

Facing the Past - the Romanian Lustration Law

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1. Introduction

Ten years after the collapse of the communist regime in Romania, the country has not fully confronted its past. Like other countries of the region, Romania has largely avoided political trials. The civil society has paid its symbolic tribute to victims of communist political persecution through books, public debates, and memorials. Institutionally, however, there has been silence.¹ In December 1999, the Romanian Parliament at last passed a law that begins this often painful process.² This paper analyzes this law from a

¹ The activity of military and secret services after 1989 continue to be a constant problem in Romania. At present, there are no less than nine official secret services in Romania, and only one of them—the Romanian Service of Information—is subject to parliamentary control. Many security institutions are not subject to any form of civilian control. The Law on National Security, enacted before the adoption of the 1991 Constitution, sealed the Securitate files for fifty years (the law adopted in December 1999, however, explicitly provides that these provisions cannot preclude the application of the lustration law). A substantial number of former secret-service officers ventured into various forms of entrepreneurial activities without abandoning their strategic positions within the state administration, thanks in part to the 1991 law on national security archives. There also exist many private secret services, and apparently their information is procured for them by the official secret services. Former Securitate officers very likely staff these new services. See *Constitution Watch: Romania*, E.EUR.CONST.REV., Vol. 7, No. 2, Spring 1998 (visited Apr. 2, 2000)

<<http://www.law.nyu.edu/eecr/vol7num2/constitutionwatch/romania.html>>.

² *Lege privind accesul la propriul dosar și deconspirarea securității ca poliție politică* [Law on Access of Citizens to their Personal Files and the Exposure of Securitate as Political Police] No. 187/Dec. 7, 1999, *Monitorul Oficial* [Official Gazette] [M.Of.] No. 603/Dec. 9, 1999. The initiator of the law is Senator Constantin Ticu Dumitrescu. The law was adopted by the Senate on June 30, 1998, by the Chamber of Deputies on June 10, 1999, and by both Chambers on October 20, 1999 (following the report of the mediation commission). It was promulgated by Decree of the President of the Republic No. 412/Dec. 6, 1999, and became law on December 7, 1999. Upheld in preliminary review by Decision of the Constitutional Court No. 203/Nov. 29, 1999, M.Of. No. 603/Dec. 9, 1999.

comparative perspective, with the background of lustration as defined in Central and Eastern Europe.

Most of the countries of Central and Eastern Europe have passed lustration laws in the last ten years,³ endeavoring to protect the new political and economic order of the state, to bring persecutors of the former system to justice, to remedy past discrimination, and to affect national reconciliation.⁴ Furthermore, lustration laws have attempted to restore people's trust in government,⁵ to protect important positions in the state administration against people who were closely connected to the former regime, and to bring into power a new elite. Lustration measures also aim to protect democracy from threats posed by the old regime, to help the country come to terms with its past, and to provide a bureaucratic alternative to unrestrained accusations and policies of outing.⁶

Within the civil society, lustration seeks to achieve complete transparency of the former regime's acts and deeds.⁷ Lustration acts as a symbol of the irreversibility of the changes.⁸ Lustration thus signifies the moral outrage of society toward communist rule. Furthermore, it is an attempt to bridge the wide gap between moral and legal norms in the former regime.

³ Lustration laws in Albania, Bulgaria, Czech Republic, Hungary, Germany and Poland are examined in Roman Boed, *An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice*, 37 COLUM. J. TRANSNAT'L L. 357, 360 -365 (1999), and ANNUAL REPORTS of the INTERNATIONAL HELSINKI FEDERATION FOR HUMAN RIGHTS (visited April 2, 2000) < <http://www.ihf-hr.org>>.

⁴ Boed, *supra* note 3, at 357.

⁵ This was the justification for the Czech lustration law. *Id.* at 383.

⁶ Kieran Williams, *A Scorecard for Czech Lustration*, CENTRAL EUROPE REVIEW, Vol. 1, No. 19, Nov. 1, 1999 (visited Mar. 19, 2000) <<http://www.ce-review.org/99/19/williams19.html>>.

⁷ As in Germany, *see* Pilar Wolfsteller, *Profile Joachim Gauck - Head of the Stasi Archives*, GERMAN LIFE, February/March 1996 (visited Apr. 2, 2000) <http://www.germanlife.com/Archives/1996/9602_02.html>.

⁸ E.g. Hungary, 60/1994. (XII. 24.) AB határozat Közzétéve a Magyar Közlöny 1994. évi 124. számában. Budapest, 1994. december 22 [Decision 60/1994 of the Hungarian Constitutional Court from Dec. 22, 1994, Official Gazette No. 124/1994] (unofficial English translation on file with the author).

Lustration must be distinguished from other measures such as purges or political trials. Lustration is a punitive administrative measure that is not premised on the criminal responsibility of its targets.⁹ Lustration laws usually lay down rules barring former party or state functionaries, former secret police agents, collaborators or informers, or only some of these categories, from certain offices. Specific laws may extend into the private sphere (e.g. Lithuania)¹⁰ or target specific areas, such as culture, higher education, academia, electronic media or lawyers (e.g. the Czech law of 1991 and the German unification treaty).¹¹ The mildest lustration laws require only public disclosure of names of former agents (e.g. the 1997 Bulgarian law for opening files of the former secret service)¹². Most lustration laws follow the harsher model, requiring resignation or other punitive measures (e.g. Czech law).

Lustration laws are problematic insofar as they presume culpability on the basis of a person's membership in the communist party, thus raising questions of collective guilt, retroactive justice, and equal protection of law.¹³ Also problematic is the integrity of the records used to identify the suspects.

2. Romania's Lustration Law

⁹ Boed, *supra* note 3, at 364-365.

¹⁰ Mel Huang, *The Amber Coast: Private-Sector Lustration*, CENTRAL EUROPE REVIEW, Vol. 0, No. 38, June 14, 1999 (visited Mar. 19, 2000) <http://www.ce-review.org./authorarchives/amber_archive/amber38old.html>.

¹¹ Boed, *supra* note 3, at 371 - 373.

¹² *Id.* at 362.

¹³ Mark F. Brzezinski, *Constitutionalism and Post-Communist Polish Politics*, 20 LOY. L.A. INT'L & COMP. L.J. 433, 439 (1998).

Romania is one of the last countries in the region to have adopted a lustration law. In the past eight years, several lustration drafts were proposed,¹⁴ foremost among them the bill on Access of Former Communist Officials and Members of the Totalitarian Regime to Public and Political Offices, proposed in March 1997 by the Romanian Parliament.¹⁵ The 1997 draft would have banned persons who had held major positions in the Communist Party at any time between March 6, 1945 and December 22, 1989, from occupying certain important position in the new system for the next eight years.¹⁶ The adoption of this draft law would have violated art. 16 of the Romanian Constitution (equality of all citizens before the law and public authorities), as well as art. 35 of the Constitution (right to be elected).¹⁷

¹⁴ The current law incorporates two other legislative initiatives, one from March 1997, the other from February 1998. *See* Propunerea legislativă privind accesul la dosarele întocmite până la 24 februarie 1992 de către fostele organe de securitate, trimisă de Biroul Permanent cu adresa nr. 39 din 15 aprilie 1997 [Legislative Proposal on Access to Files Created by the Former Bodies of State Security, Permanent Bureau, No. 39/Apr. 15, 1997]; Propunerea legislativă privind accesul la documentele fostului Departament al Securității Statului trimisă de Biroul Permanent cu adresa nr. 384 din 23 februarie 1998 [Legislative Proposal on Access to Documents of the Former Department of State Security, Permanent Bureau, No. 384/Feb. 23, 1998].

¹⁵ This draft law is discussed by Mark S. Ellis, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Purging the Past: the Current State of Lustration Laws in the Former Communist Bloc*, 59 LAW & CONTEMP. PROB. 181 (1998).

¹⁶ The draft defined "major positions" within the Communist Party to include members of the Central Committee (at the regional, district, and county levels), members of government, members of the judiciary, officers of the Securitate, and officers of the army. Also included here were the executive, the judiciary, the Great National Assembly, the army, or the Securitate. A person found to have held one of these positions could not have become prime minister, a member of the cabinet, a public prosecutor, a president of a court, a regional governor or governor's deputy, the director of the national television company, or an ambassador. Furthermore, they could not have been elected for the Constitutional Court, Supreme Court, Superior Commission of Magistrates, the Romanian Academy, or the Audio-Visual Media National Council. *Id.*

¹⁷ CONSTITUȚIA ROMÂNIEI [CONSTITUTION OF ROMANIA], art. 1 [CONST.]. The Constitution was adopted on November 21, 1991, was approved by referendum and entered into force on December 8, 1991, and was published in the Monitorul Oficial Part I, No.233 of November 21, 1991.

The preamble of the law adopted in December 1999 sets forth the justification and the two major goals of the law.¹⁸ The first is to allow the access of citizens to their own files created by organs of state security (the infamous SECURITATE) between 1945 and 1989.¹⁹ The second is to expose as agents or informers for the former state security a wide range of persons who run for or occupy certain positions in the present society.²⁰

The law adopted in December 1999 had as a model the German law of 1990 as amended in 1991, taking into account the organization and functioning of the Gauck Commission.²¹ The Romanian law regulates (1) the access of citizens to their personal files, (2) the public exposure of former Securitate agents and informers, and (3) the organization, functioning and role of the National Commission for the Study of the Archives of Securitate [hereinafter Commission].²² The law entrusts the Commission with the collection and administration of all Securitate documents pertaining to the

¹⁸ Lege privind accesul la propriul dosar și deconspirarea securității ca poliție politică [Law on Access to Files and on Exposing the Securitate as Political Police] No. 187/December 7, 1999, pmbl., M.Of. No. 603/December 9, 1999.

¹⁹ See COMISIA JURIDICĂ, DE DISCIPLINĂ ȘI IMUNITĂȚI [COMMISSION FOR JUDICIAL MATTERS, DISCIPLINE AND IMMUNITIES] & COMISIA PENTRU APĂRARE, ORDINE PUBLICĂ ȘI SIGURANȚĂ NAȚIONALĂ [COMMISSION FOR DEFENCE, PUBLIC ORDER AND NATIONAL SECURITY], CAMERA DEPUTAȚILOR [CHAMBER OF DEPUTIES], RAPORT COMUN ASUPRA PROIECTULUI DE LEGE PRIVIND ACCESUL LA PROPRIUL DOSAR ȘI DECONSPIRAREA SECURITĂȚII CA POLIȚIE POLITICĂ [COMMON REPORT ON THE DRAFT LAW ON ACCESS TO FILES AND EXPOSURE OF SECURITATE AS POLITICAL POLICE], pt. 2, at 3 (visited Mar. 19, 2000) <www.cdep.ro/proiecte/owa/main.proiect?idp=656> [hereinafter COMMON REPORT].

²⁰ The law's aim is not to expose all the activities of the Securitate, but only those of political police. *Id.* pt. 2, at 5-6.

²¹ See *Constitution Watch: Romania*, E.EUR.CONST.REV., Vol.7, No. 3 (Summer 1998); Wolf Oschlies, *Aufarbeitung der kommunistischen Vergangenheit in Rumänien. Teil II: 1996/97 [Coming to Grips with the Communist Past in Romania. Part II: 1996/97]*, BERICHT DES BIOST No. 4/1998.

²² The name of this body in Romanian is Consiliul Național pentru Studierea Arhivelor Securității. The translation of Consiliu as Commission rather than Council has been preferred in order to convey better the functions and work of this institution.

exercise of the rights established by the law.²³ The Commission is an autonomous body that issues certifications on the status of former agents or collaborators.²⁴

The law defines an agent as any person who worked as an operative officer, including undercover, for the Securitate between 1945 and 1989 (this definition excludes the administrative staff).²⁵ A collaborator is defined as a person who was paid or otherwise compensated for his or her activity for the Securitate, owned a meeting house, was a Securitate resident,²⁶ or any other person who gave information to the Securitate, thus impairing fundamental human rights and liberties, whether directly or indirectly.²⁷ This latter requirement was introduced in the law when it became clear, during legislative debates and from other countries' experiences, that it is necessary to distinguish between classes of collaborators (*see below*). Persons who gave information under detention for political reasons do not fall in the category of informers.²⁸

²³ Law No. 187/1999 on Access to Files, arts. 7(1), 20(1).

²⁴ The body charged with the screening varies from country to country. For example, in the Czech Republic it is the Ministry of Interior. Boed, *supra* note 3, at 375. Poland created a lustration court pursuant to the adoption of its 1997 lustration law. This law, however, was not enforced in Poland, mainly because provincial judges had failed to nominate a sufficient number of judges to the Lustration Court. In May 1998 the Parliamentary Committee for Justice and Administration decided that the Appeals Court in Warsaw should operate as the Lustration Court. In June the parliament amended the lustration law, creating the office of the "Spokesperson of Public Interest." The spokesperson's task would be to examine the veracity of lustration statements made by persons applying for high governmental posts. Advocates would be required to give lustration statements. In July President Aleksander Kwasniewski challenged the amendments in the Constitutional Court, which ruled that the law was in accordance with the Constitution. The Warsaw Court of Appeal started dealing with lustration cases in January 1999. In early February 1999, the Lustration Court held its first session. In March, the Official Gazette contained statements of persons who admitted having served or collaborated with the Communist state security agencies. INTERNATIONAL HELSINKI FEDERATION FOR HUMAN RIGHTS, ANNUAL REPORT 1999: POLAND (visited Apr. 2, 2000) <<http://www.ihf-hr.org/reports/ar99/ar99pol.htm>>.

²⁵ Law No. 187/1999 on Access to Files, art. 5(2).

²⁶ A resident is an intelligence agent in a foreign country. It is not clear why the Romanian legislators defined residents as collaborators rather than agents.

²⁷ *Id.* art. 5(3). Direct consequences of the activity of collaborators that impaired fundamental human rights are, for example, loss of life, liberty, property, or employment. The Commission's activity will clarify how broad is the area of indirect consequences.

²⁸ *Id.* art. 5(3)(d).

A person who transmitted or facilitated information, notes, reports or other documents that exposed anticommunist activities or opinions is also a collaborator.²⁹ Here the criterion for disclosure is broader: these notes, reports or other documents did not have to have had injured fundamental human rights, but must have had the potential to do so. Once again, this qualification attempts to distinguish between informers, taking into account each person's individual involvement with the political police. This category further includes persons who had decisional, political (including abuse of power), or judicial competence regarding the activities of the repressive structures of the former regime.³⁰

2.1. Access to files

Art. 1 of the law allows any Romanian citizen direct access to his or her file as established and maintained by the Securitate in its role of political police. The legislative debates clarified that this is not complete access to all documents of the Securitate.³¹ Citizens have access only to their own file as it existed on December 22, 1989.³²

The law defines broadly the notions of citizens and access to files. Included here are not only current Romanian citizens, but also foreign citizens who had Romanian citizenship after 1945. The framers of the law specifically intended that former Romanian citizens have access to their file.³³ Access includes the right to study directly the files and to ask for copies of all documents and evidence. The right of access to files is exercised

²⁹ *Id.* art. 5(4).

³⁰ *Id.* art. 5(5).

³¹ COMMON REPORT, *supra* note 19, pt. 2, at 1.

³² Law No. 187/1999 on Access to Files, art. 13(1)(a).

³³ COMMON REPORT, *supra* note 19, pt. 2, at 6-7.

upon request.³⁴ Also upon request, any person may learn the identities of the agents and collaborators of Securitate who were in charge of his or her personal file or who contributed information to it.³⁵ These rights may also be exercised by surviving spouses and immediate relatives of a deceased person, unless otherwise stipulated by the deceased.³⁶

Procedurally, a person who wants to access his or her file must address a written petition to the Commission, who must answer within thirty days.³⁷ The Commission must allow direct access to the file, issue copies of the file as requested, and issue, also upon request, a declaration on whether or not the person was an agent or a collaborator of the Securitate.³⁸ The content of the declarations can be appealed to the Board of the Commission, and the decision of the Commission itself is open to judicial review.³⁹

The potential clash with third parties' constitutional right to privacy is moderated by the interdiction against issuing copies of those documents whose content could have a major impact on a third party (following the German model).⁴⁰ However, copies can be issued if the third party or his or her heir consents, or if the copies do not contain the passages that affect the third party.⁴¹

³⁴ Law No. 187/1999 on Access to Files, art. 1(1).

³⁵ *Id.* art. 1(2). Earlier drafts of the law provided only that private citizens see their files but with the names of the informants deleted. *Constitution Watch: Romania*, *supra* note 1.

³⁶ Law No. 187/1999 on Access to Files, art. 1(3).

³⁷ *Id.* art. 12. Parliament had in mind the long waiting lists in Germany. *See* Dezbateri asupra proiectului de Lege privind accesul la propriul dosar și deconspirarea Securității ca poliție politică. Stenograma ședinței Camerei Deputaților din 25 mai 1999 [Debates on the Bill on Access to Files and Exposure of Securitate as Secret Police. Session of the Chamber of Deputies from May 25, 1999] (visited Mar. 23, 2000) <<http://www.cdep.ro/steno/owa/plen.stenograma?ids=3561&pct=2>>.

³⁸ Law No. 187/1999 on Access to Files, art. 13(1).

³⁹ *Id.* art. 14.

⁴⁰ *See* Debates on the Bill on Access to Files and Exposure of Securitate as Secret Police, *supra* note 37.

⁴¹ Law No. 187/1999 on Access to Files, art. 13(2).

2.2. *Public exposure*

The public exposure of former agents and informers of Securitate takes up the bulk of the law. The issue of public exposure can be broken down into the following questions: who may request the exposure, who is the target, on the basis of what type of evidence is the disclosure done, and what are the consequences of exposure.

Who may exercise the right to disclosure

Any Romanian citizen, the media, political parties, non-governmental organizations, public authorities and institutions have the right to request and be informed of whether a person who runs for office or occupies various specified positions (*see below*) was an agent or a collaborator.⁴² The Romanian law departs from the German model in that it does not focus on the "aggrieved party." The Romanian law does not offer a means of legal redress for the wrongs suffered by victims of political justice in the past regime.⁴³ For the purposes of the law—transparency and moral catharsis—the framers preferred to sidestep defining the notion of "aggrieved party."⁴⁴

Scope of the law

The screening process targets both candidates to a position and those who already occupy it. The list of covered positions includes twenty-seven categories of persons, sweeping across all sectors of public and in some instances private life. This corresponds

⁴² *Id.* arts. 2(1), 15(1), 15(2).

⁴³ This is the legislative intent. However, the law does not specifically discuss potential causes of action on the basis of information uncovered in personal files.

⁴⁴ Dezbateri asupra proiectului de Lege privind accesul la propriul dosar și deconspirarea Securității ca poliție politică. Stenograma ședinței Camerei Deputaților din 18 mai 1999 [Debates on the Bill on Access

to one of the aims of the law—that public opinion be made aware of the "moral character" of people who occupy positions of responsibility.⁴⁵ In other words, the criterion for the classification is to allow perfect transparency for the persons in authority who take major decisions, whether they act in the public or the private sphere. Both past and present play a role in this process. Almost all of the officials included in the list have to prove their moral competence in light of associations with the past regime.

Given this criterion, it was obvious that the screening should cover essentially all senior staff in the legislative⁴⁶ and executive branches.⁴⁷ The screening penetrates deeper into areas particularly sensitive in terms of public trust: police, customs,⁴⁸ defense⁴⁹ and the diplomatic corp.⁵⁰ Essentially, the entire judiciary is subject to screening, including lawyers and public notaries.⁵¹

The law does not confine its reach to state authorities, or even to the public sphere. Thus, it appears that the category of persons with responsibility towards the society includes not only public officials *per se*, but also persons who actively participate and contribute in public affairs or shape the public opinion. Thus may be explained

to Files and Exposure of Securitate as Secret Police. Session of the Chamber of Deputies from May 18, 1999] (visited Mar. 23, 2000)

< <http://www.cdep.ro/steno/owa/plen.stenograma?ids=3501&pct=2>>.

⁴⁵ COMMON REPORT, *supra* note 19, pt. 1, at 5.

⁴⁶ All deputies and senators are subject to screening, as well as senior staff working for the Chambers. For other state organs the screening can apply to ordinary members (e.g. the Legislative Council, the Ministry of Interior, the National Commission for Statistics or the National Audio-Visual Council). Law No. 187/1999 on Access to Files, art. 2(b), (d), (g), (k), (m).

⁴⁷ In the executive branch, essentially every senior official, starting with the President of Romania and ending with directors in ministries, is subject to screening (art. 2(a), (c)). Senior and mid-level officials of the local administration are also subject to screening, regardless of whether they represent the central government or represent the right to local autonomy (art. 2(e)).

⁴⁸ Senior and mid-level officials on both national and local level of the police, the Financial Inspection Agency and customs offices are subject to screening. *Id.* art. 2(g), (h).

⁴⁹ In the Ministry of National Defense all civil and military senior staff is screened. *Id.* art. 2(t).

⁵⁰ All diplomatic and consular staff is subject to screening, except those in technical and administrative functions. *Id.* art. 2(î).

screenings in the media,⁵² education,⁵³ culture,⁵⁴ religion,⁵⁵ and health care.⁵⁶ For some in this category, such as psychiatrists and clergy, the explanation can be found in their reputation for collaboration with the communist regime. Nevertheless, even if the intrusion into the private sphere as such will not be constitutionally challenged, the broad sweep of the law may come to be challenged (e.g. screening of priests as a violation of separation of state and church).⁵⁷

Other key categories included in the law, mainly for reasons of political transparency, are in the banking⁵⁸ and telecommunications sectors,⁵⁹ as well as in the national labor unions.⁶⁰ The law also targets leading members of political parties, which, in light of its purpose, is not surprising.⁶¹ More problematic is the inclusion in the screening process of leading members of non-governmental organizations,⁶² national companies and commercial societies that have a public or strategic interest, foundations and associations active in Romania.⁶³ This inclusion not only reminds one of the former regime's invasion of all areas of life, but may also help perpetuate it. Perhaps ironically,

⁵¹ All judges, public prosecutors, first bailiffs from both civil and military courts are screened, as well as the Ombudsman and his or her adjuncts. *Id.* art. 2(i), (l).

⁵² Both public and private media, including editors and political analysts. *Id.* art. 2(n).

⁵³ All levels of the education system are explored (e.g. inspectors and school principals). Private colleges and universities are also subject to screening (rectors and deans). *Id.* art. 2(r), (s).

⁵⁴ Including members of the Romanian Academy. *Id.* art. 2(p).

⁵⁵ Including the clergy, whether domestic or abroad. *Id.* art. 2(t).

⁵⁶ Including hospital directors, psychiatrists and pathologists. *Id.* art. 2(x).

⁵⁷ The Hungarian Constitutional Court found no violation of separation of state and church for a similar legislative choice. *See* 60/1994. (XII. 24.) AB határozat Közzétéve a Magyar Közlöny 1994. évi 124. számában. Budapest, 1994. december 22 [Decision 60/1994 of the Hungarian Constitutional Court from Dec. 22, 1994, Official Gazette No. 124/1994] (unofficial English translation on file with the author).

⁵⁸ Mainly senior staff is screened, starting with the governor of the National Bank down to members of councils of administration of banks. *Id.* art. 2(o).

⁵⁹ Senior staff only. *Id.* art. 2(v).

⁶⁰ *Id.* art. 2(u).

⁶¹ *Id.* art. 2(§).

⁶² *Id.* art. 2(§).

⁶³ Including, for the latter two categories, their founders. *Id.* art. 2(y).

the last category of persons subject to screening is persons who have been awarded the title of revolutionary or combatant with special merits in the 1989 Revolution.⁶⁴

With the exception of former political prisoners (eventually not on the list), and diplomatic and consular staff (added, removed, and finally brought back on to the list), only one other category was subject to intense controversy. The major point of contention was the limitation of verification of national security bodies to their directors and adjuncts only.⁶⁵ The adoption of this variant that excluded current agents from screening did not end the debate.⁶⁶ Exercising its right to challenge the constitutionality of laws prior to promulgation before the Constitutional Court,⁶⁷ the Supreme Court of Justice argued that this omission violated the constitutional right of access to information of public interest.⁶⁸ The Supreme Court claimed that part of the current staff of the national security services had previously worked for the Securitate, and that public ignorance of this fact endangers the national security of Romania, because there is no guarantee of loyalty, and these officers could be open to blackmail. Furthermore, the Supreme Court argued, these officers may attempt to restore underground networks that could jeopardize national security.

⁶⁴ *Id.* art. 2(z).

⁶⁵ These bodies include the Romanian Information Service SRI, the Service of External Information SIE, the Service of Protection and Guard SPP, and the Service for Special Telecommunications (art. 2(f)). A proposal to apply the law, two years after its entry into force, to current agents was eliminated by the Chamber in its session from June 9, 1999. *See* *Dezbateri asupra proiectului de Lege privind accesul la propriul dosar și deconspirarea Securității ca poliție politică. Stenograma ședinței Camerei Deputaților din 9 iunie 1999* [Debates on the Bill on Access to Files and Exposure of Securitate as Secret Police. Session of the Chamber of Deputies from June 9, 1999] (visited Mar. 23, 2000) <<http://www.cdep.ro/steno/owa/plen.stenograma?ids=3701&pct=2>>.

⁶⁶ In comparison, in May 1998 the Polish Parliamentary Committee for Justice and Administration turned down a proposal that intelligence and counter intelligence service be excluded from lustration. ANNUAL REPORT 1999: POLAND, *supra* note 25.

⁶⁷ CONST. art. 144(a).

⁶⁸ CONST. art. 31(1); Decision of the Constitutional Court No. 203/Nov. 29, 1999, M.Of. No. 603/Dec. 9, 1999.

The Constitutional Court, however, upheld the law, prompting the initiator of the law to call the Court the "guarantor of the former political police" and the new act "the Securitate conspiracy law".⁶⁹ In this decision the Constitutional Court departed from its previous stand that it does not rule on issues of legislative omission and argued that this is in fact a legislative option,⁷⁰ supported by three arguments. First, the disclosure of the identity of current agents would jeopardize national security. Second, the Constitution allows for the restriction of the exercise of the right to information of public interest that is prejudicial to national security.⁷¹ In this case, the restriction is proportional to the circumstances that determined it and does not infringe upon the existence of the right.⁷² Finally, the commanders of national security services already have an obligation to verify the past of their employees.⁷³

From a comparative perspective, the wide scope of the Romanian law is not unique, but it does appear to be the widest in the region. The 1994 Hungarian lustration law, for example, targeted more than twenty-five categories of high-ranking posts.⁷⁴ It prescribed the screening of, *inter alia*, members of the parliament and government officials, executives of state banks, managers of state-controlled enterprises, high-level

⁶⁹ Interview with Constantin Ticu Dumitrescu, in Rodica Palade & Cristian Vasile, *Legea privind accesul la dosare* [Law on Access to Files], REVISTA 22 No. 49/1999 (visited Mar. 21, 2000) <<http://www.dntb.ro/22/1999/49/3ancheta.html>>.

⁷⁰ See e.g. decision 62/June 13, 1995, M.Of. No. 122/June 19, 1995; decision 54/May 29, 1995, M.Of. No. 226/October 2, 1995.

⁷¹ CONST. art. 31(3).

⁷² *Id.* art. 49(2).

⁷³ The law on the organization of the Romanian Information Service excludes from the Service persons who were part of repressive structures of the former regimes and committed abuses, were informers and collaborators of Securitate. Also excluded are former members of the communist party who are guilty of acts against fundamental human rights and liberties. *Lege privind organizarea și funcționarea Serviciului Român de Informații* [Law on the Organization and Operation of the Romanian Information Service] No. 14/1992, art. 27(2), M.Of. No. 33/Mar. 3, 1992. However, the law does not impose a specific ban on former agents.

⁷⁴ Ellis, *supra* note 15.

military and police officers, executives of the state media, editors of daily newspapers and weekly magazines, and department heads and officials of state-owned or state-controlled universities.⁷⁵ As in Romania, the Hungarian law extends lustration to the private sphere.⁷⁶

Procedure for exposure

There are two procedural approaches for exposure. First, any Romanian citizen, the media, political parties, non-governmental organizations and public authorities may request the verification for any of the persons included in art. 2.⁷⁷ Art. 4 of the law establishes a list of priorities: first to be verified are election candidates, second are persons to be appointed to positions at the national level, and finally persons to be appointed at local level.

Second, all persons mentioned in art. 2 of the law must submit an affidavit, subject to criminal penalties,⁷⁸ concerning their former status of agent or informer, before they are elected or appointed. For the president of Romania, deputies and senators, and members of government, the verification is done *ex officio* (including for persons actually in office,⁷⁹ thus raising the issue of retroactivity of the law). The investigation is stopped if the person resigns or withdraws his or her candidacy within fifteen days.⁸⁰

⁷⁵ Boed, *supra* note 3, at 362-363.

⁷⁶ The Constitutional Court did not strike it down. Gábor Halmai et al., *Confronting the Past: The Hungarian Constitutional Court's Lustration Decision of 1994*, 1 E. EUR. HUM. RTS. REV. 111, 126 (1995).

⁷⁷ Law No. 187/1999 on Access to Files, art. 2.

⁷⁸ *Id.* art. 3(1). Art. 292 of the Criminal Code punishes perjury before a public authority with three months to two years prison or a fine. Codul penal [Criminal Code], art. 292, BULETINUL OFICIAL [OFFICIAL BULLETIN] No. 79-79bis/Jun. 21, 1968, as amended by Law No. 140/1996, art. 132, M.Of. 289/Nov. 14, 1996. Affidavits are signed before public notaries. This affidavit requirement was retained from the previous 1997 draft law, *supra* note 15.

⁷⁹ Law No. 187/1999 on Access to Files, art. 3(1).

⁸⁰ *Id.* art. 3(3).

Evidence for the Commission's decision

The Commission evaluates the status of the targeted individual based on the evidence in his or her file or presented by any interested party, and based on testimony of both the person who requested the disclosure and the person targeted.⁸¹ The law specifies that the main piece of evidence is the file. However, if the file is incomplete, altered or missing, the Commission accepts any other written evidence presented by any person who has an interest in the case.⁸² More specifically, the Commission analyzes the agreement written and signed by the person to act as agent or informer for Securitate, his or her reports, informative papers, handwritten papers and all other types of evidence, regardless of its support, from Securitate's archives.⁸³

Obviously, this procedure may pose certain problems. The Commission has wide powers with regard to accepting and evaluating evidence. More than ten years after the Securitate officially ended its activity, the integrity of its archives is questionable.⁸⁴ It is quite possible that many files were destroyed and that what remains consists of materials that agents deliberately distorted.⁸⁵

⁸¹ *Id.* art. 15(6).

⁸² *Id.* art. 5(6).

⁸³ *Id.* art. 15(5). The law specifically classifies the personal files and documents related to them as documents that do not involve national security. The special rules established by this law differ from the general rules and deadlines established by *Legea Arhivelor Naționale* [Law on National Archives] No. 16/1996, arts. 20(2), 22, app. 6, M.Of. No. 71/Sept. 4, 1996.

⁸⁴ See Wolf Oschlies, *Aufarbeitung der kommunistischen Vergangenheit in Rumänien. Teil I.: 1989-1995/96* [Coming to Grips with the Communist Past in Romania. Part I: 1989-1995/96], BERICHT DES BIOST No. 3/1998 (finding that archives and files were destroyed, manipulated, forged, and that re-activated secret police operated just like in the former regime).

⁸⁵ Brzezinski, *supra* note 13, at 439. The most famous scandal connected with secret documents in Romania took place in May of 1991. On the 20th of May, journalists from the newspaper *Romania Liberă* announced, in a press conference, that they discovered documents of the Securitate buried and partially burned in a pit close to the town of Berevoiești. The national security agency did not deny the authenticity of the documents. *Țara moare și politicienii se joacă de-a diversiunea!* [The Country Is Dying While Politicians Are Pursuing Diversions!], COTIDIANUL, Nov. 12, 1998,

Decisions of the Commission can be appealed to the Board of the Commission, who must allow the person verified to examine the evidence.⁸⁶ Decisions of the Board are open to judicial review at the appellate level.⁸⁷ A three-judge panel decides in secret session, its decision is final, and all documents of the session remain sealed.⁸⁸ This procedure intends to avoid criticism of denial of due process.⁸⁹

Consequences of disclosure

The most important consequence of disclosure is publicity.⁹⁰ As a general rule, the Commission publishes its final decisions in the Official Gazette,⁹¹ as well as the real and clandestine names and positions of Securitate officers and inferior officers (including collaborators and undercover agents).⁹² The Commission must also publish information and documents that prove the implication of the former national security agencies in crimes against persons and in acts of treason.⁹³ The Commission investigates unsolved

<<http://www.cotidianul.ro/anterioare/1998/editoriale/editnov98.htm#>>.

⁸⁶ Law No. 187/1999 on Access to Files, art. 16(3).

⁸⁷ *Id.* art. 16(1). The competence belongs to the court of appeal in whose jurisdiction the appellant resides.

⁸⁸ *Id.* art. 16(2).

⁸⁹ This issue was raised in the Czech Republic. There, in a 1992 decision, the Supreme Court held that the secret police collaboration certificate from the Ministry of Interior did not have the character of a judicial decision, and thus it could not be appealed. In effect, a person could not challenge the finding of the Ministry of Interior. Boed, *supra* note 3, at 377.

⁹⁰ This is similar to the Polish 1997 law. This law also provides for public disclosure of collaboration, but it does not bar a collaborator from holding a government position. As in Romania, false declarations may result in criminal punishment. Boed, *supra* note 3, at 363-364. Unlike the Romanian law, giving false statements in Poland would exclude the person from governmental posts for ten years. ANNUAL REPORT 1999: POLAND, *supra* note 24.

⁹¹ Law No. 187/1999 on Access to Files, art. 17(1).

⁹² *Id.* art. 17(2), (4).

⁹³ *Id.* art. 17(3).

cases of deaths or disappearances possibly connected with Securitate, *ex officio* or upon request.⁹⁴

Although the law provides for publication of this information, it does not set any deadline for the Commission, with the exception of candidates in elections, the results of whose screening must be published "immediately" in the Official Gazette and released to the media.⁹⁵ The law gives the Commission wide latitude with regard to what kind of documents it can publish, thus raising questions of potential political bias and abuse of power.

Another consequence of disclosure is criminal punishment. If the persons targeted by the law lie in their affidavits as to their status of former secret agents or informers, they can be punished with imprisonment or a fine.⁹⁶

2.3. The National Commission for the Study of the Archives of Securitate

The Commission is an autonomous body with legal personality, controlled by Parliament. The Commission reports to Parliament annually or upon request.⁹⁷ The Commission is led by an eleven-member Board, nominated by parliamentary parties and confirmed by Parliament (observing the political configuration of the Chambers). The mandate of the members of the Board is six years, renewable once.⁹⁸ The members of the Board must also declare that they themselves were not agents or informers.⁹⁹ Agent,

⁹⁴ *Id.* art. 18.

⁹⁵ *Id.* art. 34).

⁹⁶ *Id.* art. 3(1). Codul penal [Criminal Code], art. 292, BULETINUL OFICIAL [OFFICIAL BULLETIN] No. 79-79bis/Jun. 21, 1968, as amended by Law No. 140/1996, art. 132, M.Of. 289/Nov. 14, 1996.

⁹⁷ Law No. 187/1999 on Access to Files, art. 7(2).

⁹⁸ *Id.* art. 8(1), (2).

⁹⁹ *Id.* art. (3).

collaborator or spy status does bar membership in the Commission.¹⁰⁰ The Supreme Court of Justice is competent to screen members of the Commission and to invalidate mandates if appropriate.¹⁰¹ The Commission as a whole functions for a six-year term that can be extended by decision of Parliament.¹⁰²

The Commission implements the exercise of rights of access to files and exposure of former Securitate agents or collaborators. To this end, the Commission collects and manages all documents pertaining to the exercise of these rights. The Commission has the right not only to Securitate documents and other types of evidence, but also to relevant documents retained by the Ministry of Interior, the Ministry of Justice, the Ministry of National Defense, the National Archives, any other public or private institutions, as well as by private citizens.¹⁰³ The exception to this rule concerns national security files. The Commission and the Romanian Information Service determine whether a file concerns national security on a case by case basis.¹⁰⁴ Researchers authorized by the Commission have full access to study the structure, methods and activities of the Securitate.¹⁰⁵

3. Conclusion

¹⁰⁰ *Id.* art. 8 (8).

¹⁰¹ *Id.* art. 9.

¹⁰² *Id.* art. 22. After examining the Gauck Commission, the Romanian legislators preferred to be silent about how many members the Commission will have. The number of its employees and the organization of the Commission depend on the volume of work, and will be established by internal rules of the Commission. *See* Dezbateri asupra proiectului de Lege privind accesul la propriul dosar și deconspirarea Securității ca poliție politică. Stenograma ședinței Camerei Deputaților din 25 mai 1999 [Debates on the Bill on Access to Files and Exposure of Securitate as Secret Police. Session of the Chamber of Deputies from May 25, 1999] (visited Mar. 23, 2000) <<http://www.cdep.ro/steno/owa/plen.stenograma?ids=3561&pct=2>>.

¹⁰³ Law No. 187/1999 on Access to Files, art. 20(3).

¹⁰⁴ *Id.* art. 20(6). In case their opinions differ, the Supreme Commission of National Defence decides. Under art. 2(a) of Law No. 29 of 1990, administrative acts concerning national security are not subject to judicial review. *Legea contenciosului administrativ* [Law on Judicial Review of Administrative Acts] No. 29/1990, M.Of. No. 122/Nov. 8, 1990.

¹⁰⁵ Law No. 187/1999 on Access to Files, art. 19.

The Romanian law stays close to its German model. Citizens have direct access to their files, can request copies from its documents, and, a crucial element, they can know the names of agents and informers who worked on the file.¹⁰⁶ The law also follows the German model in its establishment of a Commission to manage the former secret-service archives and ensure that citizens have access to their own files.

Unlike the majority of lustration laws, the Romanian law does not target communist officials as such. Its main purpose is to expose the activities of Securitate as political police. Communist officials are targets insofar as they took decisions related to Securitate. Another major distinction from other lustration laws is that those discovered to have been agents or collaborators are not banned from any public position, nor do they suffer any other employment-related consequence. The major repercussion is publicity (and perjury charges related to false affidavits). Regardless of the lack of more tangible consequences, there remains a conflict with the constitutional right to privacy.

The Romanian law also tries to avoid a major problem raised by the Czech law,¹⁰⁷ namely presuming culpability on the basis of a person's membership in an organ of the communist regime. Thus, the Romanian law provides for the possibility of hearings and evidence other than the Securitate files (although they are the main piece of evidence). However, this does not necessarily guarantee the differentiation among agents and collaborators on the basis of their individual involvement with the former regime (e.g. people who promised to inform but never did, reasons for collaboration and other

¹⁰⁶ Though it is not clear whether this requires the identification of both real names and aliases.

¹⁰⁷ For a critique of the Czech law, see Boed, *supra* note 3.

mitigating circumstances). The law tries to achieve this aim by tying the definition of collaborator to actions that injured fundamental human rights and liberties.¹⁰⁸

A potentially major flaw of the law arises from art.2. The provision defines the status of former Securitate agent or collaborator as information of public interest. Access to information of public interest cannot be restricted, pursuant to art.31 of the Romanian Constitution. This definition induces a clash between the constitutional right of access to information of public interest and the constitutional right to privacy (in this case, the rights of the former agents and informers). While Parliament can circumscribe the category of "information of public interest", the very broad definition included in this law certainly does not allow much room for the privacy argument. In light of this constitutional conflict, a clear criterion of what constitutes "information of public interest" in this law should have been provided. This problem is especially poignant if one takes into account the purpose of the law, which is merely to bring to light the moral character of persons who occupy positions of responsibility, and the wide range of persons targeted. As yet, neither the framers of the Constitution nor the Constitutional Court have paid much attention to the right to privacy and other rights connected with it, such as the right to a person's own image and the right to informational self-determination. The application of this law may change this.

Theoretical considerations aside, one of the first problems for the implementation of the law will be the collection of the archives. From the beginning of the debates, the national security agencies lobbied heavily against the law and claimed that it was

¹⁰⁸ See *supra* note 26; Law No. 187/1999 on Access to Files, art. 5(4), (5).

impossible to disentangle the archives of the Securitate from other national security documents and surrender them to the Commission.¹⁰⁹

The law may or may not achieve the goal of bringing to light past deeds of the Securitate. Learning from other countries' experiences, Romania can expect negative side effects, mainly social unrest and tension. Also possible is the use of lustration for political purposes, as in Poland.¹¹⁰ Nevertheless, the law may help avoid various political scandals involving former Securitate collaborators and informers.¹¹¹

The Czech experience offers some practical evidence. In that process, only five percent of all persons screened resulted in positive certificates. At the same time, hundreds of unhappy "lustrati" challenged the certificates issued by the Interior Ministry, thus swamping the Prague Municipal Court (where these cases are heard). Also, in the most sensitive areas, for which lustration was most expressly intended, sweeping purges had already taken place before the law came into effect. Very few dismissals from leading positions took place as a result of lustration, the majority of those positively lustrated were demoted and transferred rather than fired.¹¹²

The situation in Romania may be similar. When the law was adopted, it seemed that the removal from the list of persons to be lustrated of current agents would directly impair the achievement of the law's *raison d'être*. From a practical perspective, however, this may prove to be less important. During legislative debates, the current SRI director

¹⁰⁹ See e.g. Dezbateri asupra proiectului de Lege privind accesul la propriul dosar și deconspirarea Securității ca poliție politică. Stenograma ședinței Camerei Deputaților din 26 mai 1999 [Debates on the Bill on Access to Files and Exposure of Securitate as Secret Police. Session of the Chamber of Deputies from May 26, 1999] (visited Mar. 23, 2000) <<http://www.cdep.ro/steno/owa/plen.stenograma?ids=3581&pct=1>>.

¹¹⁰ Brzezinski, *supra* note 13, at 441.

¹¹¹ For example, when Adrian Vilău, head of parliament's Commission for Foreign Secret Service Control, was forced to resign when the press threatened to publish documents implicating him as a former Securitate informer. *Constitution Watch: Romania*, E.EUR.CONSTITUTIONAL.REV. Vol.7, No. 3 (Summer 1998).

claimed that over 80 percent of the agents currently active were hired after 1990, making the average age of agents in the National Security Service 36.¹¹³

Ultimately, the question remains whether the legal system is best fit to deal with the past, especially in a society without a liberal tradition. Despite their propensity for truth, catharsis and a new beginning, lustration laws are intrinsically backward looking, breeding hate and keeping wounds open. Thus, it can be argued that the legal system should not undertake the task of coming to terms with the past. Rather, this should be achieved by cultural reflection by intellectuals, historians, publicists and reflecting ordinary citizens.¹¹⁴ Abrupt and harsh measures such as purges, political prosecutions and lustration laws may harm more than help.

¹¹² Williams, *supra* note 6.

¹¹³ Costin Georgescu, Speech before the Chamber of Deputies, *in* Dezbateri asupra proiectului de Lege privind accesul la propriul dosar și deconspirarea Securității ca poliție politică. Stenograma ședinței Camerei Deputaților din 9 iunie 1999 [Debates on the Bill on Access to Files and Exposure of Securitate as Secret Police. Session of the Chamber of Deputies from June 9, 1999] (visited Mar. 23, 2000) <<http://www.cdep.ro/steno/owa/plen.stenograma?ids=3701&pct=2>>.

¹¹⁴ Andrew Arato, *Constitution and Continuity in the East European Transitions*, 1 J.OF CON.L. IN E&CE 97, 124 (1994).

the Romanian Proclamation of Timișoara unsuccessfully called for lustration to be applied to former Communist Party officials? More interesting facts on Lustration. Include this on your site/blog

As of 1996 lustration laws had not been passed in Belarus, nor in the former Soviet Central Asian Republics of (Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan) (Ellis, 1996). The main goal of lustration is to prevent continuation of abuses that had occurred under a former regime. Lustration can serve as a form of instant revenge for those who were abused by a past government. Political figures are often banned immediately from government, and the process therefore serves as a more efficient form of justice than pursuit of such figures through court trials. How not to deal with the past: lustration in Poland. *European Journal of Sociology*, Vol. 40, Issue. 1, p. 31.

David, Roman 2003. *Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland (1989–2001)*. *Law Social Inquiry*, Vol. 28, Issue. 2, p. 387.

Process of EU-driven constitutionalisation – Decision of Romanian Constitutional Court post-EU accession – Nullification of the Lustration Law to pre-accession judiciary reform processes – Lustration elsewhere considered a matter of collective guilt of confrontation with the past – Lustration in Romania related to legislative attempts to reform the judiciary. The report observes that – with context-driven caveats – the Romanian Constitution could be categorised as representing –legal– or post-authoritarian constitutionalism. The report outlines weaknesses in Romanian constitutionalism, including issues that have necessitated the EU post-accession monitoring procedure.