Transitional Justice and Temporal Parameters: Built-in expiration dates

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Abstract: Temporal assumptions associated with personnel reforms, such as lustration and public disclosure programs, both prescribe the optimal timing for the onset of measures and proscribe a long duration for such measures. In the context of the post-communist transitions, these assumptions suggested that lustration and public disclosures should be enacted as soon as possible after a regime transition, with the legitimacy, motives, and legal appropriateness of delayed measures questioned. In terms of duration, personnel reforms should have fixed time deadlines, often suggested as no more than a decade. This paper critically explores the evolution of these temporal assumptions through an examination of the legal rulings, intergovernmental policies, and recommendations of the Parliamentary Assembly of the Council of Europe, the European Court of Human Rights, and the Venice Commission. It illustrates the tension between the continued use of the measures by some post-communist states and international rulings signaling their expiration.

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Introduction

Embedded in the words "transitional justice" are implied temporal parameters, namely that such measures are used during a country's post-conflict or post-authoritarian transition.[1] While this may have largely described the clustering of cases in the early 1990s, transitional justice now encompasses measures enacted during a transition, after a transition, and even before a transition.[2] Scholars pushed back on this nomenclature and the implied temporal delimits as the field expanded.[3] Newer transitional justice scholarship suggested terminology like retrospective, restorative or retributive justice measures, arguing these terms were more precise and inclusive of measures enacted across a range of temporal contexts.[4] Despite the broadening of our understanding of the umbrella term 'transitional justice,' temporal parameters associated with some measures have remained more durable, prescriptive and foundational than others.

In particular, the temporal assumptions associated with personnel reforms, such as lustration laws (regionally specific employment vetting based on the communist era secret police files) and public disclosure programs (publicly revealing previous secret police collaboration), both prescribe the optimal timing for the onset of measures and proscribe a long duration for such measures. In the context of the post-communist transitions, these assumptions suggested that lustration and public disclosures should be enacted as soon as possible after a regime transition, with the legitimacy and appropriateness of delayed measures questioned.[5] In terms of duration, personnel reforms should have fixed time deadlines, often suggested as no more than a decade, with a warning that measures

1 Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman, OK: University of Oklahoma Press, 1991); Neil Kritz, ed. *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington, D.C.: United States Institute of Peace Studies, 1995).
2 Lavinia Stan and Nadya Nedelsky, eds. *Encyclopedia of Transitional Justice,* Vol. 1-3 (New York: Cambridge University Press, 2013); Helga Binningsbø and Cyanne Loyle, "Justice During Armed Conflict: Trends and Implications," *PRIO Conflict Trends,* April 2018.
3 Marcos Zunino, *Justice Framed: A Genealogy of Transitional Justice* (New York: Cambridge University Press, 2019).
4 Eva-Clarita Pettai and Vello Pettai, *Transitional and Retrospective Justice in the Baltic States* (New York: Cambridge University Press, 2014); James Sweeney, "Restorative Justice and Transitional Justice at the ECHR," *International Criminal Law Review* 12, 3 (2012): 313-37.
5 United Nations, *Rule of Law Tools for Post-Conflict States: Vetting An Operational Framework*. Office of the UN High Commission for Human Rights, New York, United Nations HR/PUB/06/5 (2006); Alexander Mayer-Rieckh and Pablo de Greiff, eds. *Justice as Prevention: Vetting Public Employees in Transitional Societies* (New York: Social Science Research Council, 2007).

not last "too long."[6] Finally, embedded in the rationale for this argument is a related assumption that the utility of personnel reforms decreases as more time elapses from the transition. These temporal assumptions have affected the structure and use of lustration and public disclosure measures in past and present post-communist transitional justice programs.

This paper critically explores the temporal assumptions surrounding the use of personnel reform measures in the post-communist space through an examination of the legal rulings, intergovernmental policies, and recommendations of the Parliamentary Assembly of the Council of Europe (PACE), the European Court of Human Rights (ECtHR) and the European Commission for Democracy through Law, also known as the Venice Commission. These three international bodies have exerted a direct and outsized impact on the use of personnel reform measures in Central and Eastern Europe (CEE), shaping their structure, goals, implementation and temporal parameters. The paper is motivated by two main questions: What are these temporal assumptions, and how has thinking about them changed as the post-communist transition progressed?

Methodologically, the paper uses a legal analytical approach to process trace the evolution of temporal assumptions in the policy recommendations, reports, and legal rulings issued by these three international bodies with respect to lustration and public disclosures in post-communist countries. The paper engages all of the precedent setting ECtHR legal rulings and Venice Commission recommendations from 1995-2020, in which the timing or duration of lustration measures was a material factor in their decision-making rationale.[7] Chronologically this clusters cases and legal reasoning into three periods: 1996-2006, 2006-2015, and 2015-2020.

To preview the main findings, between 1996-2006, post-communist states were largely given a green light to use lustration measures to support and defend their new democracies, with the caveat that lustration was an inherently temporary form of transitional justice. Between 2006-2015 the green light turned to a yellow caution light as states received more critical messages about the waning legal

[6] Parliamentary Assembly Council of Europe (PACE), *Measures to Dismantle the Heritage of Former Communist Totalitarian Systems*. Resolution 1096, Doc. 7568, 3 June (Strasbourg: Council of Europe, 1996); European Court of Human Rights, *Case of Polyakh and Others v. Ukraine*. Applications nos. 58812/15, 53217/16, 59099/16, 23231/18, 47749/18. Judgment, 17 October (Strasbourg: Council of Europe, 2019) § 316.
[7] See Appendix 1 for precedent setting cases.

appropriateness, diminished moral necessity, and declining institutional utility of lustration with time. 2015 marked a pivot in Venice Commission rulings and ECtHR decisions, as post-communist states were explicitly directed that the window of opportunity for lustration and punitive public disclosure measures had closed—the yellow caution light turned to a red stop light! Moreover, a line was drawn between restorative and retributive transitional justice measures; there were no *a priori* temporal limits on acts of truth-telling and remembrance, but there were built-in expiration dates for acts that punished the past. Although this paper will focus on the regionally specific version of vetting (lustration) used in post-communist countries, these cases have broader implications for any country using personnel reforms in their transitional justice programs.

Lustration and public disclosure measures

After the fall of communism, countries in Central and Eastern Europe (CEE) and several in the Former Soviet Union (FSU) adopted transitional justice measures to address the institutional and ideational legacies of communism.[8] Lustration and public disclosure measures combined with selected access to information in the communist era secret police files were the dominant forms of transitional justice. Lustration is a form of vetting and is defined as "the broad set of parliamentary laws that restrict members and collaborators of former repressive regimes from holding a range of public offices, state management positions, or other jobs with strong public influence (such as in the media or academia) after the collapse of the authoritarian regime."[9] There are potential employment consequences for individuals who worked for or collaborated with the former secret police and/or held high ranking positions in the Communist Party, which could range from mandatory employment exclusion from certain public and semi-public positions, to exclusion only in the event of lying about previous regime involvement, and/or public disclosure of the backgrounds of former regime

8 Lavinia Stan, ed. *Transitional Justice in Eastern Europe and the Former Soviet* Union (New York: Routledge Press, 2009).

9 Monika Nalepa, "Lustration," in Lavinia Stan and Nadya Nedelsky, eds. *Encyclopedia of Transitional Justice* (New York: Cambridge University Press, 2013) 1: 46.

operatives and collaborators.[10] Public disclosure programs are forms of lustration without mandatory employment exclusion, relying instead on the potential shame of disclosure of past collaboration to encourage personal recusal from consideration for positions of public trust.[11] Both lustration and public disclosures draw on the secret police files, involve lists for employment screening, and establish agencies to enforce guidelines, publicize information and manage the vetting process. By 2010 they were widely implemented across the post-communist space, with a number of on-going programs as of early 2020.[12]

The aims of lustration are broadly two-fold: to promote truth-telling as a form of accountability, and to catalyze bureaucratic change by requiring or strongly encouraging the replacement of the old guard with individuals more willing and able to support the democratic transition. Vojtêch Cepl, a judge on the Czech Constitutional Court, also ascribed moral goals to lustration, suggesting it was a means of cleansing the state and transforming the "moral culture" and the hearts and the minds of citizens.[13] Lustration is directly and indirectly linked to a number of meta-transition goals: to (re)build trust in public institutions, to promote trust in government, to strengthen democracy, to reduce corruption by breaking up privileged networks, and to support robust civil societies. [14]

Despite the laudable goals, problems with the legality, morality, and appropriateness of lustration have been raised, which are significant enough to potentially undermine their alleged trust-building and democracy promoting effects. For example, scholars and legal experts have challenged the potential extra-legality of punishing individuals for actions that were not criminal when they were

[10] Stan 2009; Roman David. *Lustration and Transitional Justice: Personnel Systems in the Czech Republic, Hungary, and Poland* (Philadelphia: University of Pennsylvania Press, 2011).
[11] For the Baltics see Pettai and Pettai 2014; for Romania see Dragoș Petrescu, "Dealing with the Securitate Files in Post-Communist Romania: Legal and Institutional Aspects," in Florian Kührer-Wielach and Michaela Nowotnick, eds. *Aus den Giftschränken des Kommunismus Methodische Fragen zum Umgang mit Über-wachungsakten in Zentral- und Südosteuropa* (Regensburg:Verlag Friedrich Pustet, 2018); 43-60; for Bulgaria and Romania see Cynthia M. Horne, "Silent Lustration: Public Disclosures as Informal Lustration Mechanisms in Bulgaria and Romania," *Problems of Post-Communism* 62, 3 (2015): 131–144.
[12] For example, Poland, the Czech Republic, Bulgaria, Romania and Ukraine have active public disclosure measures as of 2020.
[13] Vojtêch Cepl, "The Transformation of Hearts and Minds in Eastern Europe," *The Cato Journal* 17, 2 (1997): 229-34.
[14] United Nations 2006; Mayer-Rieckh and de Greiff 2007; PACE 1996.

committed.[15] International and national legal institutions have pointed out that many lustration programs lacked adequate due process safeguards and judged people on group not individual culpability criteria, thereby violating rights enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).[16] Scholars and policymakers raised concerns with the veracity and selectivity of information in the secret police files from which lustration draws evidence of regime complicity.[17] Important dissidents have questioned the morality and appropriateness of relying on the secret police files and their legacies as a way to cleanse society of its totalitarian past.[18]

Normatively, both national and international voices have likened lustration to a "witch hunt" in the way it has been wielded by political parties as revenge measures against political opponents. [19] Tighe, Szczerbiak, and Zięba detailed the politicized cycles of lustration's passage and veto in Poland, and the controversial public outing of the national hero and Solidarity leader Lech Wałęsa as a secret police informant.[20] Tighe argued, "In the squalid Polish lustration debate paranoia and chauvinism ran rampant; careers were not often made but frequently damaged or broken there was no great improvement in access to justice and the very little truth revealed was often unintentional, compromised and generally unpalatable."[21] In such an environment, one necessarily questions the potential benefits of lustration and disclosure.

[15] Jon Elster, ed. *Retribution and Reparation in the Transition to Democracy* (New York: Cambridge University Press, 2006); Roman David, "Transitional injustice? Criteria for conformity of lustration to the right to political expression," *Europe-Asia Studies* 56, 6 (2004): 789-812.
[16] András Sajó, "Neutral Institutions: Implications for Government Trustworthiness in East European Democracies," in János Kornai and Susan Rose Ackerman, eds. *Building a Trustworthy State in Post-Socialist Transition* (New York: Palgrave Macmillan Press, 2004): 29-51; László Sólyom, "The Role of Constitutional Courts in the Transition to Democracy: With Special Reference to Hungary," *International* Sociology 18, 1(2003): 133-61.
[17] Piotr Cywinski, "Interview with Joachim Gauck: The Clean-Up Bureau," *Uncaptive minds*, translated from *Wprost* (June 14, 1992), Summer: 123-8.
[18] Adam Michnik and Václav Havel, "Justice or Revenge," *Journal of Democracy* 4, 1 (1993): 20-27.
[19] Lavinia Stan, "Witch-hunt or Moral Rebirth? Romanian Parliamentary Debates on Lustration," *East European Politics and Societies* 26, 2 (2012): 287.
[20] Aleks Szczerbiak. *Politicising the Communist Past: The Politics of Truth Revelation in Post-Communist Poland* (Abington-on-Thames: Routledge, 2018); Carl Tighe," Lustration—the Polish Experience," *Journal of European Studies* 46, 3-4 (2016): 338-373; Marta Zięba, "To what extent is lustration an effective mechanism of transitional justice and democratic consolidation? The case of Polish Lustration Law," *Security and Human Rights* 23, 2 (2012): 147-158.
[21] Tighe 2016, 366.

Even if the measures are well designed and implemented, it is not entirely clear whether they actually advance transition goals. Some scholars have argued that lustration could provoke a societal backlash, fomenting resentment of state-level efforts to criticize a vaunted past. Others have suggested that revealing the extent of state and societal complicity with the previous security services could foster generalized societal distrust.[22] In short, there are a number of serious questions raised about the use of lustration and public disclosures in transitional justice programs.

On the other hand, many academic and policy-oriented voices have argued for the benefits of these reform measures.[23] The United Nations and the International Center for Transitional Justice suggest lustration helps rebuild institutional trust and promotes democracy.[24] Grodsky linked lustration and accompanying truth-telling measures in the post-Soviet Central Asian states to trust-building and democratic stability.[25] Stan similarly linked lustration to anti-corruption and trust-building, even in Romania's flawed program.[26] She noted the words of Romanian Deputy Gabriel Sandu: "Democracy is but an empty word without lustration."[27]

Several studies have shown that post-communist countries with lustration evidenced higher levels of democratization, trust in public institutions, and good governance than countries that eschewed such measures. David's three country comparative study illustrated a positive relationship between personnel reforms and trust in government.[28] Choi and David's experimental survey work in Hungary, the Czech Republic and Poland similarly showed a strong relationship between dismissal-based lustration programs and trust in government. [29] Horne's analysis of twelve post-communist countries revealed more extensive and compulsory lustration programs were associated with higher

[22] Claus Offe, Varieties of Transition: The East European and East German Experience (London: Cambridge University Press, 1996).
[23] Natalia Letki, "Lustration and Democratisation in East-Central Europe," *Europe-Asia Studies* 54,4 (2002): 529-52.
[24] United Nations 2006; Mayer-Rieckh and de Greiff 2007.
[25] Brian Grodsky, *The Costs of Justice: How New Leaders Respond to Previous Rights* Abuses *(*Notre Dame: University of Notre Dame Press, 2010).
[26] Lavinia Stan, *Transitional Justice in Post-Communist Romania: The Politics of Memory* (Cambridge: Cambridge University Press, 2012).
[27] Stan *Transitional Justice in Post-Communist Romania*, 88.
[28] David 2011.
[29] Roman David, Susanne Y.P. Choi, "Forgiveness and transitional justice in the Czech Republic," *Journal of Conflict Resolution* 50, 3(2006): 339-367.

levels of democracy and trust in public institutions, even in countries with politicized lustration processes.[30] Rožič and Nisnevich's quantitative evaluation of thirty post-communist countries over the period 1996-2011 similarly showed that countries with more robust lustration programs had lower levels of corruption.[31] Even in what Szczerbiak describes as a "schizophrenic" approach to lustration, Poland's public opinion polls showed broad support for lustration with citizens linking lustration to a deepening of the quality of democracy.[32]

Thoms, Ron and Paris' review of the state of the discipline found very few impact assessments of lustration, constraining our ability to adjudicate competing claims.[33] Single country experiences, few studies with control variables, limited engagement with changes over time, and a focus on a handful of "big cases" produce less generalizable findings about the impact of such measures leaving many unanswered efficacy questions. Van der Merwe, Baxter and Chapman highlighted the challenges we as a discipline face discerning the impact of transitional justice measures, drawing attention to the need for more empirically grounded, systematic impact assessments.[34] In the absence of definitive impact assessments, there are reasons to argue lustration does and alternately does not support democratization.

Timing and Duration of Lustration

On-going debates in the transitional justice field surround the appropriate timing and duration of lustration and public disclosure measures. When is too late to implement these measures and how long is too long to use them? There are several rationales proffered as to why lustration is best done early, and if not early perhaps not at all. First, at its core lustration is about personnel reform:

[30] Cynthia M. Horne, *Building Trust and Democracy: Transitional Justice in Post-Communist Countries* (Oxford: Oxford University Press, 2017);
[31] Peter Rožič and Yuliy A. Nisnevich, "Lustration Matters: a Radical Approach to the Problem of Corruption," *Studies in Comparative International Development* 51(2015): 257-285.
[32] Aleks Szczerbiak, "Communist-forgiving or Communist-purging?: Public Attitudes towards Transitional Justice and Truth Revelation in Post-1989 Poland," *Europe-Asia Studies* 69, 2 (2017): 326.
[33] Oskar Thoms, James Ron and Roland Paris, "State-Level Effects of Transitional Justice: What do we Know?" *International Journal of Transitional Justice* 4, 3 (2010): 329-54.
[34] Hugo Van der Merwe, Victoria Baxter and Audrey Chapman, eds. *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (Washington, D.C.: US. Institute of Peace, 2009).

cleansing bureaucracy of the old guard who could potentially undermine the democratic transition. This is perceived to be especially urgent early in the fragile transition period, but perhaps less necessary as the regime becomes firmly established.[35] Moreover, as time elapses there will be natural bureaucratic change and demographic declines in the old guard, rendering the process either redundant or anachronistic.[36] Second, lustration's potential rule of law derogations might be tolerated for a short extraordinary time at the start of a transition, but become unacceptable legal compromises in consolidated democracies. Sweeney describes this as "transitional relativism" or the legal leeway the ECtHR has afforded transitional states to use lustration in delimited ways and for a temporary time.[37]

Third, over time the backward-looking focus of transitional justice might resonate less with citizens, who instead want more forward-looking state-building and quality of life improvements. Citizen fatigue with measures could undermine the legitimacy and positive effects of such reforms.[38] Fourth, there is a concern that the prolongation of measures is ripe for more cycles of political instrumentalization.[39] In short, there are a number of normative and institutional reasons why lustration might be less appropriate or even inappropriate late in a transition when a country has already established itself as a democracy. To quote Ruti Teitel, "restrictions of democracy in the name of democracy" might prove a legally problematic foundation in which to rebuild an effective and trustworthy state.[40]

The Parliamentary Assembly of the Council of Europe (PACE), the European Court of Human Rights, and the Venice Commission have helped to shape our understanding of the

[35] Huntington, 1991; Thomas Obel Hansen, "The Time and Space of Transitional Justice," in Cheryl Lawther, Luke Moffett, and Dov Jacobs, eds. *Research Handbook of Transitional Justice* (Cheltenham, UK: Edward Elgar, 2017), 34-51.
[36] Stan, *Transitional Justice in Post-Communist Romania*, 290; Mayer-Rieckh and de Greiff 2007.
[37] James Sweeney, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition* (New York: Routledge, 2013), 146.
[38] Cynthia M. Horne, "The Timing of Transitional Justice Measures," in Lavinia Stan and Nadya Nedelsky, eds. *Post-Communist Transitional Justice: Lessons from Twenty-Five Years of Experience* (New York: Cambridge University Press, 2015): 123-147.
[39] Aleks Szczerbiak, "Explaining Late Lustration Programs: Lessons from the Polish Case," in Lavinia Stan and Nadya Nedelsky, eds, *Post-Communist Transitional Justice: Lessons from Twenty-Five Years of Experience* (New York: Cambridge University Press, 2015): 51-70.
[40] Ruti Teitel quoted in Sweeney 2013, p. 146.

appropriate temporal parameters for lustration. The Parliamentary Assembly of the Council of Europe is dedicated to upholding democracy, rule of law and human rights across its forty-seven European member states, including the post-communist states.[41] The European Court of Human Rights has powers of oversight and enforcement of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), including purview over cases related to potential rights' abrogation by lustration measures.[42] The ECtHR has reviewed lustration cases from plaintiffs in most CEE states, resulting in a substantial body of case law engaging timing and proportionality considerations.[43] The Venice Commission is an advisory body to the Council of Europe, made up of independent experts in the fields of constitutional law, rule of law and democratization.[44] It was originally designed to provide legal advice to assist the post-communist states in their transitions to democracy, including measures to dismantle communism. Together these three institutions have the power to influence interpretations of the appropriate timing and duration of lustration and public disclosure measures in post-communist states as well as across the field of transitional justice. The following sections consider the changing approach adopted by these institutions in their thinking about these temporal parameters and reflects on the impact of these temporal considerations on state-level laws and policies.

GREEN LIGHT: There is time to enact measures but the clock is ticking

In *Vogt v. Germany* (1995), the ECtHR ruled in favor of a state's right to use vetting as a means of promoting decommunization and supporting the democratic transitions in post-communist states.[45] This precedent setting case established that political loyalty criteria, including activities and affiliations held under the previous regime, could be used in employment vetting procedures for civil servants and

[41] The Council of Europe, https://www.coe.int/en/web/about-us/who-we-are, accessed 05 February 2020.
[42] European Court of Human Rights, https://www.echr.coe.int/Pages/home.aspx?p=home, accessed 05 February 2020.
[43] Iulia Motoc and Ineta Ziemele, eds,. *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial* Perspectives (Cambridge: Cambridge University Press, 2016); Sweeney 2012.
[44] The Venice Commission, https://www.coe.int/en/web/human-rights-rule-of-law/venice-commission accessed 05 February 2020.
[45] European Court of Human Rights, *Vogt v. Germany*, Application no. 7851/91
Decision Grand Chamber 26 September (Strasbourg: Council of Europe, 1995).

public officials under the new regime in order to safeguard "democracy capable of defending itself."[46] In practice this meant post-communist states could judge the integrity and trustworthiness of job candidates and office holders using information about previous secret police collaboration and communist party affiliations, disqualifying individuals with compromised pasts. The *Vogt* decision was contested in a divided ruling because it essentially granted states the legal right to temporarily suspend certain rule of law safeguards in order to meet "pressing social needs" during the transition.[47] Importantly, *Vogt v. Germany* did not specify time parameters for the transition, although later court cases would engage these timing questions. Critically, PACE Resolution 1096 issued the following year set out concrete temporal expiration dates, clarifying what the Council understood as the transition period.

Inherent temporariness of measures

The Parliamentary Assembly of the Council of Europe's (PACE) Resolution 1096 *Measures to Dismantle the Heritage of Former Communist Totalitarian Systems* (1996) laid out guidelines for the appropriate structure, implementation, goals, legal safeguards, and temporal parameters surrounding the use of lustration and public disclosures in post-communist countries.[48] Resolution 1096 supported lustration as necessary to "dismantle the heritage of former communist totalitarian systems," "change the hearts and minds" of citizens in the region, and "create pluralist democracies."[49] While the guidelines were broad enough to encompass a range of lustration approaches, they presented a narrow understanding of temporal conditions governing their use. The guidelines specified that "lustration measures should preferably end no later than 31 December 1999, because the new democratic system should be consolidated by that time in all former communist totalitarian countries."[50] Using November/December1989 as the starting point of the Velvet Revolutions, this meant that lustration should last for at most a decade. The inherent temporariness of

[46] *Vogt v. Germany,* §54.
[47] *Vogt v. Germany,* §52, ii.
[48] PACE 1996, addendum *Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law*.
[49] PACE 1996.
[50] PACE 2006, §g.

lustration spelled out in the 1996 PACE guidelines would continue to shape perceptions and legal determinations about the appropriate duration of the measures.

CEE states were similarly optimistic in setting relatively short time limits on their initial lustration laws, but this would change as the challenge of dismantling the communist institutional structures became clearer. For example, the Czechoslovak Lustration Law (1991) was initially designed to last for five years and the Hungarian lustration law was set for six years (1994), but both extended the time limits early in the transition, with the Czech Republic extending the measures indefinitely in 2000.[51] In 2000 the Latvian Constitutional Court accepted the temporariness of lustration but rejected *a priori* limitations on duration.[52] In a 2001 judgement, the Constitutional Court of the Czech Republic ruled on the "timeless nature" of employment screening criteria, rejecting the pressure to have fixed, or truncated time periods.[53] The Polish Constitutional Court similarly took issue with the PACE Resolution's decade recommendation, situating the delayed Polish lustration program within the history of delayed transitional justice measures around the world.[54] States' increasingly expansive views of the temporal parameters for lustration diverged from the more limited temporal parameters recommended by the Council of Europe, setting the states up for conflicts that would be heard by the ECtHR.

Following the precedent set in *Vogt v. Germany*, early ECtHR post-communist cases were generally supportive of lustration. Initial case decisions focused primarily on the legality and proportionality of measures, but as time elapsed the ECtHR would articulate more clearly and

[51] For Czechoslovakia see, "Act No. 451/1991 on Conditions for Holding Certain Positions in State Bodies and Organizations (October 4, 1991), the Screening ("Lustration") Law," translated in Kritz 1995, 3: 312-321. For Hungary see, "Law on Background Checks to be Conducted on Individuals Holding Certain Important Positions," Law No. 23/1994 (March 9, 1994), translated in Kritz 1995, 3: 418-425.

[52] Judgment of 30 August 2000, Case no. 2000-03-01, issued by the Constitutional Court of Latvia, (*Satversmes tiesa*), Section 7, as cited in European Court of Human Rights, *Ždanoka v. Latvia, Application no*. 58278/00, Judgment 16 March (Strasbourg: Council of Europe, 2006) §62.

[53] Judgment of 5 December 2001, as cited in European Commission for Democracy through Law (Venice Commission), *Amicus Curiae Brief on the Law on determining a criterion for limiting the exercise of public office, access to documents and publishing, the co-operation with the bodies of the state security ("Lustration Law") of the former Yugoslav Republic of Macedonia.* CDL-AD (2012)028-e, Opinion no. 694/2012 (Strasbourg 17 December 2012) Section 18.

[54] European Court of Human Rights, *Adam Cichopek v. Poland and 1,627 other applications*, Application no. 15189/10, Decision 14 May (Strasbourg: Council of Europe, 2013) Section 8.4, §98.

emphatically how timing and duration considerations affected its decisions.[55] States were granted a 'margin of appreciation' to balance their need to safeguard democracy from internal threats with the rights of citizens enshrined in the Convention.[56] As Sweeney argued this "transitional relativism" guided early ECtHR cases, situating lustration within a delimited transitional period.[57] For example, in *Ždanoka v. Latvia* (2006) the Court deferred to states to assess their own needs for lustration to safeguard democracy:

> The Court therefore accepts in the present case that the national authorities of Latvia, both legislative and judicial, are better placed to assess the difficulties faced in establishing and safeguarding the democratic order. Those authorities should therefore be left sufficient latitude to assess the needs of their society in building confidence in the new democratic institutions, including the national parliament, and to answer the question whether the impugned measure is still needed for these purposes, provided that the Court has found nothing arbitrary or disproportionate in such an assessment.[58]

This decision included a cautionary reminder that states should constantly reevaluate the appropriateness of lustration and "bring [it] to an early end."[59] In practice this meant that although the ECtHR respected a state's margin of appreciation in implementing lustration, the ECtHR also reasserted the inherent temporariness of the measures. Foreshadowing future changes, the ECtHR warned that its views on margin of appreciation and lustration might change as more time elapsed from the transition.[60]

Questionable motives of delayed measures

[55] Sweeny 2012; Sweeney 2013.
[56] Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Strasbourg: Council of Europe, 2000).
[57] Sweeney 2013, 137.
[58] *Ždanoka v. Latvia*, §134.
[59] Ibid., §131, 135.
[60] Ibid., §135.

By counting the number of years that elapsed since 1989, the Court developed a metric for describing if reforms were delayed and by how much. Even minor delays of just a few years were noted by the ECtHR in case decisions. For example, in *Ždanovka v. Latvia* (2006) the Court noted Latvia's delayed employment vetting laws enacted in 1995-- one year after the Russian troops left--but in the end sanctioned their use.[61] In *Rekvényi* v. *Hungary* (1994) the Court remarked that Hungary's police vetting was 'delayed' by four years, but in the end accepted its necessity.[62] In *Sidabras and Džiautas v. Lithuania* (2004) and *Rainys and Gasparavičius v. Lithuania* (2005), the Court criticized the delay of nine years in the passage of the KGB Act, tying the delay to potential discrimination.

> Moreover, the very belated nature of the Act, imposing the impugned employment restrictions on the applicants a decade after the Lithuanian independence had been re-established and the applicants' KGB employment had been terminated, counts strongly in favour of a finding that the application of the Act vis-à-vis the applicants amounted to a discriminatory measure...[63]

In short, the motives of delayed measures raised concerns for the ECtHR in these cases. The ECtHR's reasoning was certainly influenced by the multiple examples of delayed and politically instrumentalized lustration going on at that time in Albania, Hungary, Romania and Poland.[64] For example, Romania and Poland were embroiled in cycles of lustration, with measures repeatedly passed, vetoed, redesigned, declared constitutionally invalid, and then passed, resulting finally in the implementation of late lustration programs in both states in 2006.[65] Domestic level disagreements between political parties, between politicians and intellectuals, and between the state and society over lustration also contributed to a politicized policy environment in which the motives for and against

[61] Ibid., §131.
[62] European Court of Human Rights, *Rekvényi v. Hungary*, Application no. 25390/94, Judgment 20 May (Strasbourg: Council of Europe, 1999).
[63] European Court of Human Rights, Case of *Rainys and Gasparavičius v. Lithuania* Applications nos. 70665/01 and 74345/01, Judgment 7 April, Final 07/07/2005 (Strasbourg: Council of Europe, 2005) §36.
[64] Csilla Kiss, "The Misuses of Manipulation: The Failure of Transitional Justice in Post-Communist Hungary," *Europe-Asia Studies* 58, 6(2006): 925-40; Szczerbiak 2015; Robert Clegg Austin, "Transitional Justice as Electoral Politics," in Lavinia Stan and Nadya Nedelsky, eds. *Post-Communist Transitional Justice: Lessons from Twenty-Five Years of Experience* (New York: Cambridge University Press, 2015): 30-50.
[65] Cynthia M. Horne, "Late Lustration Programs in Romania and Poland: Supporting or Undermining Democratic Transitions?" *Democratization* 16, 2 (2009): 344-76.

lustration were justifiably questioned.[66] Late measures and politicized measures went hand in hand in many states, leading to concern that timing made measures especially ripe for manipulation.

Declining utility of measures

Part of the rationale for temporally delimiting lustration rests on an assumption that the measures have declining utility over time. One of the original arguments in favor of lustration was that it reduced the threat of blackmail of public officials because their pasts were already made transparent.[67] With the passage of time, natural bureaucratic turnover and demographic decline would reduce the pool of officials to blackmail and therefore lustration would not be needed.[68] The Polish Constitutional Tribunal used this reasoning to argue "the lapse of time lessens the threat of blackmail and brings about the natural exchange of staff.[69] ECtHR rulings and Venice Commission reports would continue to assert the declining utility of lustration measures with time."[70]

Despite assumptions about the declining utility of measures with time, states continued to perceive an urgent need for lustration to facilitate their transitions. The continued economic and political influence of former secret police operatives and collaborators in post-communist politics is well documented in Poland, Romania, and Bulgaria. There is evidence that their influence fuels corruption and undermines democracy.[71] As Smith captured it, " In '89, only Communism was killed, but the former state security and Communist Party chiefs took the economic power."[72] States have employed lustration to break up the lingering power of these durable secret police networks, with evidence that it

[66] Ieva Zake, "Politicians versus Intellectuals in the Lustration Debates in Transitional Latvia," *Journal of Communist Studies and Transition Politics* 26, 3 (2010); 389-412.
[67] Nalepa, 2013.
[68] Stan, "Witch Hunt or Moral Rebirth"; Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004).
[69] The Constitutional Tribunal in Poland (Judgement on May,11th, 2007, file Ref. No. K 2/07), as cited in European Commission for Democracy Through Law (Venice Commission), *Comments on the Law on the Cleanliness of the Figure of High Functionaries of the Public Administration and Elected Persons of the Republic of Albania, by Ms Hanna Suchocka* (Member, Poland), Strasbourg, 30 September 2009 Opinion No. 524/2009 CDL (2009)154* Engl. Only, Section 5.
[70] European Court of Human Rights, *Case of Ādamsons v. Latvia,* Application no 3669/03, Decision, 24 June (Strasbourg: Council of Europe, 2009) §§ 116 and 129.
[71] Stan, *Transitional Justice in Post-Communist Romania,* 90; Maria Lós and Andrzej Zybertowicz, *Privatizing the Police State: The Case of Poland* (New York: Palgrave Macmillan, 2000); Horne 2015.
[72] Craig Smith, "Eastern Europe Still Struggles to Purge Its Security Services," *The New York Times*, International Section, December 12, 2006.

has been helpful in lessening corruption.[73] In short, as states faced hurdles in their democratization and development efforts, they turned to and in some ways repurposed lustration to advance stalled reforms. State perceptions about the need for and utility of expanded and elongated lustration did not necessarily comport with the structurally and temporally delimited vision of lustration in the PACE 1996 resolution.

To conclude, in the first wave of rulings and recommendations on lustration from 1989 through 2006, all three institutions initially gave post-communist states a green light to use lustration laws to address communist legacies, facilitate reforms and promote democratic transitions; a green light with built-in expiration dates. Their inherent temporariness was not just assumed but included in the structure of laws, rulings on the laws, and recommendations for the laws. There was a noticeable shift to more narrowly interpret these temporal parameters after 2006.

YELLOW LIGHT: Caution, time is running out

Moving past retributive justice

In 2005 the Political Affairs Committee submitted a report to the Parliamentary Assembly of the Council of Europe detailing the post-communist region's failure to authentically reckon with its totalitarian past. The report cited persistent communist institutional legacies, a worrisome lack of understanding among citizens about communist era crimes, a rise in nostalgia, and even a denial of critical aspects of the past.[74] Drawing on the recommendations in this report, PACE adopted Resolution 1481 (2006) on *the Need for International Condemnation of Crimes of Totalitarian Communist Regimes.*[75] The Council of Europe argued a failure to address communist legacies threatened the fledgling CEE democracies.[76]

[73] Rožič and Nisnevich 2016; Polityka, "Polish Report Views Impact of Secret Service Reforms, 'Unprecedented Suspicion'," *BBC Monitoring European*, November 4, 2006; "Bulgarian MPs Vote for Check into Credit Millionaires' Communist Secret Service Links," *Sofia Echo,* April 4, 2012.
[74] Political Affairs Committee, *Report: Need for International Condemnation of Crimes of Totalitarian Communist Regimes.* Presented to Parliamentary Assembly, Council of Europe, Doc. 10765, 16 December (Strasbourg: Council of Europe, 2005).
[75] Parliamentary Assembly of the Council of Europe (PACE) Resolution 1481 (2006) "On the Need for International Condemnation of Crimes of Totalitarian Communist Regimes," 25 January 2006.
[76] Ibid, Section 13.

> …it is now time to take stock of the numerous crimes of totalitarian communism of the past and condemn it solemnly. If we fail to do this an illusion of nostalgia might set in the minds of younger generations as an alternative to liberal democracy. This would constitute a huge setback to our endeavours to strengthen democratic citizenship and to reject all concepts of authoritarian regimes.[77]

While both the 1996 PACE Resolution and the 2006 PACE Resolution encouraged addressing the communist past and identified similar threats to the young democracies, the concrete policy recommendations were decidedly different. The 1996 Resolution provided detailed guidelines for how to use lustration to catalyze institutional and ideational change. This included language about *dismantling* legacies of communism, *prosecuting* individuals, *punishing* crimes, and *disqualifying* people from public office, to name a few of the retributive justice verbs.[78] By comparison, in the 2005 PACE report and subsequent 2006 Resolution, there was no engagement with personnel reforms. Instead the language encouraged increased national *awareness* of crimes committed by totalitarian communist regimes, a *reassessment* of the history of communism, a *distancing* from those crimes, and encouraged historians to *research* and *verify* the historical record.[79] The draft report stressed the importance of collecting information about the crimes of communism to support "in-depth and exhaustive international debate on the crimes committed by totalitarian communist regimes with a view to giving sympathy, understanding and recognition to all those affected by these crimes."[80]

In another confirmation that the intention of the recommendations had shifted, there were no *a priori* time limits set for these measures, unlike the 31 December 1999 deadline in the 1996 Resolution.[81] This sent the message that the window of opportunity to use retributive justice measures was closing but states were encouraged to expand restorative justice measures to promote

[77] Ibid., Appendix I.
[78] PACE 1996.
[79] PACE 2006.
[80] Political Affairs Committee, 2005, Section II Draft recommendation, Sec. 2.
[81] Political Affairs Committee, 2005, Section II Draft recommendation, Explanatory Memorandum, Section 8.

understanding, remembering and truth-telling. The ECtHR and the Venice Commissions echoed these explicit and implicit suggestions in subsequent cases and legal reviews.

Despite this new directive, states continued to engage in delayed lustration. Poland and Romania started new and expanded programs in 2006, the Czech Republic expanded police vetting in 2007, and Bulgaria started a public disclosure program in 2009.[82] The Polish Constitutional Court attempted to normalize its delayed measures, using extra-regional examples in Europe and South America to illustrate that delays were not necessarily inappropriate or ineffective.[83] In some ways post-communist states and the 2006 PACE Resolution similarly identified the institutional and ideational legacies of communism and the problems they posed for democratic deepening. However, post-communist states continued to take a more retributive and compulsory approach to solving these problems while the PACE guidelines were more focused on reckoning through acknowledgment and truth-telling. Different conceptualizations of the temporal parameters for lustration and public disclosure measures were material factors in the divergent approaches to similarly identified problems.

Delayed measures and corrupted motives

The motives of delayed measures became more salient in Venice Commission briefings and ECtHR rulings as more time elapsed. The Venice Commission's amicus briefs submitted in reference to Albania's (2008), North Macedonia's (2012) and Ukraine's late lustration measures (2014) questioned if there were ulterior motives behind the significantly delayed measures. To be fair, even by regional standards, these countries are examples of very delayed lustration enacted in a heavily politicized context. The Former Yugoslav Republic of Macedonia (hereinafter "North Macedonia") declared independence from Yugoslavia in 1991, passed an initial Lustration Act in 2008 and a New Lustration Act in July 2012.[84] North Macedonia's political parties have repeatedly sparred over

[82] Horne 2017.
[83] Polish Constitutional Court decision cited in *Cichopek v. Poland*, §98.
[84] European Commission for Democracy through Law (Venice Commission), *Amicus Curiae Brief on the Law on determining a criterion for limiting the exercise of public office, access to documents and publishing, the co-operation with the bodies of the state security ("Lustration Law") of "the former Yugoslav Republic of Macedonia" adopted by the Venice Commission At its 93rd Plenary Session* (Venice, 14-15 December 2012), CDL-AD(2012)028-e, Opinion no. 694/2012, 17 December (Strasbourg: Venice Commission, 2012), Sec I, 1.

lustration laws and the Constitutional Court struck down components of the law in January 2012, all contributing to questions about the true intentions of the late measures.[85] Moreover, problems with the veracity of the files and the Macedonian Lustration Commission's implementation of the law resulted in a "blurred process."[86] Nonetheless, North Macedonia leaders and civil society groups contended that continued problems with corruption and a lack of transparency necessitated lustration measures, despite being delayed.[87]

Ukraine passed two lustration laws in 2014, more than two decades after its independence from the USSR in 1991.[88] The laws grouped together the crimes of the communist past, the excesses of the Yanukovych regime, and the current problems with corruption, creating an expansive version of lustration.[89] Ukraine framed state, economic and political lustration as inherently linked, and highlighted the continued problematic influence of Soviet era secret police networks and bureaucratic apparatchiki on current affairs in both political and economic realms.[90] In short, both of these very late lustration programs were passed in politicized domestic contexts, both reflected societal pressure for reform, both expanded the purview of lustration beyond what was the norm in CEE, both were justified by national governments as mechanisms to address legacies of communism and lingering corruption, and both pushed the temporal boundaries for use of communist vetting more than 20 years after their transitions.

The Venice Commission had two types of critiques for the Ukrainian and North Macedonian lustration programs: a critique of specific rule of law problems and a critique of the appropriateness of

[85] "Macedonia politics: Limits on lustration process," *Economist Intelligence Unit ViewsWire*, February 7, 2012.
[86] "Macedonian paper says lustration process 'blurred'," *BBC Monitoring Europe* –text of report from *Fakti, Skopje* September 3, 2011.
[87] Bojana Dimitrijevska,"Lustration Should Include All Citizens," *BBC Monitoring Europe* – Text of report by *Makfax*, February 2, 2010.
[88] Law of Ukraine No. 1682-VII, "On the Law on Government Cleansing (Lustration Law)" Verkhovna Rada, 2014, No. 44, st. 2041, Act of April 8, 2014; Law of Ukraine No. 1188-VII, "On Restoring Confidence in the Judiciary in Ukraine," Verkhovna Rada, 2014, No. 23, st. 870, Act of April 8, 2014.
[89] Agnieszka Piasecka, "Summary of Legislative Work on Lustration Act No. 4359 'On Purification of Government'," *The Open Dialogue Foundation*, November 19, 2014; Roman David, "Lustration in Ukraine and Democracy Capable of Defending Itself," in Cynthia M. Horne and Lavinia Stan, eds. *Transitional Justice in the Former Soviet Union: Reviewing the Past, Looking toward the Future* (New York: Cambridge University Press, 2018): 135-144.
[90] Bessonova Maryna, "Lustration: Ukrainian Case," in Marcin Moskalewicz and Wojciech Przybylski, eds. *Understanding Central Europe* (UK: Routledge Press, 2018): 385-394.

the programs altogether. The first types of critiques were meant to improve the laws and bring them into compliance with European principles and PACE guidelines. Both North Macedonia and Ukraine made significant changes to the structure of their laws thereby illustrating the power of the Commission to influence domestic policies in post-communist states.[91] The second type of critique questioned the *reasons* why the states turned to lustration so many years after their transitions, asking whether revenge might be a subterranean goal.[92] Drawing on the PACE standards, the Commission reasserted the need to bring measures to "to an end early" and to avoid creating a "never-ending" story." In both cases the Venice Commission ultimately approved the significant revisions states made to their programs to bring them in line with Commission requirements and European rule of law principles. In both cases, modified lustration programs moved forward. However, the equation of late measures with potentially dubious measures remained a precedent that would weigh against states in future ECtHR decisions.

Time and proportionality: inverse relationship

In the ECtHR's own words: "The Court has long held that the timing of adoption and implementation of post-Communist lustration measures is a key consideration in assessing their proportionality."[93] Echoing the PACE 2006 recommendations, this became more explicit after 2008 with additional weight placed on time as a factor in margin of appreciation determinations. For example, in both *Ādamsons v. Latvia* (2008) and *Jałowiecki v. Poland* (2009), the Court elaborated on the temporariness of lustration, encouraging states to regularly reexamine the continued necessity of such screening measures, and warning states that previous margin of appreciation decisions were becoming less credible as more time passed.[94] A watershed moment occurred in *Sõro v Estonia* (2015), when the

[91] "Venice Commission Insists On Amending Lustration Law," *Ukrainian News Agency*, March 21, 2016; "The political scene: The Constitutional Court limits the lustration process (Macedonia)," *Economist Intelligence Unit (EIU) Country Reports*, February 6, 2012.
[92] Venice Commission, *Amicus Brief North Macedonia*, §17 and §77.
[93] *Polyakh v. Ukraine* §316.
[94] European Court of Human Rights, *Case of Jałowiecki v. Poland*, Application no. 34030/07, Final *17/05/2009*, 17 February (Strasbourg, France: Council of Europe, 2009), §37.

Court pushed back on the appropriateness of using lustration measures so late in the transition, ruling against their legal proportionality.[95]

A brief review of some of the case details illustrates the centrality of timing to the ECtHR judgment that public disclosures violated Mr. Sõro's right to privacy. Mr. Sõro challenged Estonia's public disclosure program on the grounds that revealing his former work with the state security organizations compromised his right to respect for private life (the Convention, Article 8). The ECtHR concurred: "The passage of time reduces the weight of the exigencies of defending the newly established democracies, which underpins the legitimacy of lustration."[96] In particular, the ECtHR evaluated the risk posed by former secret police collaborators by counting the number of years that had elapsed from the transition—in this case thirteen years—and determined that "any threat the former servicemen of the KGB could initially pose to the newly created democracy must have considerably decreased with the passage of time."[97]

Judge de Albuquerque's concurring opinion elaborated on the Court's reasoning, which focused on a rejection of the utility, the appropriateness, and the intentions of measures delayed so long after the original offenses. "Maintaining a legal obligation to confess non-criminal, professional activities that may have occurred thirty-five to seventy-five years ago is pointless."[98] Judge Pinto de Albuquerque maligned the intention of delayed public disclosures and stressed the probability of their misuse. "These temporal derogations will contribute to the misuse of the measures… It [disclosure] is prone to be misused as an instrument of partisan discrimination, personal revenge and political witch-hunting."[99] In short, the rationale for why Estonia's measures violated Article 8's guarantees for respect for private life was grounded in assumptions about lustration's temporal boundaries; the more time elapsed, the less legally proportional the measures were.

[95] European Court of Human Rights, *Case of Sõro v. Estonia*, Application no. 22588/08, Final Judgment 3 September (Strasbourg: France: Council of Europe, 2015), §3.
[96] *Sõro v. Estonia*, Concurring Opinion §22.
[97] *Sõro v. Estonia***,** §62.
[98] *Sõro v. Estonia*, Concurring Opinion, §24.
[99] *Sõro v. Estonia*, Concurring opinion, §29.

These critiques of delayed measures were largely consistent with the ECtHR's previous cases, which encouraged states to bring lustration to a quick conclusion. [100] What was different was that the ECtHR did not just reiterate the temporariness of lustration, it ruled that the window of opportunity for credibly using lustration and public disclosures as employment screening tools was closed. Three judges presented a joint dissenting opinion, arguing that undue weight was placed on temporal factors in rendering this decision.[101] Nonetheless, *Sõro v. Estonia* illustrates a pivot in thinking on the part of the Court. The rationale against delayed lustration was explicated and the final decision reinforced the view that the time for lustration and public disclosures had run out.

RED LIGHT-Time has run out

Following *Sõro v. Estonia*, the Court crafted decisions in which delayed *punitive* public disclosures were rejected but delayed *non-punitive* public disclosures were accepted, reflecting the 2006 PACE guidelines in which the different temporal parameters for restorative and retributive justice measures were elaborated.

Retributive v. Restorative Justice: different temporal parameters

In *Ivanovski v. the Former Yugoslav Republic of Macedonia* (2016), the temporal parameters of lustration were central to the Court's negative ruling.[102] As previously noted, North Macedonia's lustration measures were late, elongated, and had punitive employment dimensions that restricted individuals from holding certain public positions. Drawing on the critique of punitive and delayed lustration measures explicated in *Sõro v. Estonia*, the Court argued that the necessity for such long and delayed measures in a democratic society was questionable."[103] The time elapsed since the plaintiff collaborated with the secret police was also cited as a factor weighing against the proportionality of lustration. "The Court is not persuaded that after twenty-seven years the applicant posed such a

[100] Ibid., §10; and *Ādamsons v. Latvia*, §116.
[101] *Sõro v. Estonia*, Joint Dissenting Opinion, §28.
[102] European Court of Human Rights, *Case of Ivanovski v. the Former Yugoslav Republic of Macedonia*, Application No. 29908/11, Judgment 21 January, Final 21 April (Strasbourg: Council of Europe, 2016) §185.
[103] Ibid., §185.

threat."[104] In short, the Court asserted that the passage of time reduced the threat that the shadow of the past posed on the politics of the present. In so doing, it asserted the expiration date for lustration had been reached.

By comparison, in *Anchev v. Bulgaria* (2018) the Court accepted the continued use of late transition, non-punitive public disclosures, differentiating them from the punitive public disclosures in *Sõro v. Estonia*.[105] In this way, the case directly engaged the different temporal parameters associated with punitive and non-punitive transitional justice measures outlined in the 2006 PACE Resolution. Bulgaria's Public Disclosures Act was passed in 2006, sixteen years after the end of Communism, and Bulgaria had engaged on and off with lustration measures for more than twenty-five years, similar to the conditions criticized in *Sõro* and *Ivanovski*.[106] However, the non-punitive nature of public disclosures in Bulgaria pivoted the case determination, leading the Court to reject the plaintiff's claims that public disclosures violated his right to privacy.

The Court elaborated on the distinction between *Sõro* and *Anchev*, arguing that perceptions of disclosures were different in these two political contexts. In *Sõro*, the "core element of the Estonian lustration policy [is] indefinite, widespread social stimatisation [which] is supposed to cure the evils of the communist past and neutralize future threats to democracy and national security."[107] In contrast, drawing on the arguments made by the Constitutional Court of Bulgaria in upholding the legality of the measures, the ECtHR argued that exposure did not hold the same social stigmatization or employment consequences in Bulgaria, because revealing communist era collaboration did not have the same negative normative implications.[108] By framing exposure as a form of truth-telling in Bulgaria, the ECtHR elongated the time period for the use of public disclosures beyond what it considered reasonable in *Sõro*.[109]

[104] Ibid., §186.
[105] European Court of Human Rights, *Haralambi Borisov Anchev v. Bulgaria*, Applications nos. 38334/08 and 68242/16, Decision 11 January 2018 (Strasbourg, France: Council of Europe, 2018) §§79-80.
[106] Bulgaria passed early lustration measures in 1990-1991, in 1992, and 1998, as well as public disclosure measures in 1997, 1999, 2001, and 2005. See *Anchev v. Bulgaria*, Section B. Relevant domestic law and practice, §§ 27-52.
[107] *Sõro v. Estonia*, concurring opinion, §§ 12-13.
[108] *Sõro v. Estonia*, § 106.
[109] *Anchev v. Bulgaria* §71.

Moreover, although the ECtHR rejected the appropriateness of long and delayed lustration measures in *Ivanovski* and would do so again in *Polyakh and Others v. Ukraine* (2019), the Court reaffirmed the appropriateness of Bulgaria's employment screening as necessary in a democratic society *despite* the time elapsed from the transition:

> In an ex-communist country, where many of those in charge of key parts of government, the media and the economy are still suspected of veiled links with the communist regime's repressive apparatus, there is a strong public interest in making all available information on that point public. That interest did not necessarily subside after a few years; it is well known that the ex-communist countries' transition to democracy and a market economy involved many complex and controversial reforms which had to be spread out over time.[110]

In short, the Court explicated that punitive and non-punitive public disclosure measures entailed different temporal parameters, and non-punitive measures were still needed in some countries to safeguard democracy.

The case of *Polyakh and Others v. Ukraine* (2019) reinforced this interpretation. In *Polyakh v. Ukraine*, five plaintiffs contended that the Government Cleansing Act of 2014 (Lustration Law) in Ukraine violated their fundamental rights.[111] The ECtHR agreed and its judgment against the proportionality of lustration measures emphasized the centrality of three temporal factors: the time that had elapsed since Ukraine's transition, the duration of the measures, and the time period under scrutiny. First, the Court reiterated that lustration measures should be delimited and articulated a presumption that the necessity of such measures declined with time.[112] Second, the number of years that had elapsed since Ukraine's independence—twenty-three—affected the Court's view that the measures were disproportionate.[113] In the end, the Court argued that Ukraine's severely delayed and

[110] Ibid., §107.
[111] *Polyakh v. Ukraine*.
[112] Ibid., § 317.
[113] Ibid., §318.

punitive lustration measures were "unnecessary in a democratic society."[114] This 2019 decision reconfirmed the reasoning in *Ivanovski* and *Sõro* --- the window of time for lustration had closed.

Third, the Court engaged which slice of the past was suitable for lustration. The Ukrainian lustration law extended the period of lustration past 1991 capturing offenses committed under President Viktor Yanukovych's regime between 2010-2014 and especially during Euro-Maidan.[115] The Ukrainian government argued that this was necessary to address the legacies of communism after the transition, particularly the continued staffing of central and local government authorities with former communist elites. Ukraine linked the crimes of the past to the crimes of the present, arguing lustration was necessary "in order to protect [its] young democracy" from the continued effects of the past.[116] The ECtHR rejected this reasoning, arguing that the use of lustration to address crimes committed after independence in 1991 was inappropriate because Ukraine already had "democratic constitutional foundations" by then.[117] In this way, *Polyakh and Others v. Ukraine* inserted a temporal wall between the pre-1991 totalitarian system and the post-1991 democratic system. This raises another important temporal issue for transitional justice, namely which period of the past should be subjected to punitive measures when the shadow of the past continues to affect the present.

Conclusion

This paper traced the shifting institutional perspective on the appropriateness and proportionality of lustration and public disclosure measures through three time periods. Early in the transition post-communist states were largely given a green light for the use of lustration to facilitate the dismantling of the institutional and ideational heritage of communism, albeit with reminders about the inherent temporariness of these transitional measures. This green light would turn to yellow by the mid-2000s, with PACE 2006 guidelines and post-2008 ECtHR cases drawing distinctions between the temporal parameters governing punitive and non-punitive transitional justice measures. By the

[114] Ibid., §323.
[115] The Venice Commission was very critical of this time extension as well, before this case ever reached the ECtHR. See Venice Commission 2015.
[116] *Polyakh v. Ukraine*, §235 and §243.
[117] Ibid., §275.

mid-2010s the narrative would shift from caution to stop. Venice Commission amicus briefs and ECtHR cases issued more strongly worded and explicit critiques of the lateness of measures, questioning possible subterranean motives for such delayed transitional justice. In short, approximately twenty-five years after the start of the post-communist transitions, the ECtHR, the Council of Europe, and the Venice Commission rulings and recommendations signaled that the window of opportunity for lustration and punitive public disclosure measures had closed.

These legal rulings and policy recommendations had a demonstrated impact on domestic regulations in post-communist countries. Ukraine changed its approach to lustration following iterated reviews and corrections from the Venice Commission.[118] Following the *Polyakh* decision, in 2020 the Ukrainian Cabinet of Ministers established the Commission for the Execution of Decisions of the European Court of Human Rights to improve Ukraine's compliance with ECtHR rulings.[119] In 2019, the Ministry of Justice of Ukraine initiated a review of its 'On the Purification of Power' lustration law taking into account the negative *Polyakh* decision.[120] Albania modified its lustration law and ultimately the Albanian Constitutional Court rejected the law in compliance with Venice Commission recommendations.[121] North Macedonia's Constitutional Court similarly cited the Council of Europe and PACE guidelines in its decision to limit the purview of the lustration law.[122] Of course, not every ECtHR decision catalyzes modification of lustration at the domestic level. Although the ECtHR urged Lithuania to modify the component of its lustration that allowed for vetting of both private and public positions, Lithuania was slow to implement this change.[123] Nonetheless, the credibility and power of

[118] David, 2018; "Venice Commission Insists On Amending Lustration Law," *Ukrainian News Agency*, March 21, 2016; "PACE requests for Venice Commission's expert opinion towards bill on Ukraine's judicial governance," *Ukraine General Newswire*, October 7, 2019.
[119] "Cabinet Creates Commission For Execution Of ECHR Decisions," *Ukrainian News Agency*, April 1, 2020.
[120] "Justice Ministry To Initiate Lustration Law Review, Taking Into Account ECHR Decision," *Ukrainian News Agency*, December 30, 2019.
[121] "Albanian Constitutional Court rejects lustration law," *BBC Monitoring Europe*-from *Koha Jone*, March 28, 2010.
[122] "The political scene: The Constitutional Court limits the lustration process," *Economist Intelligence Unit (EIU) Country Reports-Macedonia*, February 6, 2012.
[123] "ECHR Chairman Urges Lithuania to Amend Lustration Law, Regulate Sex Change Operations," *Baltic News Service*, March 11, 2008.

the Venice Commission and the ECtHR to influence domestic laws and policies is evident in both post-communist states and across Europe more widely.[124]

In process-tracing the treatment of time as a material consideration in margin of appreciation decisions and policy recommendations, this paper made explicit three temporal assumptions: lustration measures should be used early in the transition, late transition measures were not only less utile but also potentially tainted, and the duration of reforms should be delimited to ideally a decade. These assumptions continue to govern our thinking about best practices for lustration and public disclosures, with potential implications for on-going, renewed or proposed programs in 2020. For example, in 2020 Armenia's Prime Minister Nikol Pashinian continued to call for a lustration program to address corruption, something supported by civil society groups in Armenia where there has been limited post-communist reckoning.[125] Civil society and NGO groups raised the possibility of lustration in Slovenia and Croatia in 2019, as neither country enacted such measures.[126] These countries might more closely resemble Ukraine's lustration experience where Yugoslav war crimes are layered on unresolved communist era offenses, thereby potentially raising concerns about what slice of the past was appropriate for lustration. Other countries, like Romania and Bulgaria, continue to use public disclosures and Romania even renewed a call for lustration in 2019.[127] In short, the delayed use of lustration and public disclosures remain regionally salient issues even thirty years after the Velvet Revolutions.

In conclusion, this inquiry raises questions about our temporal assumptions that expand beyond the post-communist experience. As Neil Kritz has observed, personnel reforms of various types are part of almost every transitional justice program.[128] Given the prevalence of this form of

[124] Sergey Bosak, "Interview with Sergey Golovaty, Member of the Venice Commission," *Ukrainian News*, January 3, 2018, https://ukranews.com/interview/1849-sergey-golovatyy-konstytucyya-1996-goda-ne-nayluchshaya-v-evrope-ehto-vse-myf.
[125] "Political scientist: Lack of transition to systemic solutions is Armenia's main problem," *ARMINFO News Agency*, May 6, 2020.
[126] "Brief News Bulletin No. 10814," *HINA Digest*- Croatian News Agency, 4 June 4, 2019.
[127] "Romanian paper calls for lustration, snap elections," *BBC Monitoring Europe*, September 30, 2019.
[128] Neil Kritz, "Policy Implications of Empirical Research on Transitional Justice," in Hugo Van der Merwe, Victoria Baxter and Audrey Chapman, eds. *Assessing the Impact of Transitional Justice* (Washington, D.C. U.S. Institute of Peace, 2009): 19-20.

transitional justice and potential policy implications for new democracies, assumptions surrounding their use merit intentional consideration. Temporal assumptions are not value neutral; they are infused with neoliberal assumptions about democracy, justice, and rights. Being aware of these normative components will bring to light how these assumptions shape our perceptions of the legality and appropriateness of a state's transitional justice choices. The plethora of new cases of transitional justice should encourage us to constantly reevaluate what we think we know about measures in order to advance their ability to truly promote state building and societal reconciliation.

Appendix 1

Precedent setting ECtHR cases on lustration and public disclosures with temporal components			
Case Name	**Application No.**	**Date judgement**	**Relevant Legal Articles and decisions**
Sidabras and Džiautas v. Lithuania	55480/00; 59330/00	27/07/2004;	Violation Article 14-Employment Discrimination, in conjunction with Article 8- Respect for Private Life
Rainys and Gasparavičius v. Lithuania	70665/01 and 74345/01	07/07/2005	Article 14-Employment Discrimination, in conjunction with Article 8-Respect for Private Life
Ždanoka v Latvia	58278/00	16/03/2006	No violation Article 3-Humane treatment
Turek v. Slovakia	57986/00	14/02/2006	Violation Article 8- Respect for Private Life
Matyjek v. Poland	38184/03	24/04/2007	Violation Article 6-Fair Hearing
Bobek v. Poland	68761/01	17/07/2007	Violation Article 6-Fair Hearing
Ādamsons v. Latvia	3669/03	24/06/2008	Violation Article 3-Humane treatment
Jałowiecki v. Poland	*34030/07*	17/05/2009	Violation Article 6-Fair Hearing
Szulc v. Poland	43932/08	13/10/2012	Violation Article 6-Fair Hearing; concerns about political manipulation of process
Sõro v. Estonia	22588/08	03/12/2015	Violation Article 8-Respect for Private Life
Ivanovski v. the Former Yugoslav Republic of Macedonia	29908/11	21/04/2016	No violation Article 6, but Violation of Article 8; no need to examine Article 13
Anchev v. Bulgaria	38334/08; 68242/16	11/01/2018	Case not admissible
Polyakh and Others v. Ukraine	58812/15; 53217/16; 59099/16; 23231/18; 47749/18	17/10/2019	Violation of Article 6 and Article 8
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