
ensure the loyalty of the leaders of the public administration to the state at times of danger or internal crisis. Consequently, it is unsurprising that the law targets members of state organisations and networks who played a central role in the suppression of human rights under the past regime. Although they had belonged to the bodies, organisations and networks of the former political regime, they posed an actual risk to democratic consolidation. The aims and activities of the defined groups, the intentions of the legislator and the prevailing forward-looking concept of the law challenge the validity of the ILO allegations.

The Memorandum overlooks the forward-looking meaning of the law and its role in consolidating democracy in transitional countries. It focuses mainly on the backward-looking dimension of the law and underestimates the reasons behind the risks to the democratic system. In common with the ILO, the authors of the Memorandum do not seem to be aware of the lack of congruence between working for the communist repressive apparatus and the expression of political opinions. The Memorandum is based on the assumption that membership in any part of the repressive apparatus implies political opinions like membership in political parties or associations. Referring to the ILO Report, the Memorandum declares that the Czech lustration law intrudes on the right to expression of political opinions. It then discusses whether the breach falls within the scope of the exception granted by Article 10 (2) of the European Convention. It suggests that the violation is not permissible in democratic society because it does not meet the individual principle. Lustration law ‘is a broad disqualification based solely on holding a particular office at some time during a 41-year period, regardless of the individual person’s view or behaviour’.

The argumentation of the Memorandum thus suffers from inconsistency. The assumption that working for, and having an affiliation with, certain state bodies and networks implies political opinions is utilised as an argument that the law violates the right to political opinion. At the same time the assumption that the work does not imply personal political opinions is used as an argument for the inapplicability of exceptions from the right to political opinion. Apparently the holders of these security positions had certain political opinions. The majority of them were Communists, some of them were Socialists and others may have been Christians. Nevertheless, the law does not target political convictions in the category under scrutiny. To extend this argument ad absurdum, one may object that the law violates the freedom of religion too because a substantial number of the secret police collaborators were adherents of various churches.

There is also another argument why these provisions of the lustration law do not target political opinions or political associations of members of the repressive apparatus. The secret police was a state department, its collaborators were part-time employees paid or rewarded by the state, purge committees were quasi-state bodies, and the experts trained at the Soviet security universities did not form any organisation. Former employees of the state departments can hardly claim the violation of the right to expression or to association once their departments are dissolved, and members of informal groups cannot demand the protection of the right to associate at all. Moreover, although the State Security and its network were dissolved after 1989, the lustration law does not preclude former members from founding or joining a political organisation, expressing their views publicly or being candidates in general
or local elections. What might be violated here is the right of former employees of the totalitarian state to hold senior administrative positions in the new democracy. However, the right to public employment was deliberately omitted from the European Convention of Human Rights,\textsuperscript{41} and was, for the group of secret police members, \textit{de facto} financially compensated by the Czechoslovak government because of its limitation on senior posts.\textsuperscript{42}

Hence there is no breach of the right to political opinion or the right to association in the cases of security/non-CP categories listed in the lustration law. This means that exclusion of members of the totalitarian security apparatus from senior posts in the democratic administration and security forces does not violate their right to expression and association.

\textit{Political categories}

Unlike past security categories, the exclusion of some Communist Party members from leading administrative positions may reflect interference with their right to political opinion and association. The second category consists of high Communist Party officials, including the political management of the State Security, and members of the People’s Militias. The analysis of these groups necessitates answering the question whether all kinds of political belief come under the protection of constitutional and human rights instruments.

It is widely recognised that access to public service can be limited only in the case of unconstitutional speech or activities. Countries evidently differ in their judgement of what is constitutional and what is not. For example, the constitutional practices of the United States and Germany are often considered antipodean, especially in the area of ‘free speech’. The United States values ‘freedom of speech’ more than ‘human dignity’ while Germany prefers ‘human dignity’ to ‘freedom of speech’. Yet in the sphere of freedom of speech versus public employment their judgement of constitutionality differs only in degree.

The United States seeks to hold that public employment may not be conditioned on activities within constitutional protection: ‘[government] may not deny a benefit to a person on a basis that infringes his constitutionally protected speech or association’.\textsuperscript{43} However, the US Supreme Court’s statement that employment may not be conditioned on activities within constitutional protection is, tautologically, valid as long as the activity is protected. Constitutional rights may not be absolute when they encounter some vital government interests.\textsuperscript{44} These government ends are also recognised in the sphere of public administration.

The US Supreme Court has confirmed several qualifications for public employees, such as ‘trust’, ‘integrity and competency’, ‘fitness and loyalty’ and ‘impartiality’, ‘fairness and effectiveness’.\textsuperscript{45} It has also stated that administrative decisions have to meet these conditions objectively as well as subjectively: ‘It is not only important that the Government and its employees in fact avoid practising political justice, but it is also critical that they \textit{appear to the public} to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent’.\textsuperscript{46} For the above reasons, states not only impose preconditions for their employees but are also obliged to do so.\textsuperscript{47}
The requirements imposed on public servants mean that their employment is generally treated differently from that in the private sector. Public employment had sometimes been regarded as a privilege and, although that concept was discarded many years ago, its functions have not changed. Requirements for public service or legitimate state interest in this area remain basically the same. Thus there are still several good reasons for not labelling work in public service as a right.

The same is true in Germany, although its presuppositions and procedures differ from those of the United States. The German Basic Law, adopting the principle of militant democracy, anticipates the compromise between constitutionally protected speech and government interests. The Federal Constitutional Court recognises that expression or association might be considered unconstitutional even before it declares so: ‘Affiliation with or membership in an unconstitutional party, whether or not the Federal Constitutional Court has declared it unconstitutional, is an admissible factor in evaluating the credentials of an applicant …’. This means that judicial dissolution of an association implies almost automatic denial of access to public service for its members and the same may occur also to the members of an organisation that is not (yet) declared unconstitutional. In other words, public employment may also be conditioned on activities within constitutional protection as long as they are not, tautologically, considered unconstitutional.

The loyalty requirements in the context of German militant democracy, which reflects the events that led to World War II, are acknowledged by the European Court of Human Rights. The court stated that ‘the obligation imposed on German civil servants to … actively uphold at all times the free democratic constitutional system … is founded on the notion that the civil service is the guarantor of the Constitution and democracy. This notion has a special importance in Germany because of that country’s experience under the Weimar Republic, which, when the Federal Republic was founded after the nightmare of nazism, led to its constitution being based on the principle of a “democracy capable of defending itself” ’.

Thus, although their aspirations and practice differ, the results in the United States are in principle fairly similar to those in Germany. In both countries the freedom of expression is compromised when it is considered to have inhibited legitimate government interest. It is a matter of degree what is considered constitutional, although the scope of requirements for public employees is certainly much wider, and the freedom of speech and association much smaller, in Germany than in the United States. The degree of constitutionality is shaped by the openness of society, which reflects its historical experience and present situation. How does this apply to the Czech Republic and the lustration law?

Given their similar experiences with totalitarian regimes, the Czech Republic and other Central European countries adopted some principles of the German Constitution (Basic Law) of 1949 based on militant democracy. The concept has implications for the social as well as institutional spheres. In the social domain it implies awareness of the existence of intolerant opinions. On the institutional level it means the absolute rigidity of the substance of the Constitution, the possibility to limit certain rights if necessary in democratic society, the power of the Constitutional Court to dissolve undemocratic political parties, and to secure a public administration loyal to democratic principles.
The Czech Constitution seems to be applied in a more open manner than its German model. The Czech Constitutional Court, so far, has not made any judgement on dissolution of a political party. There is no law that restricts access to public service owing to current affiliation with an extremist organisation. Only the lustration law disqualifies some members of the former Communist Party and the People’s Militias from holding senior public posts and that was in its substance upheld by the Constitutional Court. What was the nature of these organisations? Can they be considered constitutional?

The Communist Party of Czechoslovakia was not a political party as the term is understood in pluralist democracies. The word ‘party’ is derived from the Latin term *pars* that means a ‘part’ and as such it presupposes the existence of at least another ‘part’, another party, or other ‘parts’, parties. The Communist Party took monopoly power in 1948 and maintained it until 1989. It was a monolithic organisation which excluded opposition, prohibited discussion and did not allow free elections. The party was a ubiquitous super-department of the state power.

The Communist Party was unconstitutional in a material sense: the constitution of the regime that grants monopoly power to a political party is merely a fiction of the separation of powers and the rule of law, a semantic façade of a democratic constitution. Although it formally protected some fundamental rights, they were impaired by its inverse legal system and the discretion of the power holders. Moreover, since the Constitution of 1920 laid down the foundation of Czechoslovak democracy and human rights, the fact that the Communist Party overthrew the regime of human rights and legalised its power constitutionally cannot change its unconstitutional character but only serves as further evidence of its unconstitutionality.

After 1989 the unconstitutionality of the Communist Party was reflected in many political, legal and judicial measures. The Czechoslovak parliament passed a few laws that addressed injustices caused by the predecessor regime, such as the Constitutional Law on the Restitution of the Property of the Communist Party to the People and the Law on the Era of Non-Freedom. In 1993 the Czech House of Deputies approved the Law on the Lawlessness of the Communist Regime, which was also upheld by the Constitutional Court. There is also a wide social consensus on the unconstitutionality of the communist regime and its pillars. This triggered the general strike on 27 November 1989. Shortly after, the Communist Party and the People’s Militias ceased to exist.

From an international perspective, the former Communist Party can hardly claim the same legal protection which is given to other parties. For instance, the ILO standards require ‘the absence of the use or advocacy of violent methods’. Leaders of the Communist Party prior to 1989 obviously do not meet these criteria as they issued thousands of public statements glorifying the communist take-over, approving repression and initiating struggles against domestic enemies.

The People’s Militias was a paramilitary organisation, representing an armed fist of the Communist Party. It not only advocated but also adopted violent methods. It was one of the most important actors in facilitating the communist putsch in 1948. In order to protect and defend the party, the people’s democratic regime and the building of socialism, its members were trained to ‘attack,’ ‘defend’ and ‘suppress massive counter-societal expressions’. They accomplished direct or indirect repressive tasks
During the communist regime, such as the liquidation of illegal organisations or ‘persuasion’ of farmers to join cooperatives. Until the end of the regime they had been participating in the suppression of opposition demonstrations. There was no legal ground for the existence of the militias.

It is thus argued that the Communist Party and the People’s Militias were unconstitutional in a material sense and cannot gain the protection of international instruments because they initiated, advocated and systematically exercised human rights violations. The still unanswered question is on what scale a law can affect the members of an unconstitutional organisation or, more precisely, whether it can apply to all of its members or only its leaders. Where to draw a line?

**Vertical distinction between members of an unconstitutional political organisation**

In order to determine the scale on which membership of an unconstitutional organisation may imply exclusion from public administration, the following section briefly reviews the most relevant cases judged by the US Supreme Court, which is more developed in this area than the European Court of Human Rights. The reason for this considerable development is that the United States had to deal with what is considered the darkest period of its legal history, the period of McCarthyism. The broad exclusions and prosecutions of members of the Communist Party and other associations based on the Alien Registration Act and other laws and the operation of the un-American Activities Committee posed serious challenges to the American legal system. How did the United States deal with the period?

Since some US federal and state public employment laws imposed limits on constitutionally protected rights of certain members of certain political organisations, there is a wide range of ‘membership cases’ that have been heard in the US Supreme Court. In some cases membership led to denial of access to the state service, the bar or a labour union. In other cases it resulted in refusal of a passport, disqualification from the ballot and criminal punishment. Here attention will be directed to the denial of access to public service and the bar, as these are the areas that are related to those in the lustration law. In most cases the court applied the First Amendment provision, although the Fifth and the Fourteenth Amendments or the Bill of Attainder clauses were also occasionally applied. From the 1950s to the 1970s the court circumscribed the membership clauses to a minimum. The membership clauses have gradually been limited and the development can be grouped into the following stages: membership, knowing membership, active membership and commitment/sharing of unlawful purposes.

Initial cases dealt with the broad category of membership and gradually shifted towards further requirements. The tendency towards knowing membership became clearer in the cases decided at the beginning of the 1950s. In the case of Adler v. Board of Education the court stated that persons may be denied ‘the privilege of working for the school system … because of … unexplained membership in an organisation found by the school authorities, after notice and hearing, to teach and advocate the overthrow of the government by force or violence, and known by such persons to have such purpose’. In the case of Wieman v. Updegraf the court invalidated — without dissent — an Oklahoma Act and declared that it ‘matters
whether association existed innocently or knowingly’. The court also insisted that previous cases (i.e. Garner, Adler and Gerende) concerned knowing membership. However, in Adler the court went further than ‘knowing membership’. It spoke about the knowledge of the subversive aims of the organisation that were important in the following cases.

At the beginning of the 1960s, in the case of Scales v. the United States, the court stipulated the requirement of active membership and stated that an organisation might embrace legal as well as illegal aims. ‘If there were a blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired’. Thus another relevant condition, accordingly applied in Aptheker v. Secretary of State, was the members’ degree of activity and commitment to the organisation’s purposes, for the court states in Elfbrant v. Russel that ‘those who join an organisation but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees’.

These arguments were summarised in cases heard in the late 1960s and the beginning of the 1970s. In Keyshian v. Board of Regents the split court found a law, previously upheld in Adler, unconstitutionally vague and ‘overbroad’. It formulated the governing standard: ‘legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organisation or which is not active membership violates constitutional limitations’. Correspondingly, in United States v. Robel, the court created guidelines for such law: the statute must not include passive or inactive members or those who may disagree with unlawful aims, and this kind of membership must not have an impact on non-sensitive positions. In Cole v. Richardson, one of the last decisions in this category, the court specified that ‘protected activities include membership in organisations having illegal purposes unless one knows of the purpose and shares a specific intent to promote the illegal purpose’. The majority of the subsequent cases did not deal with subversive organisations but concern political patronage.

These Supreme Court decisions indicate a gradual development of membership cases, which largely depends on changes in external conditions and their internal impact. The membership clauses were evidently an attempt by the US government to uproot communism within the country. The justices could not be unaware of the Cold War. Their judgements and the gradual narrowing down of the scale of membership reflected the decreasing intensity and the détente stage of the Cold War. They also illustrate how difficult it was to reach conclusions in sensitive political cases. Many decisions split the court; some of them over turned its precedents.

The court had to carefully balance state interests and constitutional rights. It had to determine what kind of membership may affect legitimate state interests and what kind of membership enjoys constitutional protection. It ruled that measures enforcing state interest were too broad to be considered legitimate. It understood that membership might be innocent, either because everybody wants ‘to join something’, or a person might simply be ‘foolish’, or because of some other innocent reasons. The justices were, however, mindful that ‘spies and saboteurs do exist’. They did not approve any constitutional right to conspiracy or to overthrow a government by force, violence or illegal or unconstitutional means. They recognised the right to self-pres-
ervation\textsuperscript{85} and acknowledged the legislative finding that anticipated the likelihood of disloyal behaviour of members of subversive organisations.\textsuperscript{86}

How would the US Supreme Court today judge the substantive provisions of the Czech lustration law? The law distinguishes two political categories of the repressive apparatus: high Communist Party officials, including the political management of the secret police, and members of the People’s Militias. According to the US Supreme Court criteria, they must be knowing members of the organisation, be aware of its illegal aims and actively participate in its illegal purpose.

In former Czechoslovakia it was impossible not to be a knowing member of the Communist Party. A person with the intention to join the party first had to become a candidate for membership. The stage of candidacy took at least one year,\textsuperscript{87} during which the applicant and his/her family were screened and his/her devotion to the conclusions of party meetings was tested. Only devoted and loyal candidates were granted membership. As a result, it was impossible to be an un-knowing member of the party.

The US Supreme Court also protects knowing members of organisations seeking to overthrow the government who are not aware of their aims. However, the logic of the Communist Realpolitik in Czechoslovakia means that its illegitimate aims were generally known either from official propaganda, which did not hide its intention to suppress ‘internal enemies’, or by the massive scale of human rights violations.\textsuperscript{88} Communist Party officials who are targeted by the law held decision-making posts in the party and could not, therefore, be unaware of its aims. Moreover, they also seem to meet the condition of active membership because only overactive loyal servants of the totalitarian regime were promoted to such high positions as that at the district level and above.\textsuperscript{89} More importantly, they were in charge of the policies of the party whose activities resulted in gross human rights violations.

The situation is, however, more complex regarding members of the People’s Militias. On one hand, this organisation facilitated the communist coup in February 1948 and this fact was generally known and regularly glorified. Its members were trained to suppress the opposition. It was almost impossible that they did not know its aims while suppressing opposition demonstrations or receiving training to do so. All of them were knowing members of the Communist Party\textsuperscript{90} and, owing to their membership of the People’s Militias, their party membership became active. Yet this category substantially differs from the previous one.

Members of the People’s Militias might not have held any other position in the Communist Party. They might remain ordinary, though active, members of both organisations. Unlike communist officials targeted by the law, they were not paid for their association. Although affiliation with the People’s Militias might indicate active membership of the Communist Party, it did not necessarily mean approval of the aims of both organisations. They might become fully aware of the militias’ aims only after their units started to suppress opposition. Nonetheless, by then, they could not leave the militias as it was difficult to leave any communist association. The fact that, in general, they did not hold any higher party position and were denied the right to disassociate under the threat of the loss of livelihood constitutes a valid argument for limitation of the lustration law.\textsuperscript{91} This category, therefore, can include only officers
of the People’s Militias, as was originally suggested in the parliamentary debate and proposed by President Havel.92

There is another reason to reconsider the scope of the section regarding the People’s Militias. Unlike high Communist Party officials who held positions during the 1968 Prague Spring reform movement and who are consequently exempted from the lustration law, reform members of the People’s Militias do not enjoy any exemptory clause.93

In sum, since the Czech lustration law concerns only high Communist Party officials, it is drawn within the scope of the precedents of the US Supreme Court. Our analysis has shown that the scope of the provision applying to members of the People’s Militias is too broad because of the lack of evidence that they shared the unlawful purposes of the organisation, the fact that they were denied the right to disassociate, and the absence of any exemption. The above analysis has also shown that the membership clause in the United States has been gradually reduced in scope because of the ending of the Cold War and changes in the political threat. Likewise, although the Czech lustration law served important functions during the initial period of transition, the balance between liberty and security is not constant. It is a challenge to review the law in the light of a changing political environment and other considerations. Do members of Peoples Militias pose the same security and political risks in 2003 as they did in 1991? Would their presence, for instance, in a commanding position in the police undermine its credibility?

Conclusion

Many established democracies have public employment laws which do not differ substantially from lustration laws. Many countries treat their public employment laws differently from private sector laws, and the right to expression of public employees is limited when it encounters vital state interests. The United States, Germany and other countries of the EU impose requirements for public service, such as loyalty, impartiality, trustworthiness, effectiveness, political neutrality etc., and domestic as well as international judiciaries recognise these requirements. They were required in various periods, on different levels and with differing intensity. Based on this experience, this article arrives at the following conditions that would make lustration or other special public employment laws consistent with the rights to political expression and association.

(i) At the horizontal level, we distinguish between political and non-political categories. Membership, collaboration and employment in the security and governmental units of the past repressive apparatus cannot be considered a form of political expression or association. However, certain political associations, including the ruling totalitarian party and related political organisations, can claim the protection of the right to political expression and association.

(ii) The constitutional practices of Germany, recognised by the European Court of Human Rights, and the United States suggest that the denial of access to public employment cannot target members of constitutional political organisations. However, not all political associations enjoy the constitutional protection of the rights to political expression and association especially when the organisation adopts or
advocates violent means to pursue its political objectives, as stated by the ILO standards. The right to political expression and association does not cover a right to conspiracy or a right to overthrow a government by force, violence, illegal or unconstitutional means.

(iii) Vertically, it is vital to make distinctions at least among a few levels of engagement in an unconstitutional organisation: membership, active membership and the commitment to share unlawful purposes of the organisation. The exclusion from public service cannot indiscriminately include all rank and file members and those who are not aware of the illegal aims of the organisation. On the other hand, those members who actively participated in their pursuit cannot claim the protection of the right to expression. The findings and their application to the Czech lustration law are illustrated in Figure 3.

(iv) International standards are not rigid principles which would forever remain unchanged. Depending on particular circumstances, the same judiciaries solved the dilemma of liberty versus security differently in different periods. There was an apparent increase in the scope of liberty in the United States as the intensity of the Cold War decreased. The same expansion is apparent in the decisions of the German Constitutional Court and the European Court of Human Rights after the fall of the iron curtain. Now liberty is again limited by the concerns for public security in the world after September 2001.

The current version of the Czech lustration law meets these requirements with the exception of one broad provision. The scope of the section which applies to members of the People’s Militias is too broad. Members of the militias may not have shared the unlawful purposes of the organisation, and they may have been denied the right to disassociate. Moreover, unlike high Communist Party officials who held positions during the Prague Spring in 1968, and who are consequently exempted from the lustration law, reform members of the People’s Militias do not enjoy any exemptory clause. However, the law may conform to international standards if it includes officers of the People’s Militias.

This survey deals only with the rights to expression and association, which are allegedly violated by the lustration law. Although it may also provide readers with answers regarding the right to be free from discrimination and the often questionable right to public employment, it does not thoroughly investigate allegations that the law violates procedural rights. The article takes Czech lustration procedures as they developed; if they had followed the German model, which assigned tens of thousands of reliable personnel to carry out the examinations in the new Länder, many other categories would perhaps have been screened. In other words, the major limitation of the Czech model of lustration is that, owing to its procedures, it cannot include grey categories of members of the repressive apparatus who may or may not have a particular characteristic, such as ordinary members of Peoples Militias. The inclusion of any grassroots political category carries a risk that amounts to unfair collective treatment.

The changing nature of the networks may also point to a need for revision of the lustration law. Post-communist corruption, lack of impartiality and poor efficiency of public administration, problems with law enforcement etc. cannot forever be blamed upon ex-communist players. There are both old and new corruption-generating actors,
### Categories protected by the right to political expression and association

Categories that can be included in lustration laws

Notes:

* The Czech lustration law did not affect an organisation that would be considered constitutional.
* This category is not explicitly specified in the law but it is covered in the membership provision. It is a residual category, if the membership clause is narrowed by the court.
* The category that should be reviewed and narrowed by the constitutional court.
* The unpolitical categories cannot claim the protection of the right to expression. Their vertical divisions were therefore not examined.

#### FIGURE 3. THE SCOPE OF LUSTRATION LAWS THAT CONFORM TO THE RIGHT TO EXPRESSION AND ASSOCIATION AND THEIR APPLICATION TO THE CZECH LUSTRATION LAW.

who use other channels (e.g. party financing) to strengthen their economic influence in Central Europe. However, these suggestions exceed the findings of this article and more research that would justify such revision has yet to be conducted.

There is one more limitation which goes beyond the findings of this article. The higher loyalty requirements cannot apply to all public servants equally but only to senior or security-sensitive public posts. The need to enact the law cannot justify disqualification of all those who associated with the authoritarian regime from participating in the new system. State interests must be protected by the least restrictive means. The Czech lustration law may, to a large extent, satisfy this condition. The forward-looking provisions of the law affect only senior public
positions, the least restrictive means on the vertical scale. On the other hand, on the horizontal scale, it is suggested here that the notions of ‘the state organs and organisations’ are applied too broadly to be necessary in a democratic society when they include senior academic officials.97

Our examination has also found that some aspects of the criticism of the Czech lustration law are of political rather than human rights concern. This is the case with the criticism raised by the International Labour Organisation and the Parliamentary Assembly of the Council of Europe. The criticism from human rights groups, largely rejected in this article, seemed to reflect then genuine concerns about the future of democracy in Czechoslovakia although the character of some of its arguments is also not immune from questioning.

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10 The ‘de-Baathification’ policy pursued by the occupying authorities in Iraq and designed against former members of the Baath Party, one of the political instruments of Saddam’s oppression, is a case in point. Order 1, signed by Paul Bremmer, the head of the Coalition Provisional Authority, in May 2003 facilitated exclusion of certain party members from certain administrative positions.

11 The distinction between lustration and de-communisation is common among scholars writing on the Polish lustration law, which does not include members of the former Communist Party (PZPR). See for example A. Szczersiak, ‘Dealing with the Communist Past or the Politics of the Present? Lustration in Post-Communist Poland,’ Europe-Asia Studies, 54, 4, 2002, pp. 553–554.


13 ‘Act that Prescribes Certain Additional Prerequisites for the Exercise of Certain Positions Filled by Election, Appointment, or Assignment in the State Organs and Organisations’, Act No. 451/1991 Sb.

14 See for example the ILO Report.


16 See CTK (the Czech Press Agency), ‘Havel Declines to Sign Amendments to Screening Laws’, 16 November 2000, ‘Mr President did not sign the laws in 1995 either because he did not want to justify the five-year period of waiting for the bills on the civil service’, a presidential spokesman said, adding that ‘for this reason Havel would not allow another five-year waiting period’. The lustration law is to be incorporated into the law on the civil service.


18 Naturally, prosecutors, investigators and judges cannot be transferred to a lower position.

19 It adopts the feature of the tort law principle res ipsa loquitur (the thing speaks for itself). ‘We know that a wrong occurred and that the persons in question were in control of the instrumentality which brought about the wrong when it occurred, but we do not have more specific evidence to prove the actual event. Nonetheless, the law in this field does not throw its hands up and declare that nothing can be done’, M. Gillis, ‘Lustration and Decommmunisation’, in J. Přibíč & J. Young (eds), The Rule of Law in Central Europe, 56, 64, 1999. However, there can be no doubt that a choice of particular procedures must take into account the scope of law and vice versa; see the section on limitations in the Conclusion to this article. ‘In areas of protected freedoms, regulation based upon mere association and not upon proof of misconduct or even of intention to act unlawfully, must at least be accompanied by standards or procedural protections sufficient to safeguard against indiscriminate application’, United States v. Robel, 389 U.S. 258, 282.

20 See Lustration Law, § 18 (2). See also Act No. 99/1963 Sb., Civil Procedures, § 9 (2) d) and § 10 (2), in the current version.


22 The law concerns only leading positions in the listed organisations. It does not affect employees therein with the exception of those in the justice system. Hence the petition of the Czech unions submitted to the ILO (see ILO Report) appears to be a political rather than social concern since principal officials are not supposed to be members of a union. The same is true in the case of the ILO Report itself, based on the ‘Discrimination (Employment and Occupation) Convention’ (italics added). Cf. n.41 (the attitude of the Parliamentary Assembly of the Council of Europe).

23 See Lustration Law, § 1 (5). See also Act No. 455/1991 Sb., § 27 (2) and its App. No. 3 (Concession-based trade). It concerns trade in areas such as production and transport of firearms, explosives etc. Contra Memorandum, p. 341 (mistakenly assuming that the law ‘apparently can include taxi drivers, antique dealers etc.’).

24 See Act No. 422/2000 Sb., § 1.

25 Two sections of the lustration law concern the repressive apparatus: §§ 2 and 3. The latter is only a modification of the former; it does not cover all members of the secret police but some communist officials in the National Security Corps. Here the attention is focused on the more important section 2.

includes: (a) Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; … (b) Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

Art. 4. Any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the state shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice’.

For the ILO definition of ‘political opinions’ see ILO Report, para. 57, ‘The Convention implies protection in respect of activities expressing or demonstrating opposition to the established political principles … even if certain doctrines are aimed at fundamental changes in the institutions of the state … in the absence of the use or advocacy of violent methods to bring about that result. … The protection of freedom of expression … extend to their collective advocacy …’.

27 ILO Report, para. 79, italics added.

28 Ibid.

29 ‘Convention for the Protection of Human Rights and Fundamental Freedoms’, 4 November 1950, 213 U.N.T.S. 221 (hereinafter European Convention), Art. 10 provides:1. Everyone has the right to freedom of expression …2. The exercise of these freedoms … may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others …’. See for example Boed, ‘An Evaluation of the Legality and Efficacy of Lustration’.

31 See generally Los & Zybortowicz, Privatizing the Police-State; David, ‘Lustration Laws in Action’; Tinker, ‘Paranoids may be Prosecuted’.

32 See Szczerbiak, ‘Dealing with the Communist Past or the Politics of the Present?’, p. 562, arguing that sponsors of lustration were not motivated by securing historical justice but by ‘a desire for openness in public life together with the need to protect national security and prevent so-called “wild lustration” ’. For a comparative overview of legislative intention see David, ‘Lustration Laws in Action’, pp. 392–394. President Havel initially did not seem to understand the intention of the legislator. He found the law too wide but when looking from the perspective of political opinions he criticised it for being too narrow: ‘The law generally spares persons who in their writings and publications have supported lawlessness, have glorified political trials and systematically created a climate of fear in society’, quoted in ILO Report, para. 39.

33 The minimal measures of discontinuity with its predecessor and the lack of repentance are probably the main reason why the Czech Communist Party had long been politically isolated. Until 2002 none of its members had ever been elected to any leading post in the parliament. President Havel never invited the CP to political consultations. Even its ideologically closest potential ally, the Czech Social Democratic Party, approved a statement of non-cooperation with the Communist Party at the party congress held in March 1997. However, the isolation of the CP has changed with the 2003 presidential election; in exchange for the votes of the CP deputies, President Klaus is attempting to ‘rehabilitate’ the CP.

34 See <http://ks-cssp.webpark.cz/>. The party adopted the name of the totalitarian Communist Party, which had changed its name to ‘the Communist Party of Bohemia and Moravia’.


36 See for example Ústava ČR (Constitution of the Czech Rep.), art. 5, 9 (2), and 87 (1) j.


38 Memorandum, p. 339, n.5.

39 In order to legitimise the system the Communist Party nominally tolerated the Czechoslovak Socialist Party and the Czechoslovak People’s Party; see ‘Auxiliary Parties, Mass Organizations, and Mass Media’, in I. Gawdiak (ed.), Czechoslovakia: A Country Study (1987), <http://1cweb2.loc.gov/frd/cs/cstoc.html>. The committees were established soon after the communist takeover in 1948 and after the
Soviet invasion in 1968. Their tasks were to cleanse all segments of society from ‘reactionaries’ or those who disapproved of the Soviet occupation. Consequently, hundreds of thousands of people were dismissed from their jobs. The operation of the committees was entirely illegal, although they received their legal status retroactively. The procedures of the Action Committees of the National Front in 1948 were legalised ex post as measures taken ‘in accordance with law, even in cases which would not have otherwise been in conformity with the appropriate enactments’. See Act No. 213/1948 Sb., quoted in Decision of the Constitutional Court of CSFR, Pl. ÚS 1/92. The post-1968 Screening and Normalisation Commissions applied similar draconian methods. They were ‘regulated’ by the measure issued by the Presidium of the Federal Assembly one year after the Soviet invasion, which, among other things, suspended relevant provisions of the labour code (Presidium of the Federal Assembly Measure No. 99, 22 August 1968, signed by A. Dubcek).

41 The European Court of Human Rights explicitly recognises the omission of the right of access to public service. See Glasenapp v. Germany, App. No. 9228/80, 9 Eur. H.R. Rep. 25 (1986) (Eur. Ct. H.R.), para. 48, ‘Neither the European Convention nor any of its Protocols sets forth any such right. Moreover, … the signatory States deliberately did not include such a right’. The inconsistency between the organisations of the Council of Europe — the Court and the Parliamentary Assembly (Resolution 1096) — reveals political rather than human rights concern about the lustration law. Cf. n. 22 (the attitude of the ILO).

42 For example, if an employee at a security department with a salary of CZK10,000 was dismissed after 20 years of service, he/she was entitled to compensation of CZK80,000 plus a CZK3,800 monthly income paid until his/her retirement; see Act No. 100/1970 Sb., in the version of 169/1990 Sb., on service in the Corps of National Security; J. Spurný, ‘Odsˇkodne´ pro estˇbáky’, Respekt, 8 June 1992, p. 4; R. Křižanová & M. Bartuňek, ‘Dobrˇe zaplaceny´ civil’, Respekt, 23 November 1992, p. 5. For comparison, political prisoners were compensated by CZK2,500 for each month spent in prison; see Rehabilitation Act, No. 119/1990 Sb.

43 Perry v. Sindermann, 408 U.S. 593, 597 (1972), ‘This Court has made clear that even though a person has no “right” to a valuable governmental benefit, and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech’. See also Cole v. Richardson, 405 U.S. 676, 680 (1972), ‘Employment may not be conditioned on an oath denying past, or abjuring future, associational activities within constitutional protection’.

44 For the specification of the limits of the First Amendment rights see Elrod v. Burns, 427 U.S. 347 (1976); for the Fifth Amendment rights see Aptheker v. Secretary of State, 378 U.S. 500 (1964). Although, for example, in the case of Buckley v. Valeo, 424 U.S. 1 (1976), the US Supreme Court failed to recognise a vital government interest in preserving the integrity of the electoral process, it seems that the case could soon be re-examined as unlimited contributions to electoral candidates may threaten the reproduction of the democratic process; see 120 S.Ct. 897, 913–14 (Justice Breyer, concurring); ‘Time to Rethink Buckley v. Valeo’, New York Times, 12 November 1998.


46 Ibid., italics added.

47 See, for example Adler v. Board of Education, 342 U.S. at 493, italics added. (The Court also stated that ‘the right and the duty of the school authorities to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools … cannot be doubted’.) See also German Civil Servant Loyalty Case, p. 234, where the Constitutional Court confirmed that ‘the free democratic constitutional state cannot and must not hand itself over to its destroyers’.

48 After Garner and Adler the US Supreme Court ceased to consider public work as a privilege; see W. W. Alstyne, ‘The Demise of the Right-Privilege Distinction in Constitutional Law’, Harvard Law Review, 81, 1439, 1968. Obviously, labelling something as a privilege cannot justify an arbitrary action, or cannot deny other constitutional protections. Yet the abandonment of the misused term of, or wrongly assigned label to, an object may not mean that that object changed its substance. Cf. G.S. Morris, ‘Employment in Public Services: The Case for Special Treatment’, Oxford Journal of Legal Studies, 20, 167, 2000, arguing that although status-based restrictions were modified or abandoned during the 1960s and 1970s function-based requirements of public employment can justify additional measures to these of the private sector.

49 Civil Servant Loyalty Case, p. 234.

50 Vogt v. Germany, para 51.

51 See notes 35 and 36.

52 See Tucker, ‘Paranoids may be Prosecuted’, p. 75.

53 See Decision of the Const. Ct. of the Czech Rep. of 21 December 1993, Pl. ÚS 19/93,
available at <http://www.concourt.cz/angl_verze/doc/p-19–93.html>. The Communist system was ‘a regime, in which hardly anybody was unaware of the fact that the elections were not elections, that the parties were not parties, that democracy was not democracy, and that the law was not law (at least not in the sense of a law-based state, since the application of the law was politically schizophrenic and everywhere discarded when the interests of those who governed entered into the picture)’. The Constitution effectively impaired human rights. See Ústava ČSSR, 1960, art. 34, ‘Citizens are in all their actions to pay heed to the interests of the socialist state and the society of the working people’.

54 See Ústava ČSSR, art. 4, ‘The leading force in society and in the state was the vanguard of the working class, the Communist Party of Czechoslovakia, a voluntary combat union of the most active and conscious citizens among workers, peasants, and intelligentsia’.

55 For the distinction between real, nominal and semantic constitutions see Karl Loewenstein, Verfassungsllehre (Tübingen, Mohr, 1969), pp. 151–157.

56 The inverse character of the legal system meant it did not serve the protection of human rights but the protection of the monopoly power of the ruling party. Laws violated not only political rights but perhaps all human rights in the abstract sense, which means they would have been nullified if they had been reviewed by a democratically established constitutional court. For example, the freedom of religion was apparently violated by the Penal Code (Act No. 140/1961 Sb.), which included offences such as ‘abuse of a religious position’ and ‘impairment of supervision over churches and religious communities’.

57 See for example the Manifesto of Charter 77, 1 January 1977, <http://www.cmn.com/SPECIAL/cold.war/episodes/19/documents/charter.77/>, ‘One instrument for the curtailment or … complete elimination of many civic rights is the system by which all national institutions and organisations are in effect subject to political directives from the machinery of the ruling party and to decisions made by powerful individuals. The constitution of the republic, its laws and legal norms do not regulate the form or content, the issuing or application of such decisions; they are often only given out verbally, unknown to the public at large and beyond its powers to check …’.

58 See Ústavní listina Československé republiky (Constitution of Czechoslovakia), 1920, English translation available at <http://www2.tltc.ttu.edu/kelly/Archive/czslconst1920.html>.

60 See Act No. 491/1991 Sb.
61 See Act No. 198/1993 Sb.
63 The People’s Militias were dissolved on 21 December 1989; see Jiri Bílek & Vladimir Piláš, ‘Zavodní, Delnicke a Lidove Milice v Ceskoslovensku’, Historie a vojenství, 1995, 3, p. 79. The Communist Party of Czechoslovakia tried to break its continuity with its totalitarian predecessor. It changed its name to the Communist Party of Bohemia and Moravia and expelled a few of its leading members; see ČSTK, ‘Vyloučení M. Jakeše a M. Štěpána z KSČ’, 7 December 1989. The party remains unrepentant to date.

65 See ibid., pp. 91 and 95; for example, 73,606 members of the People’s Militias in Czechoslovakia (92%) participated in the manoeuvres on 30 June 1989 (p. 100).
66 See ibid., pp. 83, 87, 94–95 and 100.
67 For example, it helped to suppress the opposition demonstrations in 1989; see for example ČSTK, 15 January 1989, ‘Several groups of subversive elements attempted carefully prepared provocations organised by diverse Western centres … Members of the Public Security resolutely intervened against these provocateurs … At the request of Prague workers, members of the People’s Militias from Prague enterprises participated in the intervention’.

68 Decision of the Constitutional Court of CSFR, Pl. ÚS 1/92.
69 Here, ‘membership cases’ are distinguished from the ‘loyalty oath’ and ‘self-incrimination’ cases unless they mutually overlap. The subject of the former is a ‘membership’, while the subject of the latter is an ‘inquiry into a membership’. The former deals with consequences of a membership, while the latter deals with the consequences of the refusal to answer the questions on ‘a membership’; see Slochover v. Board of Higher Education, 350 U.S. 551 (1956) (Harlan, J., dissenting); Lerner v. Casey, 357 U.S. 468 (1958).

70 In the case of American Communications Association v. Douds, 339 U.S. 382, 393 (1950), the court recognised that ‘Congress might reasonably find that Communists, unlike members of other political parties, … represent a continuing danger of disruptive political strikes when they hold positions of union leadership’. In Garner v. Los Angeles Board, 341 U.S. 716, 719 (1951), the court ruled that ‘the Federal Constitution does not forbid a municipality to require its employees to execute affidavits disclosing whether or not they are, or ever have been, members of the Communist Party …’. 
LUSTRATION AND POLITICAL EXPRESSION

71 Adler v. Board of Education, 342 U.S. 485, 492 (1952). The court also affirmed the legislative finding concerning ‘membership in a listed organisation found to be within the statute and known by the member to be within the statute …’, ibid., 494; see also Gerende v. Election Board, 341 U.S. 56 (1951).


73 Scales v. the United States, 367 U.S. 203, 229 (1961), ‘The petitioner’s actions on behalf of the Communist Party most certainly amounted to active membership by whatever standards one could reasonably anticipate, and he can therefore hardly be considered to have acted unadvisedly on this score’ (223); see also Noto v. United States, 367 U.S. 290 (1961).

74 Aptheker v. Secretary of State, 378 U.S. 500, 510.


77 United States v. Robel, 389 U.S. 258, 266 (1967). (The court also found that the government aims were disproportionally unbalanced in comparison to the First Amendments’ rights.)


79 The most obvious contradiction includes ‘the Feinberg Law cases’ of Adler v. Board of Education and Keyshian v. Board of Regents, 385 U.S. 589 (1967). In the dissenting opinion to Keyshian the minority found it ‘strange’ that, after 15 years of following Adler, ‘the Court now finds that the constitutional doctrine which has emerged since … has rejected [Adler’s] major premise’ (Clark, J., joined with other three justices, dissenting) (625). Similarly contradictory are the bar cases of Baird v. State Bar of Arizona, 401 U.S. 1 (1971) and Stolar v. Ohio, 401 U.S. 23 (1971) on one hand and Law Student Research Council v. Wadmond, 401 U.S. 154 (1971) on the other.

80 Wieman, 344 U.S. 190.

81 Scales, 367 U.S. 230, ‘A person may be foolish, deluded, or perhaps merely optimistic, but he is not by this statute made a criminal’.


85 See Keyshian, 385 U.S. at 628 (Clark, J., joined with three other justices, dissenting).

Nevertheless, even the majority stated that ‘there can be no doubt of the legitimacy of New York’s interest in protecting its education system from subversion’ (602).

86 The notions of probability and likelihood were often applied in the ‘clear and present danger’ test of criminal conduct; see Dennis v. United States, 341 U.S. 494, 509, ‘The words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited’; see also Brandenburg v. Ohio, 395 U.S. 444, 447. In the non-criminal area see for example United States v. Brown, 381 U.S. 437, 465–475 (White, J., joined with three other justices, dissenting); Law Students Research Council v. Wadmond, 401 U.S. 154, 197 (Marshall, J., joined with another justice, dissenting).


88 During the period of communist rule more than 6,000 people died under unclear circumstances, e.g. shot at the state borders (interview with O. Stehlı´k, Head of the Archive of the Confederation of Political Prisoners, 18 January 2000). The Czechoslovak judiciary condemned at least 257,000 people; see F. Gebauer et al., Soudnı´ perzekuce politicke´ povahy v Československu 1948–1989: Statistický přehled (1993), pp. 57–68

89 In addition to this they had to undergo intensive political training; see ‘The Communist Party of Czechoslovakia, Membership and Training’.

90 Initially, a few members of People’s Militias were also non-members of the CP. However, they were expelled from the organisation shortly after the communist take-over (Bı ´lek & Pila´t, ‘Zavodni, Delnicke a Lidove Milice’, p. 86).

91 See James, Young, Webster v. The United Kingdom, App. No. 7601/76; 7806/77, 4 Eur. H.R. Rep. 38 (1982), para. 55, ‘Assuming that Article 11 does not guarantee the negative aspect of [freedom of association] on the same footing as the positive aspect, compulsion to join a particular trade union may not always be contrary to the Convention. However, a threat of dismissal involving loss of livelihood is a most serious form of compulsion … [which] strikes at the very substance of the freedom guaranteed by Article 11’.

92 See ILO Report, para. 39, ‘The President … is not sure … as regards the People’s Militias, whether the law should not deal only with those having exercised command functions for more than one year …’.

93 See Michnik & Havel, ‘Confronting the Past’, p. 23; Havel states the Lustration law ‘also includes [People’s] Militiamen who in 1968 defended the extraordinary Party Congress at Vysočany
against the Soviet occupation army’. The vast majority of Militiamen were, however, hard-liners who resisted the reform attempts of 1968 and welcomed the Soviet invasion; see Bilek & Pilát, ‘Factory, Workers’ and People’s Militias’, p. 94.


95 See Gillis, ‘Lustration and Decommunisation’; United States v. Robel; and note 19.


97 The category of academic officials also fails the test against lustration goals; see David, ‘Lustration Law in Action’.