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From Prague to Baghdad: Lustration Systems and their Political Effects¹

IN AUGUST 1990, 10 MONTHS AFTER THE VELVET REVOLUTION SHOOK off 40 years of Communist rule, the then newly elected Czechoslovakian president, Václav Havel, complained: ‘We had free elections, . . . we elected a free parliament, we have a free press, we have a democratic government. Yet . . . [t]here still exist and work the powerful structures of the former regime. . . . Many places are governed by the same people as before. They are connected to managers of industrial enterprises. The old bureaucracy persists at all levels.’²

Paul Bremer, head of the Coalition Provisional Authority (CPA) in occupied Iraq in 2003–04, ‘knows all about it’. Members of the administration, the security forces and the judiciary who remain loyal to Saddam Hussein’s regime pose an enormous challenge to rebuilding Iraqi society. Many other transitional countries have encountered the same problem: whether open or clandestine, loyal to the past elite or ‘accommodating’ to the new democracy, members of the anciens régimes who have retained their positions of influence have effectively impaired democratic consolidation in Chile, undermined credibility of privatization in Poland, and bolstered the semi-authoritarian, nationalistic regime in Slovakia between 1994 and 1998.³

¹ The article was first presented at the East–West Talks in the Hong Kong Baptist University on 13 November 2003. It was submitted to the journal in December 2003 and accepted in September 2004. I thank Susanne Choi and two anonymous reviewers for their comments.

² Václav Havel, ‘Vyroci okupace Ceskoslovenska vojsky Varsavskeho paktu’ (Anniversary of the Occupation of Czechoslovakia by the Warsaw Pact Armies), speech, 21 August 1990, available at <http://old.hrad.cz/president/Havel/speeches/>.

³ Slovakia had officially abandoned the Czechoslovak lustration law by the end of 1996. However, the law had not been enforced in Slovakia since the split of the Federation in 1992.

In 1991, Czechoslovaks devised a controversial solution to such difficulties. In order to protect democratic transition, minimize security risks, re-establish trust towards public institutions and address the secrecy that surrounded the past regime, they enacted so-called 'lustration law'.⁴ Lustration law provided for discontinuity of employment for officials in key positions. It either disqualified high-ranking Communist cadres, secret police members and their collaborators from senior posts in the new administration and security forces, or it downgraded them to lower posts in the state hierarchy.

The measure instantly triggered an international outrage. Critics alleged that illiberal means could not lead to liberal ends. Intellectuals, human rights activists and international organizations feared revenge, anticipated new human rights violations and worried that law would be manipulated for political purposes.⁵ In spite of these

⁴ For the literature on lustrations published in the last decade, see, e.g. N. J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Washington, USIP, 1995; M. Los, 'Lustration and Truth Claims: Unfinished Revolutions in Central Europe', *Law and Social Inquiry*, 20: 1 (1995), pp. 117–62; A. Stinchcombe, 'Lustration as a Problem of the Social Basis of Constitutionalism', *Law and Social Inquiry*, 20: 1 (1995), pp. 245–76; V. Cepl and M. Gillis, 'Making Amends after Communism', *Journal of Democracy*, 7: 4 (1996), pp. 118–24; H. Welsh, 'Dealing with the Communist Past: Central and Eastern European Experience after 1990', *Europe-Asia Studies*, 48: 3 (May 1996), 413–28; A. Tucker, 'Paranoids May Be Persecuted: Post-totalitarian Retroactive Justice', *Archives Européennes de Sociologie*, 40: 1 (1999), pp. 56–100; M. Los and A. Zybortowicz, *Privatizing the Police State: The Case of Poland*, New York, St Martin's Press, 2000; R. G. Teitel, *Transitional Justice*, Oxford, Oxford University Press, 2000; N. Letki, 'Lustration and Democratization in East-Central Europe', *Europe-Asia Studies*, 54: 4 (2002), pp. 529–52; A. Szczerbiak, 'Dealing with the Communist Past or the Politics of the Present? Lustration in Post-Communist Poland', *Europe-Asia Studies*, 54: 4 (2002), pp. 553–72; L. Stan, 'Moral Cleansing Romanian Style', *Problems of Post-Communism*, 49: 4 (July/August 2002), pp. 52–62; R. David, 'Lustration Laws in Action: The Motives and Evaluation of Lustration Policies in the Czech Republic and Poland', *Law and Social Inquiry*, 28: 2 (2003), pp. 387–439; R. David, 'Transitional Injustice? Lustration and the Right to Expression', *Europe-Asia Studies*, 56: 6 (2004), pp. 789–812; K. Williams, A. Szczerbiak and B. Fowler, 'Explaining Lustration in Eastern Europe: a "Post-Communist Politics" Approach', *Democratization*, 12: 1 (2005), pp. 22–43. See also the literature quoted below.

⁵ See, e.g. Helsinki Watch, International Helsinki Federation for Human Rights and Project on Justice in Times of Transition, 'Memorandum on the Applicability of International Agreements to the Screening Law' (1992), reprinted in Kritz, *Transitional Justice*, Vol. 3, p. 335; 'Report of the Committee Set up to Examine the Representations Made by the Trade Union Association of Bohemia, Moravia, and Slovakia

fears, lustration did not inhibit the consolidation of democracy in Czechoslovakia, nor did it undermine the country's intention to join NATO and the EU.⁶ Disqualification and downgrading remained an essential part of lustration law in the Czech Republic and its validity was indefinitely extended in 2001.

The 'fashion', or the 'spectre', of lustration laws has spread widely across Eastern Europe. Several post-socialist countries, which shared a similar legacy, attempted to draw on the Czech experience while at the same time tempering the most common reservations against lustration. In each of these countries, political situations, legitimate interests, human rights issues and ideological interpretation of past experiences differed. They came to different models of lustrations, which changed the status of specified groups and redefined political identities within the whole polity. Some lustrations targeted the entire network of the former elite, secret police and their collaborators, whilst others attacked only specific segments of the former regime. Some lustrations excluded the members of former regimes completely from the new democratic order while others stipulated additional conditions for them to retain their posts.

How can we categorize lustration models? What is the effect of each model? What are its advantages and disadvantages? The answers to these questions are crucial to the current situation in Iraq. Everyday experience indicates that an acceptable solution to the complex personnel situation is pivotal to the successful consolidation of state structures and the social basis for the establishment of democracy. The 'Iraqi Opposition Report on the Transition to Democracy in Iraq', recognizing the importance of the personnel situation, recommended that the new transitional government examine the East European experience with lustration.⁷

This article seeks to answer these questions. It introduces the term 'lustration system' and attempts to classify lustration models for the

and by the Czech and Slovak Confederation of Trade Unions under Article 24 of the ILO Constitution alleging Non-Observance by CSFR of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), LXXV ILO', *Official Bulletin*, Supp. 1, Ser. B (1992); Parliamentary Assembly of the Council Europe, Resolution on measures to dismantle the heritage of former Communist totalitarian systems, Doc. No. 1096 (1996).

⁶ See generally Letki, 'Lustration and Democratisation in East Central Europe'.

⁷ 'Iraqi Opposition Report on the Transition to Democracy in Iraq', *Journal of Democracy*, 14: 3 (2003), pp. 14–29, 26.

first time. It briefly assesses their limitations, advantages and problems, recommending specific models to suit particular types of countries. It is based on a comparative study of the seven lustration laws, or special public employment laws, adopted in Czechoslovakia/Czech Republic, Germany, Hungary, Poland, which are complemented by less prominent examples of lustrations in Albania, Bulgaria and Serbia between 1990 and 2003.⁸ In the light of this exercise, the paper goes on to assess the initial public employment policies pursued by the CPA in Iraq between 2003 and 2004. It proposes an alternative model that would be more suitable for the divided society and more compatible with the objectives of the Report on the Transition to Democracy in Iraq.

LUSTRATION, LUSTRATION LAW AND LUSTRATION SYSTEMS

Before embarking upon an analysis of lustration systems, it is necessary to define the meaning of the concept and its nomenclature. *Lustration* is derived from the Latin term 'lustrare', which means 'to review, survey, observe, examine'.⁹ In post-1989 Czechoslovakia, lustration has come to mean the examination of certain groups of people, especially politicians, public officials and judges to determine whether they have been members or collaborators of the secret police of the previous regime.¹⁰ Naturally, the etymological origin of the term is narrower than its common use. Lustrations may concern a wider range of involvement in the repressive apparatus of the former regime than a mere collaboration with its secret police; and the lustration procedure may go far beyond a mere screening of records held in secret archives.

Lustration law is a special public employment law that regulates the access of members of the former repressive apparatus to public positions in the new democracy. It usually concerns appointed positions in public administration and armed forces, although it may also reach senior positions in public media, the management of

⁸ See generally 'Constitutional Watch', in *East European Constitutional Review* (quarterly country reports, 1992–2003); Kritz, *Transitional Justice*, Vol. 3 (English translation of major reports and rulings).

⁹ T. C. Lewis and C. Short, *A Latin Dictionary*, Oxford, Clarendon Press, 1879.

¹⁰ David, 'Lustration Laws in Action', pp. 388–9.

state-owned companies, and some private-sphere posts with public concern, such as the regulation of the security-sensitive trade etc.¹¹ Its public employment character distinguishes lustration law from other measures taken against the members of the former repressive apparatus, such as criminal prosecutions, retributive laws and ‘ritual sacrifices’, as suggested by some critics.¹²

The term *lustration system* reflects on the logic behind a lustration law. It is an abstraction of a lustration law mechanism in the same way as the term ‘electoral system’ is congruent with ‘an electoral law’. Lustration systems denote the methods used to deal with members of the repressive apparatus of the former regime in public positions in the aftermath of regime changes. The term is a conceptual tool developed for the purpose of classifying various methods of dealing with the inherited personnel situation in the state apparatus and for the assessment of their various effects. It is a theoretical construction that ignores most of the substantive and procedural provisions of lustration or other special public employment laws.

The term does not concern itself with the substantive sections of the laws affecting the quantity and quality (categories of personnel affected) of their backward- and forward-looking provisions. It leaves out a consideration of the number of members of the repressive apparatus and the services they rendered – whether they worked in political bureaux, paramilitary units, the army, secret services or

¹¹ Some countries, e.g. Poland, Hungary and Lithuania, extended lustrations to elected positions. The logic behind this extension is the right of voters to information that would enable them to make a qualified decision on candidates. As it will be clear from the forthcoming text, lustration of candidates is possible only within a particular lustration system. The major motivation behind most lustration systems is the establishment of impartial and trustworthy state apparatus and security services and this is also the interest of this paper.

¹² Although lustration laws merely concern public employment, many critics create an impression of their criminal nature, which brings them to conclusions that they do not meet standards of criminal law. Another group of critics tend to label lustration as a retributive legislation. The post-war retributive legislation in France, Belgium, Denmark, Czechoslovakia and other countries was primarily backward looking, attaching certain sanctions to collaboration (e.g. imprisonment, confiscation of property, banishment, etc.). Lustration laws are primarily forward looking, attaching ‘sanctions’ to the collaboration only if the collaborator seeks to hold certain public posts. Finally, suggestions that ‘lustrations’ are ‘ritual sacrifices’ belong to a political science fiction. However, it is not the purpose of this article to ridicule some of the early scholarship on lustration.

clandestine informers' networks. All lustration systems differ in this aspect and can be qualitatively classified according to these categories. Based on which sectors and services are targeted by the law, one can distinguish between the depoliticization of the state administration (de-Nazification, de-Communization, de-Baathification), its demilitarization, desecuritization and 'lustration' in its original meaning of a verification tool against clandestine collaborators.¹³ However, such classification is unusable because it would not allow drawing conclusions from one country and applying them to another. For example, when former Chilean President Eduardo Frei visited the Czech Republic, he was more interested in the country's experiences with what is here termed its 'lustration system', than in how it dealt with particular segments of the administration and judiciary. He sought to discover a *method* for dealing with members of previous regimes that had been deeply entrenched in the state institutions as a whole.¹⁴ The classification of lustration systems based on the type of posts targeted in the repressive apparatus, though possible, is not the subject of the current enquiry.

Furthermore, this paper does not classify lustration systems according to the particular procedures involved. The presented classification of lustration systems is based on the distinction between various *methods of dealing with inherited personnel situations* within the framework of public administration, security and other positions in the state structure in times of regime changes, regardless of *the method of lustration* (examination) that determines collaboration. In other words, lustration systems concern mechanisms that determine what happens if a member of the past repressive apparatus wants to retain a particular public post, rather than how the fact of his or her collaboration is determined, whether it involves screening against

¹³ Authors writing on the Polish lustration law, which does not include members of the former Communist Party (PZPR), tend to classify lustration laws on the basis of what posts of the past repressive apparatus are included in the law. Thus, they distinguish between lustration, which they relate to former security apparatus, and de-Communization. See, e.g. Szczerbiak, 'Dealing with the Communist Past or the Politics of the Present?', pp. 553–4.

¹⁴ See 'Czech-Chile-President', *Radio Prague*, 19 March 1999 ('Here in Prague, the visiting Chilean President Eduardo Frei stressed the need to thoroughly cleanse state and government institutions of people implicated with former totalitarian regimes. The Chilean president . . . took a lively interest in the Czech legislation that requires mandatory screening of state officials.').

secret records, public archives, witness testimonies, the findings of truth commissions etc.

CLASSIFICATION OF LUSTRATION SYSTEMS

Theorists of transitional justice uncritically regard lustration laws as the tool for political change. ‘Politicized public [employment] law’, according to Ruti Teitel, ‘can effect radical change when it distributes power explicitly on the basis of the new ideology’.¹⁵ The importance of this concept is that it acknowledges the instrumental nature of law as being subservient to politics and ideology. Its shortcoming is that it indiscriminately treats all lustration systems as almost identical. While it is true that some lustration systems do distribute power, others maintain and legitimize the *status quo*. While some lustrations fit the definition, others do not.

Not all lustration systems are the same. They can broadly be grouped into two major families. The key characteristic that distinguishes these two families is the particular consequence of having been associated with the past regime. The distinguishing question is whether the lustration allows a public official associated with the previous regime to hold certain posts in the new administration or not. If a public official associated with the previous regime is not allowed to hold certain posts in the new administration, the model is *exclusive*. If the person may – under certain conditions and at his or her own election – remain, the model is *inclusive*; and if the person may remain, under conditions of demonstrating change in his or her behaviour, the inclusive model is termed *reconciliatory*. If the answer is sometimes positive and sometimes negative, depending on whether the authorities decide that a person should receive tenure or not, the system pursues partial personnel discontinuity and is *mixed*.

Different types of lustration systems adopt different strategies for achieving discontinuity with the past. The first type is defined by Ruti Teitel as a ‘carrier of a political change’ through which the new leaders achieve discontinuity by changing certain personnel who are associated with the past. The second type is defined as a ‘carrier of ideological change’, when the new leaders, unable or unwilling to

¹⁵ R. G. Teitel, *Transitional Justice*, Oxford, Oxford University Press, 2000, p. 149.

defeat former oppressors and destroy their structures, adopt value-based discontinuity as a proxy for personnel changes.

The second strategy is usually a product of political negotiations. It is shaped by the balance of power and limited by structural constraints and often promotes national understanding and reconciliation. It tends to foster a spirit of forgiveness that aspires to lighten the burden of political compromise, soothe retributive desires among people and erase the inimical record of the former ruling elite. Lustration measures then stipulate conditions for members of the old elite to retain their posts. The usual condition is that their past associations must be revealed. The context in which this kind of lustration system emerged resembles the one that gave birth to truth commissions. When external circumstances do not allow addressing past crimes at the court of justice, the new representation opts for a second-best alternative – to name the perpetrators and dismantle the violent nature of the predecessor regime at the truth commission.

All systems help transform the past identities of political subjects into more or less democratic citizens. By passing a judgement on past behaviour, they redefine the boundaries of the new polity. For many, a new understanding of the past offers an escape from their own role in the former regime. It reshapes interpersonal behaviour and provides a framework for sociopolitical restructuring in the period of pervasive uncertainty. Lustrations, alongside other measures of transitional justice, construct transitional identities that remain in place until more stable identities take root and the reproduction of the democratic process is secured.

Exclusive Systems

Exclusive systems imply automatic exclusion of persons associated with particular departments or activities in the former regime from certain state positions. They do not provide any space for discretion once the fact of collaboration is established, although the collaborationist may be downgraded to a position that is not lustrated. As a result, crucial posts in state institutions of the new regime are disconnected from past practices through personnel changes.

The system is based on the presumption that records of the past are reliable predictors of future behaviour. For this reason we are accountable for our past: we submit our resumés when applying for a

job or declare that we did not commit any crime when entering some countries. The human character is treated as a constant, which implies that people would act in the same way in the future as they did in the past if they have an opportunity to do so. The danger of a return to the Hobbesian state of nature seems imminent.

The justifications for exclusive systems are multilayered: those who associated with the criminal departments of the old regime and its criminal activities may continue to abuse their power, they may blackmail or be blackmailed. They may become a centre of subversion and attempt to resurrect the undemocratic system. Citizens would not trust new institutions staffed with the old personnel. Another major justification for exclusion is its function of redressing past injustice. It often happens that in the past positions were unfairly distributed on political criteria. In order to address these past inequities, the previously disadvantaged group are given priority over the previously advantaged group when filling positions in the new democratic order.

Righting past wrongs, settling scores and acknowledging that injustices occurred are promoted as shared values of a new society. The past is negated, the regime's façades destroyed, its authority de-legitimized and its dogmas deconstructed. *Justice* lies at the heart of the social construction of transitional-democratic identities, ideologically utilized by the new representation for justifying the redistribution of political influence and gaining control over the state apparatus. The rebirth of justice, manifested in punishing perpetrators, redressing victims, returning property and rectifying unfair selection criteria, however legitimate, may nevertheless perpetuate past divides with new actors in the old process of exclusion.

The lustration systems adopted in Czechoslovakia in 1991, Bulgaria in 1992 and Albania in 1993 are all exclusive.¹⁶ The model adopted by Serbia in 2003 is exclusive for some high-ranking public officials and inclusive for others.¹⁷ The example of the Czech lustration law illustrates the work of the exclusive system: 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

¹⁶ For the texts of the laws, see Kritz, *Transitional Justice*, Vol. 3.

¹⁷ Accountability for Human Rights Violations Act, Official Gazette of the RS, No. 58/2003.

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 belongs 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 lustration law. The person can judicially challenge both the lustration certificate and the dismissal. The process was conceived as secret: the public was not supposed to learn the reasons for dismissals or resignation. Nevertheless, the secrecy of the Czech lustration system ended with the leakage of names of collaborators in 1992 and with their official publication in 2003.¹⁸

It was these exclusive lustrations which generated strong international criticism. Although many critics acknowledged the need for certain personnel changes, they disagreed with the way they were carried out. The indiscriminate nature of exclusion, they alleged, constituted a collective punishment and violated international human rights standards, namely the right to expression, the right to be free from discrimination and the oft-questionable right to work in public service.¹⁹ The opposition in all countries that enacted lustrations requested their constitutional review. The constitutional judiciaries narrowed the law but upheld it in its substance in Czechoslovakia, endorsed one lustration law in Bulgaria and struck down the legislation in Albania.²⁰ For this the latter won a moment of praise as the most progressive in the region.²¹

In comparison with other models, exclusive lustrations are conclusive and efficient. During initial stages of transition in Czechoslovakia, the system enabled the new elite to secure control over the state administration, launch crucial reforms and catch up with Poland and Hungary, which were more reformed at the time. This model is also more suitable for societies that are poor in human resources and do not have a large number of reliable civil servants to carry out the examination of transgressors. The absence of a case-by-case examination, however, comes at a price. The system requires higher legal

¹⁸ David, 'Lustration Laws in Action', p. 419. The names are available at the server of the Czech Interior Ministry, www.mvcr.cz.

¹⁹ See note 5.

²⁰ See Kritz, *Transitional Justice*, Vol. 2 (Country Studies), Vol. 3 (Laws, Rulings, and Reports).

²¹ See Albania articles excerpted in Kritz, *Transitional Justice*, Vol. 2 (Country Studies).

protection and has to be carefully and narrowly drawn. In the Czech Republic, it excluded only a margin of the Communist gerontocracy and *nomenklatura* cadres. Fuzzy categories of those who did not have a clear characteristic of membership in the repressive apparatus were annulled.²² Thus, contrary to expectations, the bulk of the old *nomenklatura* has adapted to the new situation, redefined its identities, reinvented biographies and used different channels (e.g. party financing, privatization funds) to capitalize on its social capital.²³

Inclusive Systems

In inclusive systems, public officials may retain their positions despite their past collaboration. However, their inclusion is conditional upon the revelation of their past. The individual is offered a bargain to exchange a public office for the revelation of truth about his or her past. The assumption is that once this fact is revealed, the public can exercise control over the steps taken by the official. The system adopts value-based discontinuity. The new democracy breaks continuity with the past through ending the secrecy typical of the previous regime, making the new personnel policies transparent. Alternatively, if the individual does not want to accept the deal, he or she may resign without being exposed. This leads to personnel discontinuity.

Inclusive systems are based on the belief in the improvement of human nature. That is why some cultures developed institutions of the second chance and forgiveness. Instead of being stoned, unfaithful parties can beg their partners for forgiveness and promise that the adultery will not happen again. In the macropolitical context, this approach might be justified when human behaviour is largely determined by structural factors. Once external constraints fade, Rousseau, Marx or Che all believe that *Hombre Nuevo*, a new, better, person will emerge. Collaborators, according to the supporters of the inclusive systems, are those who could not sustain the enormous pressure and threats to which they and their families were exposed under the past regime. The new regime should provide a fresh start for all.

²² See Decision of the Constitutional Court of CSFR, Pl. ÚS 1/92 (26 November 1992).

²³ See generally, e.g. Tucker, 'Paranoids May be Persecuted'; Los and Zybortowicz, *Privatizing the Police-State*.

Indeed, Hungary adopted this system under the pretext of human rights for all.²⁴ The inclusive systems are perceived as human rights-friendly, especially in contrast to exclusive models. ‘Naming collaborators’, which resembles ‘naming perpetrators’, and is part of truth commission practice, is considered a fairer option to outright dismissals.²⁵ Citizens can scrutinize public officials with a questionable past without creating new injustices. The offer of a second chance in exchange for the limitation of privacy is believed to be a sufficient precaution against blackmail or power abuses. The system assumes that the scope of personal privacy is larger for public officials than for private persons, as acknowledged in several cases of the European Court of Human Rights and confirmed by the Hungarian Constitutional Court.²⁶

According to the procedure of the Hungarian lustration law of 1994, specified senior public servants have to be screened according to their membership in the repressive apparatus of the Communist regime and even in the Hungarian Nazi Party. If a panel consisting of at least three judges finds that a public official collaborated, he or she is confronted with the findings and requested to resign within a prescribed period. At this stage, the person can request a review of the process. If a person chooses to retain his or her position, his or her name is published by the official newspaper *Magyar Kozlony* and disseminated by the Hungarian News Service. Thus the public can oversee steps taken by the officials.²⁷ Neither its 1994 constitutional review nor later revisions of the law in 1996 and 2002 changed the inclusive nature of Hungarian lustrations.²⁸ The model was adopted

²⁴ G. Halmai and K. L. Scheppelle, ‘Living Well is Best Revenge’, in A. J. McAdams (ed.), *Transitional Justice and the Rules of Law in New Democracies*, Notre Dame, University of Notre Dame Press, 1997, p. 156.

²⁵ For the discussion of ‘naming the guilty’ at truth commissions, see P. B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, New York, Routledge, 2001, pp. 107–32.

²⁶ See *Lingens v. Austria*, 8 July 1986, Application No. 9815/82 (European Court of Human Rights); Decision 60/1994 on background checks for those in public office (24 December 1994), translated in S. Laszlo and G. Brunner, *Constitutional Judiciary in New Democracy: The Hungarian Constitutional Court*, Ann Arbor, University of Michigan Press, 2000, p. 306.

²⁷ E. Oltay, ‘Hungary’s Screening Law’, *RFE/RL Research Report*, 3: 15 (15 April 1994), reprinted in Kritz, *Transitional Justice*, Vol. 2, pp. 662–7.

²⁸ See ‘Constitutional Watch: Hungary’, *East European Constitutional Review*, 11: 3 (Summer 2002).

in Romania in 1999 and partly in Serbia in 2003, which applied it to the highest state officials. An inclusive model was also approved in Poland in 1997. The Polish model, although also inclusive, significantly differs from the Hungarian one and deserves special attention (see below).

Inclusion best suits heterogeneous societies because it provides a framework for an elite accommodation. Universal *equality* and opportunities for all, regardless of the position held in the past regime, are cornerstones of new democratic identities. They are socially constructed as an ideology for overcoming past divides, but effectively disguise their continuation. As a result of the summer scandals that erupted in 2002 after government officials were found to be former clandestine collaborators, the Hungarian model was criticized as toothless and ineffective.²⁹ Moreover, similar to exclusive systems, the method of inclusive system is founded on the existence of background information about screened persons. The information is often unreliable. The archives of the past regime are often incomplete, usually because its officials attempted to destroy evidence and steal the dossiers of their rivals. These difficulties lay the inclusive system open to question from opponents of the process and the screened persons themselves who are able to criticize the effect of the process as a whole.

Reconciliatory Inclusive Systems

Similar to other inclusive systems, the Polish lustration system also institutionalizes a second chance and public employment forgiveness. Collaborators may hold positions of influence in the new regime. However, this system differs from the simple inclusive system with respect to the deal offered for the second chance. The inclusion is conditional upon the concerned individual's *own* public revelation of past collaboration. Each official has to submit an affidavit that is verified by a special lustration procedure. The affidavit serves as a loyalty test. A public official-collaborationist faces an option: to tell the truth and retain the office or to deny the past and risk the dismissal. The revelation of past collaboration and any discovery of dishonesty, i.e. concealed facts, are announced officially. No one is

²⁹ See 'Hungary's Ex-Spook Politicians', *The Economist*, 17 August 2002.

forced to undergo this process. Resignation and transfer to a non-lustrated position are common exits.

Similar to other inclusive models, this system is grounded on value-based discontinuity because the truth becomes publicly known. But, unlike simple inclusive systems, the primary revelation rests with the public official, not with the political system. While both the Hungarian and the Polish systems assume the change of background political practices, the latter also exposes the change of a perpetrator's attitudes. The willingness to disclose the past serves as the evidence of a change of heart. By renouncing his or her past, the collaborationist gives the truth a negative mark, which signifies a normative shift. The system therefore conducts value-normative discontinuity. While other inclusive systems merely require that collaboration per se be exposed, the Polish system extends the message that collaboration was also wrong. In divided societies, in which former adversaries have their own interpretation of history, the immorality of any past wrongdoing is not self-evident to everyone.

It is probably not accidental that this system developed in Poland in 1997 and was launched in 1999. It is a country that is deeply polarized about its past. Likewise, it may not be a coincidence that this system adopted the same mechanism of 'truth exchange' as the Truth and Reconciliation Commission in South Africa, another deeply divided country. As perpetrators in South Africa were given a chance to gain amnesty in exchange for truth, so collaborators in Poland retained public office in exchange for truth.³⁰ It was the individual's active demonstration that he or she deserved a second chance that gave the Polish lustration model a reconciliatory character. However, full reconciliation required collaborators to face their victims, have a dialogue, and, ideally, apologize; victims then had a right to learn more about the truth and to decide whether to forgive or not. The Polish system remains one-sided, perpetrator-centred. For this reason, it should be termed *semi-reconciliatory*.

The main feature of the Polish lustration law procedure is verification of affidavits submitted by persons who apply for positions specified by the act as to whether they worked or collaborated with security services of the Communist regime. The judicialized verification procedure can be initiated by the spokesperson of the Public

³⁰ R. David, 'In Exchange for Truth: Polish Lustrations and the South African Amnesty Process', *Politikon*, 33: 1 (2006), pp. 81–99.

Interest (a lustration prosecutor) or a member of parliament at the Lustration Court. The Lustration Court decides whether the affidavit is true or false, which leads to the conviction that a person is dishonest. The Polish lustration law thus divides high-level public officials into three groups: those who did not work or collaborate with the past security organs, those who did so but revealed the fact, and those who failed to confess their past. The first group is 'innocent', the second group demonstrates the change of heart, and the third group is dismissed and barred from a position in the democratic government for 10 years.³¹

The South African amnesty process offers a great deal of inspiration for strengthening the reconciliation potential of this model. The lustration process should be open, transparent and hence credible. Poles are currently deprived of the chance to review the process critically. At the request of the person under examination, the doors of the lustration court are closed. Opening the process would also help people to come to terms with the past, to understand the perpetrator's motives for collaboration and its social and political consequences. The assessment of whether collaboration is tolerable or not can only be formed from an exchange of ideas in open debate. Public revelation of the truth is also extremely limited in Poland. The society is not exposed to information about whom, when and for what reason the official collaborated. This has undermined the process's potential to shed light on institutional abuses and to help formulate recommendations for institutional reform. In sum, there are several ways of strengthening the model in order for it to perform a role comparable to that of the truth and reconciliation commissions.³²

Mixed Systems

Supporters of inclusive systems stress their accommodative potential. The inclusive nature addresses the problems of the past and at the same time keeps experts in decision-making positions. On the other hand, its critics may laugh at naive beliefs in the improvement of human nature, frown upon the denial of legitimate claims for retribution, and ridicule the value of 'experts in human rights

³¹ David, 'Lustration Laws in Action', p. 412.

³² David, 'In Exchange for Truth'.

abuses'. In choosing a lustration system the question that has to be weighed is whether it is better to fill administrative posts with corrupted professionals, or to fill them with loyal amateurs.

Mixed systems solve this dilemma on a case-by-case determination. They do not attach any automatic consequences to a public official's shadowy past. Collaboration may or may not cause exclusion. Collaborationists have to demonstrate their ability to hold a position of trust. Taking into account the past record of the applicant, the requirements of a particular post and the overall situation in the labour market, authorities exercise discretion as to whether a second chance should be granted or not. These systems clear the way for partial personnel discontinuity with the past. They are equivalent to selective prosecutions on criminal justice level.

The Unification Treaty provided a legal background for the introduction of a mixed lustration system in Germany. The authorities required applicants for a public post to submit an agreement to be screened, along with a questionnaire on the extent of collaboration. Similar to the affidavit in the Polish reconciliatory model, the questionnaire was used as a test of loyalty. Those who concealed their involvement in past oppression were usually removed. However, unlike the Polish system, truth-telling did not automatically grant collaborators a second chance. If a person admitted to being a collaborator, he or she was also asked for an explanation, followed by another interview and the possibility of further screening. Based on the results, the collaborator could be permitted to keep the office and enjoy a second chance, or be either transferred to a lower position or dismissed. So the system had either inclusive or exclusive effects, depending on the outcome of the screening process.³³

The major justification for the mixed system is its procedural *fairness*. Discretion enables an examination of each case, thus avoiding collective justice. The flexibility of mixed systems also seems politically pragmatic. It enables authorities to consider the quality and quantity of applicants. If there are 10 posts and 20 applicants, the discretion may be useful when 15 of them are collaborators. However, this advantage can turn into a disadvantage when candidates are not well matched with the posts they obtain.

³³ M. Gravier, 'East-Germans in the Post-Unification German Civil Service: The Role of Political Loyalty in a Transition to Democracy', paper presented at the IPSA 19th World Congress, Durban, 29 June–4 July 2003.

In Germany, inconsistent application was exacerbated by the country's federal structure. Different *Länder* within the federation adopted different public employment laws and applied different procedures. The discretion was applied exclusively in some new German lands and inclusively in others. Saxony and Thuringia used their discretionary powers in a way that effectively caused personnel discontinuity. In contrast, Berlin and Brandenburg were much more lenient to their officials. The German judiciary stopped many of these inconsistencies in the mid 1990s.³⁴

A mixed system also has another problem: it can only be implemented in a country with a large cadre of reliable and trustworthy human resources to carry out a rigorous and independent screening process. The unification of Germany after the collapse of the Berlin Wall required an enormous army of senior civil servants. Some 35,000 people worked in the Gauck office alone.³⁵ Its major function was merely to conduct the examination of *Stasi* archives. Poland, Hungary and many other East European countries could only dream of such an independent workforce.

A further problem associated with obtaining reliable personnel to carry out the screening process is that former clandestine collaborators can infiltrate the initial screening boards, as happened in Poland and Hungary. Even Germany was not immune to the problem of infiltration. One of the reasons for a lenient application of lustrations in Brandenburg may have been that its premier, Manfred Stolpe, was himself accused of being a *Stasi* secret informer.³⁶

THE POLITICAL EFFECTS OF LUSTRATION SYSTEMS

Lustration systems may be regarded as a part of post-conflict intervention strategies. They not only impact on public administration but also influence political loyalties and the social construction of the historical memory. Their political effects and their application can therefore be generally assessed in the light of their ability to overcome past divisions. The choice of a suitable lustration system for a

³⁴ A. J. McAdams, *Judging the Past in United Germany*, Cambridge, Cambridge University Press, 2001, pp. 55–87.

³⁵ *Ibid.*

³⁶ *Ibid.*, pp. 75–6.

particular country would depend on the interaction between their purported effects and the nature of the inherited divisions.³⁷

The hypothesized effect of exclusive systems is that of *inversion* as the government and the former opposition leaders may only change places. The transformative value of this system is minimal; past divides are only 'overcome' through the defeat, humiliation and marginalization of the former ruling elite. In the Czech Republic, an exclusive system enabled the new leaders to gain control over the state apparatus. An up-side of this was that it may account for the rapid progress that was made in pursuing political and economic reforms during a short period after its adoption. On the other hand, the down-side was that the former Czechoslovak Communist Party has remained unreformed and unrepentant; it even preserved 'communism' in its title and ideology. Although one can only speculate whether the exclusive lustration system is the cause or the effect of the situation, it certainly did not bridge past divisions. This system can only be applied to a homogeneous society with political divides. In heterogeneous societies, inserting political identities on existing national, ethnic or religious identities creates an imminent risk of exacerbating the past conflict.

Inclusive systems provide the new leaders with the opportunity, or the necessity, of pursuing a strategy to discharge one side of the conflict ideologically. The antagonism between the former adversaries is overcome by an attempt to transform perceptions about the past in exchange for the *accommodation* of the past elite. The accommodation of the elite in Hungary was relatively successful because collaborationists were widely spread across all political parties. Hungary produced a lustration law that was narrow in scope and toothless in effect. The population remains ideologically divided over the past, as each group retains its own interpretation of history. According to a poll, 57 per cent of Hungarians believe that people collaborated for some kind of profit, while 26 per cent think that collaborators were victims of the system.³⁸ The inclusive system was used in countries where the exclusive system was not a feasible option due to political

³⁷ Naturally, a choice of a lustration system is largely determined by a particular political configuration that accompanies transition. However, we are interested in assessing the suitability of lustration systems to a particular social situation, rather than in making predictions about their evolution.

³⁸ M. Vasarhelyi, 'Airing the Dirty Laundry', *TOL WIRE: News*, 2 April 2003.

and structural constraints accompanying the transition. It best suits heterogeneous societies because it provides a framework for an elite accommodation.

The reconciliatory version of the inclusive system is expected to transform the past divides through the *conversion* of former wrongdoers. It offers collaborationists a second chance, providing them with the opportunity to make a new beginning. In evaluating the semi-reconciliatory system in Poland, it is important to mention that the prolonged, 10-year pre-lustration period has escalated mutual accusations and deepened mistrust among people. Although the majority of Poles persistently supported lustration, the lengthy unregulated period of 'wild lustrations' has led to deepening schisms over the past.³⁹ In spite of this, however, a recent poll in Poland suggested that lustration supporters were indeed willing to give their discredited leaders a second chance.⁴⁰ As stated above, this model serves the interests of divided or polarized societies where the need to overcome past divisions and restore national unification is particularly pressing. It has the potential to satisfy social and individual needs for learning the truth and coming to terms with the past. The aggregate of individual *truth exchanges* enables a society to dismantle the illegitimacy of the past regime in exchange for retention of positions of power once held in the past. However, the system not only accommodates the former elite but also softens past divides. Shifting its loyalties and subscribing to new identities, the old elite rehabilitates itself as a legitimate alternative to the new representation.

Finally, the mixed system provides an opportunity to adopt any or all of these strategies. It may be applied exclusively, inclusively and it theoretically offers the possibility of demonstrating a change of heart as is the case of the reconciliatory system. However, judging the conscience of collaborators has proved to be a difficult and, in respect of the results, a controversial exercise that was not able to unite German peoples. The power hierarchy inherent to the examination process forced 'German Democrats' to submit to their 'new democratic masters', thus maintaining past divisions. The very existence of the discretion may bring corruption and conflict with the

³⁹ Szczerbiak, 'Dealing with the Communist Past', p. 559; David, 'Lustration Laws in Action', p. 430.

⁴⁰ Autorzy Rzeczypospolitej and Pracownia Badan Społecznych, 'Prezydent nie skłamał', *Rzeczpospolita*, 11 August 2000.

effort to construct new democratic social foundations because of the inherently conflicting messages it sends. The justification for exclusion undermines that of inclusion and vice versa; the social need to accommodate undermines the need to settle scores.

DE-BAATHIFICATION OF IRAQ

Which system would be the most optimal for the situation in Iraq? Did CPA policy go in the right direction? What steps should the new Iraqi government take in the personnel policy? The first matter to remember is that Iraqi society is deeply divided. It is traditionally diverse and heterogeneous along religious and ethnic lines. Three major groups, Sunnis, Shiites and Kurds, are themselves fragmented into secular groups, royalists, traditional communities, and others. Under Saddam Hussein's rule, different societal factions were not given the opportunity to develop normal sociopolitical relationships. In fact, the past regime deepened many of these cleavages and created new political divisions. In addition, the war has magnified an anti-American sentiment among a significant part of the population.

The first programme, advanced by the CPA, concerned the 'De-Baathification of Iraq'. The Baath Party was an instrument of political oppression under Saddam's rule. Occupying powers targeted structures, members and assets of the Baath Party. Order 1 on 'De-Baathification of Iraqi Society', signed by Paul Bremer on 16 May 2003, together with other rules, established a mixed lustration system.⁴¹ Although it assumed the exclusion of senior ex-Baathists from the entire administration and ordinary members from its top three layers, the head of the CPA reserved himself, or his designees, the discretion to grant exceptions. The results of a mixed system depend largely on how often such exceptions are granted. The experience of Germany shows that the system may be applied either in an exclusive or inclusive way.

The CPA started to implement the system exclusively. This was an understandable but unfortunate decision in view of the situation in the aftermath of the war. It was largely motivated by the need to avoid filling top posts with former enemies.

⁴¹ The other rules are 'Memorandum No. 1 on De-Baathification' and 'Order No. 5 on Establishment of the Iraqi De-Baathification Council'.

There are several problems associated with such a policy. Firstly, it has led to the continuation of the conflict. Excluded and marginalized Baathists resisted the new system. In addition to ideological reasons for fighting the invaders, there were few employment options available to them. According to *The Economist*, unemployment ranged between 60 and 75 per cent in October 2003.⁴² The salaries of senior Baath members were frozen. However, giving Baathists 'golden parachutes', as Czechoslovaks offered to their former secret policemen, may have resulted in the coalition financing the war against itself.⁴³

Extensive exclusion also resulted in a shortage of suitable professionals to run the administration, the security, and the police. Those who possess expertise and experience in capturing *mujahideen* from the entire Muslim world who enter Iraq to fight Americans were forced to leave their posts. At the same time, there was a shortage of loyal amateurs to fill the gaps left by Baathists. A lack of legitimacy of the US-led coalition has created new divisions and new identities – pro-American and anti-American – and overshadowed past divides. In October 2003, attacks against the coalition forces and new authorities intensified. Consequently, those who would otherwise have the capacity to be trained for posts in the new administration were reluctant to do so. Assassinations of those who joined the CPA made their reluctance quite understandable.

The exclusive approach has been widely criticized as a mistake that has cost many civilian lives and has led to numerous casualties amongst the occupying forces. Some US officers, for example, have suggested that the CPA should have been more pragmatic in building a new Iraqi army by reconstituting entire units of the old army which was disbanded in May 2003.⁴⁴ Such an approach would bring back the

⁴² 'Rebuilding Iraq: Amid the Bombs and the Rubble, the Country is Still Slowly on the Mend', *The Economist*, 1 November 2003.

⁴³ In 1990, former members of the Czechoslovak secret police were rewarded for their service more than their victims were compensated; David, 'Transitional Injustice', p. 809, n. 42. In Iraq, Paul Bremer's predecessor, Jay Garner, advocated paying members of the former Iraqi army as a way to keep their units intact for possible construction tasks and to prevent them from turning against Americans. See T. Shanker and E. Schmitt, 'Some U.S. Officers Want to Reunite Iraqi Units to Build a New Army', *International Herald Tribune*, 3 November 2003, p. 3.

⁴⁴ *Ibid.* This approach later prevailed. CNN, 'Rumsfeld: Officials Mull Recalling Iraqi Army Units,' www.CNN.com, 25 November 2003.

much-needed professionals to run the basic functions of the state. At the same time, however, having these professionals – former loyalists of Saddam Hussein – in the administration, the army, and the police, etc., would carry the risk of subversion at any time.

It seems that the exclusive system and the mixed system, applied exclusively, can hardly be solutions to the current Iraqi situation. The newly created administration, the police and the army will not be perceived as neutral, impartial, and trustworthy if they are staffed by either Saddam Hussein's collaborators or pro-American collaborators, or both.

AN ALTERNATIVE MODEL FOR IRAQ

In view of the experience of Eastern Europe, the heterogeneity of the Iraqi society, the complexity of the current political situation and objectives for transitional justice set out in the Iraqi Opposition Report on the Transition to Democracy in Iraq, I strongly recommend adopting an inclusive system that adopts value-based discontinuity, namely a reconciliatory system. Its capacity to conduct a value-normative shift makes it a better option for a divided society with scattered identities than exclusive and mixed systems.

The recommended model is congruent with the objectives set in the Report on the Transition to Democracy. The report declares three categories of objectives. It defines general objectives of transitional justice based on individual accountability, reconciliation and forgiveness. One of its pillars is truth revelation that discloses the atrocities of the previous regime and submits a report to recommend institutional reforms. It specifies 'de-Baathification' objectives, which include the dissolution of some institutions and de-ideologization of the society. At the same time, in reforming the civil service, it seeks to absorb people associated with the former regime in order to prevent their ostracization and resistance, and to utilize their knowledge, experience and skills. In other words, the report prefers reconciliation to retribution, inclusion to exclusion and value-based discontinuity to personnel discontinuity.⁴⁵

The proposed model is based on the premise that everyone is eligible for public service. No one is a priori excluded, unless

⁴⁵ 'Iraqi Opposition Report on the Transition to Democracy'.

investigated for committing a crime, which would fall within the scope of criminal justice system or an amnesty committee. The model has two dimensions: backward looking and forward looking. The backward-looking one aims to renounce past loyalties publicly. This will help to advance a value-normative shift *from* Saddam Hussein's rule. The forward-looking one aims to promote new loyalties towards the future political system based on the rule of law and human rights for all. This could mean taking an oath on the new Iraqi Constitution, or, before its approval, on a provisional charter on the future of Iraq, which would presume a full restoration of the Iraqi sovereignty. This would provide a value-normative shift *towards* a new democracy and allow the process to begin even before the first elections.

Everyone takes the oath publicly, vowing commitment to uphold human rights and other shared values of the Iraqi society. Everyone also submits an affidavit to declare whether he or she was associated with the former regime and pledges the truthfulness of this revelation. Those associated with the past regime, for example, former members of the Baath Party, Mukhabarat secret police, etc., also have to reveal publicly the details of their involvement, renounce their loyalties and express their regret. The truthfulness of the affidavits can be examined against past records, other revelations, revelations coming from a parallel truth commission, and witness testimonies. Witnesses should have a chance to testify as to the involvement of a particular person under Saddam's rule. If the affidavit is found to be true, a person, regardless of the level of his/her involvement in the past regime, is granted tenure. If the affidavit is false, exclusion and prohibition of public employment or sanctions for perjury or both may follow.

In order to cover the process institutionally, an impartial quasi-judicial body has to be established. Its members should be carefully selected to reflect as broad a spectrum of the Iraqi society as possible and, due to the importance of maintaining its legitimacy, should exclude the presence of the foreign personnel. The members have to be entrusted with the authority to inquire into the past of an applicant under scrutiny, to demand materials from other institutions, to investigate and to call witnesses. They should be responsible for publishing the names of applicants for certain levels of public employment, their revelations, the results of these inquiries, and whether an affidavit of a particular applicant was found to be true or not. They should also be required to submit a final report on their activities and findings as to institutional abuses of the past regime. This could be the basis for

institutional reform and the training of new staff in order to prevent the recurrence of power abuses. These proceedings could also become a part of the historical memory of the new Iraqi nation.

The recruitment and screening process must be open to the public and especially to the media. The change of loyalties should not result from a single act such as a signature or a half-hour public hearing. The change should not only concern the person under scrutiny but society as whole. It is a process in which concerned individuals can influence society, which in turn influences individuals. The media play an important role in the process of creating new identities and loyalties and of providing a sort of a hermeneutic dialogue between society and the individual. The experience of live radio and TV broadcasting of victims' testimonies and perpetrators' hearings at the Truth and Reconciliation Commission are believed to be the most crucial elements behind the South African miracle of avoiding a civil war.

CONCLUSION

Various lustration systems employ different methods for solving the personnel problem in the inherited public administration in the aftermath of regime changes and, by doing so, they have different aptitudes for sustaining the divisions of the past (see Table 1). They may be regarded as different forms of post-conflict intervention strategies in which the victory of one side over another may be extended, or they may implement a negotiated settlement.⁴⁶ The experience of the Czech Republic shows that the exclusive system may enable new leaders to secure control over the state apparatus but may also perpetuate past divisions with the same actors in opposite, *inverse*, power relations. The divisions may gradually fade in homogeneous societies where economic growth and consumerism privatize transitional political identities, but it may continue in societies with heterogeneous identities.

⁴⁶ In this sense, their evolution may correspond with a particular dynamics of transition. I hypothesize that the origin of the four lustration systems reflects on four modes of exit of the authoritarian regime, as classified by Huntington – replacement, transformation, transplacement and intervention. However, exploring the link between the mode of exit and lustration system deserves a separate paper. S. P. Huntington, *The Third Wave: Democratization in Late Twentieth Century*, Oklahoma, University of Oklahoma Press, 1991.

Table 1
Lustration Systems and their Effects

<i>Lustration System</i>	<i>Hypothesized Effect</i>	<i>Example</i>	<i>Impact</i>		<i>Application Possible to</i>
			<i>Administration</i>	<i>View of the past, loyalties</i>	
Exclusive	Inversion	Czech Rep., Albania, Bulgaria*	Senior positions disconnected	Divisions, CP in isolation, two versions of truth	Homogeneous societies
Mixed	Depends on application	Germany, Iraq	Exclusion in some areas, inclusion in others	Divisions, disunity	Homogeneous societies
Inclusive	Accommodation	Hungary, Romania (partially Serbia*)	Elite accommodation	CP rehabilitated, two versions of truth	Heterogeneous societies
Reconciliatory	Conversion	Poland (analogy to the amnesty process in South Africa)	Elite accommodation	CP rehabilitated, deep divisions but public forgiveness reported	Deeply divided, heterogeneous societies

* In Albania and Bulgaria, the initial lustration processes were halted by their constitutional courts. The lustration in Serbia is in its beginning. They are therefore only categorized, not evaluated in this paper.

Simple inclusive lustration systems may serve as proxies that enable the new leaders to have a say, though nothing much else, on the issue of the past. The exchange of public posts for truthful revelation about their holders' pasts has the potential to provide *accommodation* between the old and new elites in the long term, but in the short-term period it means nothing more than the coexistence of two interpretations of the past, as the experience of Hungary shows. The mixed system enables countries to pursue a case-by-case approach and procedural fairness in dealing with the inherited situation. The flexibility of the mixed system is politically pragmatic as it enables regimes to balance the need for a loyal administration with the need for staff with expertise and experience. Germany and occupied Iraq demonstrate that the political effect of the mixed system may vary depending on its exclusive or inclusive application. However, discretion in the hands of the authorities is likely to generate corruption and the power hierarchy inherent in the system would not be helpful in overcoming the divisions of the past.

In the middle of the road, we find reconciliatory approaches. They facilitate value-normative shift, transform past loyalties and create shared identities, that are probably the best option for democracy-building in heterogeneous and deeply divided societies. Their application to a particular country, as fragmented as Iraq and South Africa, may be the only possible solution. However, this does not make them universally valid. The strong ethos of reconciliatory models may be undermined by their unethical denial of legitimate retributive desires and the right to justice among the previously oppressed and disadvantaged.