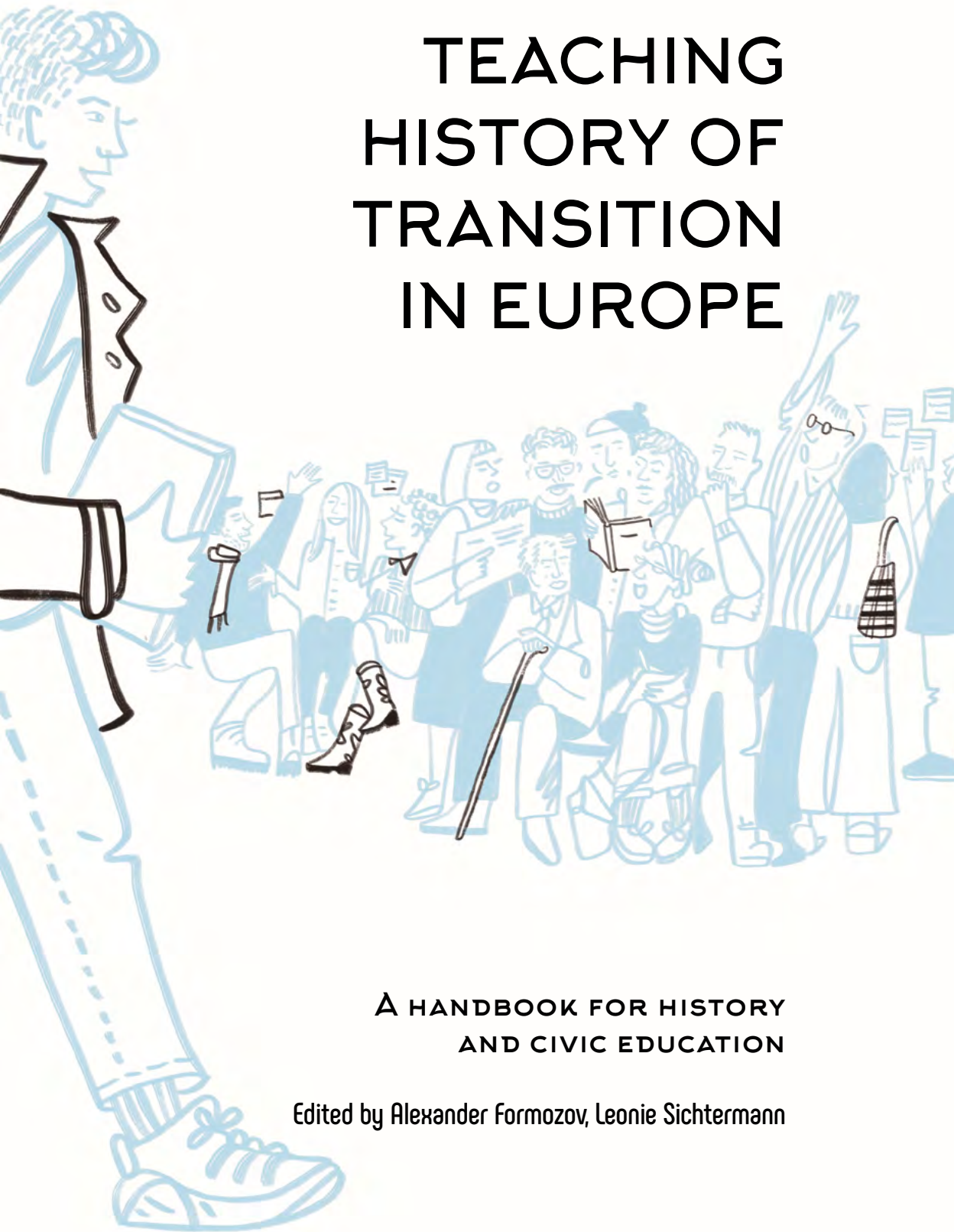
TEACHING HISTORY OF TRANSITION IN EUROPE



A HANDBOOK FOR HISTORY AND CIVIC EDUCATION

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CRIME AND PUNISHMENT? TRANSITIONAL JUSTICE IN POST-COMMUNIST COUNTRIES

Examples from Bulgaria, Germany, Lithuania and Poland.

Authors: Stanisław Zakroczymski, Aiguste Starkutė, Momchil Metodiev & Alicja Pacewicz

I. Overview

This lesson offers insight into complex issues connected with transitional justice in post-communist countries. The pivotal questions which students consider include: How should we deal with the communist past and the people who were responsible for communist repressions and crimes? What approaches were adopted in our country, and in other countries, during the transition period? What is the difference between legal prosecution, lustration and decommunization? The learning experience is based on concise descriptions of real cases from four countries (Bulgaria, Germany, Lithuania, and Poland) and builds on critical analysis and role playing.

II. Objectives

- To explain the need for – and difficulties with – transitional justice as a way of dealing with the totalitarian past in post-communist countries.
- To compare different approaches to the criminal prosecution of former communist officials by analysing cases from two different countries.
- To identify the main goals of criminal prosecution, decommunization and lustration in their own state and illustrate this with examples.
- To take part in the debate on the advantages and disadvantages of different forms of transitional justice in their country.

III. Key concepts

- **Transition** – radical change of a political, social, and economic system caused by the fall of communist dictatorships in the former Eastern Bloc, connected with the fall of the Soviet Union and the emergence of the free market democracies aspiring to membership in Western political structures such as the European Union or NATO.
- **Transitional justice** – a set of legal and ethical problems concerning the way in which new democracies are dealing with the totalitarian past. For example, how are the crimes committed by the officials of the dictatorship treated and judged? Are the politicians of the former communist parties entitled to take part in the political life of the new, democratic countries?

- **Criminal prosecution –** the investigation and accusation of the people who are suspected of committing crimes. It is the state's (parliament's) role to define what kinds of behaviour are perceived as criminal. It is also the state's (prosecutor's office) role to decide whether to prosecute people suspected of committing crimes.
- **Decommunization –** banning politicians and officials of the Communist Party and state from participation in public life, i.e., running in elections or holding important offices.
- **Lustration** – disclosing information on someone's collaboration with the services (such as the secret police) of the communist regime. Its rationale was first to reveal the historical truth and prevent the possibility of blackmailing and influencing the decisions of individuals holding important positions with the undisclosed materials from the communist past.
- **Radbruch formula** – the legal theory formulated after WWII by the German lawyer, Gustav Radbruch. According to this approach, in case of the conflict between an 'immoral' statute and what someone perceives as just and moral, a judge may decide not to apply the statute if he finds it "unbearably unjust" or in "deliberate disregard" of human equality before the law.

IV. Key questions

- Should the officials, soldiers, and secret agents of the communist past be punished?
- Should the former leaders of the Communist Party and its collaborators be entitled to hold important public posts?
- What are the models of transitional justice and which of them were used in our countries?

V. Prior knowledge

The students need basic knowledge about the transition from communism to democracy in Central and Eastern Europe. They should be able to understand the differences between totalitarian, authoritarian and democratic political systems and know about the violations of human rights during the communist period. The basic comprehension of legal rules, procedures and notions is also necessary, including such terms as: crime, criminal prosecution, perpetrator, sentence, investigation, and acquittal.

VI. Step-by-step description of the lesson

UNIT I: IN SEARCH OF TRANSITIONAL JUSTICE

ACTIVITY 1 How to deal with communist crimes

Aim: To introduce students to the problems and challenges connected with different ways of bringing to justice communist officials and perpetrators of human rights violations.

Description: Begin the lesson by showing photos of the communist officials (use any search engine, e.g., Google by image). Ask if anyone recognizes who they are. Ask them why you might be interested in these individuals and what the topic of this unit might be. Outline the key questions you will be examining together (see above). Explain that after the fall of the communist regime, the new governments – among many other decisions – had to decide what to do with symbols, organizations, officials, and leaders of authoritarian systems. Bringing people to justice was the most difficult task, for many reasons.

Ask the students how they understand the notion "transitional justice". After a short discussion, give the short lecture based on the text "In search of transitional justice" or suggest reading the text (see APPENDIX – SOURCE A, *p. 265*). Ask the students to take notes on the main challenges faced in the punishment of the communist officials and perpetrators and to identify the four different models of doing this. Check that students have identified all the key points as this knowledge will be necessary for the next class activity.

ACTIVITY 2: Four cases, four approaches

Aim: A critical analysis and interpretation of four court cases from the transition period.

Description: After this introduction the students will be working in smaller groups. This activity has two stages – in the first stage, each group, consisting of 3-4 students, will receive written material on a case from one country (Bulgaria, Lithuania, Germany, or Bulgaria: see APPENDIX – SOURCE B, *p. 268*) with a set of questions for analysis and reflection.

A. What case does the text describe? When and where did all this happen? Who were the perpetrators and what were their crimes?
B. What model of transitional justice was implemented in this case: "liberal abandonment of criminal prosecution", "conditional resignation", "limited prosecution" or "comprehensive prosecution"?
C. What is your judgement on this ruling? In your opinion, was this the right judgement (students may have different perspectives on the issue)? If not, what should have been done?

ACTIVITY 3: Compare and contrast

Aim: To compare and contrast different legal strategies against the background of their political and legal contexts.

Description: In the next stage of analysis, groups merge to work together and examine a small comparative study of cases from two different countries. This work will be done in two blocks: cases from I. Poland and Germany and II. Bulgaria and Lithuania. Ask the students to form the appropriate teams and give them questions for the comparison of two countries:

A. What are the differences and similarities between the legal approaches used in these two cases?

B. What are the circumstances that help us to understand why this approach was implemented in these two national cases? If possible, try to find additional information from reliable sources online to get more insight.

In order to answer question B it might be necessary to search online (using smartphones, laptops, etc.). If this is not possible, this might be a task for students interested in the topic or in the history of the particular country to undertake as homework.

Ask students to share the results of their group work briefly – possibly on a chart or through 1-2 slides of short PowerPoint/Jamboard presentations.

ACTIVITY 4: Flaws and merits of transitional justice in our country

Aim: To discuss the model for administering justice adopted by your country; searching for both positive and negative implications and phrasing arguments for and against this approach.

Description: Invite all the students to take part in the class discussion on transitional justice in your country – coming back to the four models from the opening lecture/text and to the comparison with other post-communist states. Was the approach closer to the "Radbruch formula" or to the liberal philosophy of abandonment of criminal prosecution? What were the flaws and positive effects of this approach?

You can also ask the students to take a more distanced approach by asking: If you were in the position of an advisor to the country undergoing transition now (imaginary or real) – which approach would you recommend and why? What are the arguments for this solution and what are the potential traps one should foresee?

Depending on time constraints, the teacher can also highlight the role of transitional justice in building collective memory and narratives about recent history, the atrocities committed by the communist regimes and the effectiveness

of the new states to establish a democratic system. The trials of the perpetrators may be understood to have both affective and cognitive functions which contribute to the unconscious or conscious role of the law in the construction of collective memory.

UNIT II: DECOMMUNIZATION AND LUSTRATION – MODELS AND DILEMMAS

ACTIVITY 1: Three legal procedures

Aim: To understand the difference between three of the legal procedures which were used in the cases against the former officials of totalitarian regimes: executing justice, decommunization and lustration.

Description: Begin the lesson by reminding students of the last section of the introductory text from the previous unit on the differences between the three different legal procedures which were used in the cases against former communist officials – leaders, decision makers and collaborators. This part of the text begins with "Apart from...". Check if they can grasp the main differences between a) executing justice, b) decommunization, and c) the process of lustration. Discuss as a class to answer any questions and define the main goals which each procedure serves. If the students have access to the internet during the lesson, the teacher can ask them to find examples of each of the procedures online (through a Google search) and share with their classmates to develop their understanding.

Invite the students to identify the differences between these institutional responses and their more general meaning. What other purposes do they serve? They implement justice – this is clear, but usually they mean much more. Explain that responses such as trials, decommunization, and lustration, in addition to other procedures, such as truth and reconciliation commissions, provide compensation for the victims, commemoration, and public acknowledgement. These procedures can also be seen as methods which protect against denial in collective memory. Furthermore, asserting this respect for the law challenges the absence of legal procedure under the previous regime and strengthens critical perspectives on its crimes.

ACTIVITY 2: Understanding lustration – purpose, procedure, and challenges

Aim: To develop an understanding of lustration as a public procedure for disclosing information on collaboration with the communist regime. To prepare a poster or slides as a simple teaching aid on lustration.

Description: In this section, students will be given brief handouts outlining the lustration processes in the same four countries as in the first lesson (see APPENDIX – SOURCE C, *p.273*). Lustration is the exclusion from particular types of occupations of certain categories of people involved in previous regimes. The texts describe the general approach to lustration and the work of national institutes of memory created to deal with the disclosure of information on collaboration with the communist regimes. Explain to students that in all post-communist countries there was a commitment to gathering such information and making it accessible to individuals and to the general public. However, these procedures and accusations could also be misused in political struggles.

Students are asked to read texts (in pairs or small groups) and to produce one slide or one poster with key information on lustration in a given country. Students will then present their posters concerning each of the four states and compare them. The accompanying task (during the lesson or as homework for volunteers) would be to produce a joint presentation, consisting of 8 slides. Each pair or group would contribute two slides: 1) country and name of the institution, with a photograph 2) key issues and controversies.

Ask students to comment on the role of such institutions in post-transition countries with a special focus on their own state. How many people were dismissed or excluded from holding important positions through this procedure? Is the situation always black and white? Is there a possibility of self-lustration in your country and does it work smoothly? What is the role of the archives in the process of lustration? Who is in control of those archives – is this institution completely independent? Can the documents gathered by the totalitarian regime and its secret service be trusted? It is widely acknowledged that the facts described in the archives may not reflect the full context of events or may present falsified data, and consequently do not always accurately reflect events.

It is also worth recalling Václav Havel, the Czech dissident and then president who was one of the first public figures to call for lustration: "Our society has a great need to face that past, to get rid of the people who terrorized the nation and conspicuously violated human rights, to remove them from the positions that they are still holding".[147] Lustration laws were passed in the 1990s in almost all CEE countries. The first Lustration Act was adopted in Czechoslovakia on October 4, 1991, on December 21, 1991, the German Bundesrat approved the Stasi Records Act, which established the so-called Gauck Office. On March 9, 1994, the Lustration Act followed in Hungary, on November 30, 1995 – Albania. In Bulgaria, the Lustration Act was adopted on July 30, 1997. In Poland, the first lustration law which was adopted on April 11, 1997, was replaced by the current law on October 18, 2006.

[147] Michnik, A. & Havel, V. (1993): 'Justice or Revenge', p.23. In: *Journal of Democracy*, January 1993, 4.

It might be also useful to note that all lustration models adopted in post-communist countries meet the standards of international law in the field of human rights protection. They are justified by the concept of 'a democracy capable of defending itself', developed in the jurisdiction of the European Court of Human Rights. The level of loyalty of public officials and the society's trust in their credibility are crucial for a democratic society and its morale. Unreliable public officials constitute a threat to democracy, and the democratic state has the right to defend itself against this peril by adopting diverse means that help to eliminate it.

ACTIVITY 3: Debating the political and moral aspects of decommunization

Aim: To prepare for and participate in an open debate on the political and moral aspects of decommunization. This debate can take the form of "a parliamentary commission" or a "student seminar".

Description: Invite students to participate in a role-playing debate (fish-bowl discussion[148]) on the problems and challenges connected with decommunization. Before the fish-bowl debate you can ask students to prepare for the discussion by talking about or writing (in bullet points) the pros and cons of banning the former party and state officials from active participation in the public life of a country after transition, i.e., running in elections or taking public posts.

The debate on decommunization can take the form of "a parliamentary commission" or "a student seminar". One or two moderators ask the class to form two circles of speakers and take a seat in the inner one. The students who are ready to take part in the first round sit in the inner circle, the rest surround them, leaving some space for changing seats. The introductory questions for the debate can include: "Should former party and state officials be allowed to take part in public life?" Speakers have 2-3 minutes to present their position and they can refer to the previous speakers and cite examples from other countries. Once a student has spoken, they leave their seat to a classmate from the outer circle who presents their argument. Continue to switch participants in and out of the conversation as long as there is engagement and input from the group. From the start, ask the students entering the dialogue to put into practice arguments and positions they had considered helpful to the dialogue while observing the discussion.

The debate ends when everyone who wants to have a say has had a chance to do so. If possible, the teacher could summarize the debate with the main arguments raised by students (one can choose the students to speak randomly or

[148] A fishbowl debate is a strategy for organizing medium-to large group discussions. Participants are separated into an inner and outer circle. In the inner circle, or fishbowl, participants debate; in the outer circle participants listen to the discussion and take notes. Participants take turns in these roles, so that they participate as both contributors and listeners in the discussion.

ask for volunteers) and his/her own reflections on the content and process of the dialogue. If no time is left – these reflections can be included in the closing activity of the lesson.

ACTIVITY 4: Exit cards with key take-aways from the lesson

Aim: To formulate the key conclusion or key question for further research. To get feedback from students on their learning experience.

Description: To sum up the lesson (both units), every student writes a one sentence "exit card" – it can be a reflection, a statement, a question or even a doubt with which he/she ends the "Crime and Punishment" units. These reflections can be written on a Jamboard or take any other form of "post-it" note (virtual or material). This is a valuable activity for students and can offer a useful record of the learning experience. Such exit cards provide feedback for the teacher and help him/her to plan further lessons.

APPENDIX

SOURCES – Unit I

SOURCE A: Text – In search for transitional justice (Stanisław Zakroczymski)

The problem of transitional justice has been broadly discussed in legal, historical, and sociological literature. The dilemmas of transitional justice may be summarized in the expression used by Nelson Mandela in his foreword to the monograph concerning this problem, i.e., **"search for equilibria"**. *Equilibrium* between the natural claims of victims for criminal justice, punishment for the perpetrators, and social peace. *Equilibrium* between the restoration of unlawfully taken goods and the limited resources of public finances. *Equilibrium* between the undemocratic ideas (and deeds) of the *ancien regime's* leaders and their constitutional right to participation in the political life of the new, democratic state. These are only a few of the many *equilibria* to be found by societies and states emerging from dictatorship. Finding those *equilibria*, transforming them into concrete legal solutions and putting them into practice is a great political and social challenge, raising many challenging questions and conflicts.

Several approaches to the main problems of transitional justice were introduced and implemented in countries which were undergoing this process (not only in Eastern Europe, but also in Portugal, Spain, Greece, as well as in many countries of Latin America and North Africa, for instance). Some symbols of the different approaches to transitional justice persists in collective memory: the

sham criminal trial of Nicolae Ceaușescu on the one side, and the 'smooth' treatment of Augusto Pinochet in Chile after his brutal dictatorship.

Generally, the 'punitive' aspects of transitional justice may be divided into the subsections: criminal sanctions *stricto sensu*, and non-criminal (administrative, constitutional) sanctions. A persuasive classification of these approaches to criminal sanctions against the officials of the *ancien regime* was presented (in line with the findings of the Max Planck Institute in Freiburg) by the eminent polish philosopher of Law Jerzy Zajadło. In his famous essay "Five minutes of anti-legal anti-philosophy" he distinguished four such approaches:

- The first approach is the most 'liberal' – i.e., the deliberate abandonment of the prosecution of the past crimes. This approach was introduced in Chile, Russia, and Belarus, for instance.
- The second and third approach may be called 'medium':
  - One approach is the 'conditional resignation of the criminal prosecution' and was introduced in South Africa.
  - Another is 'limited prosecution', and this is the most popular solution, followed by countries such as Bulgaria, Poland, Hungary, Argentina, Greece or Portugal.
  - The last approach, i.e., comprehensive, all-embracing criminal prosecution may be considered the most rigorous and was introduced only in Germany after 1990.

There are many specific dilemmas concerning the criminal prosecution and punishment of the *ancien regime*'s officials. I will describe two of them. First, **the problem of the statute of limitations – can the democratic state's prosecutors and judges investigate and punish crimes which have been committed nearly 50 years earlier, for instance, where a statute of limitation has already expired?** On the one hand, the prohibition of such behaviour by the state in normal cases is one of the most important principles of the rule of law. On the other hand, it is obvious that the dictatorship's law enforcement authorities were not interested in the prosecution of criminals serving their regime. There is no single answer to such a dilemma. The best proof of this is the fact that, in 1992, the Constitutional Tribunal of the Czech Republic found the law permitting for the temporary restoration of the possibility of persecution of such crimes constitutional, while the Hungarian Court rejected a similar law.

The second, and maybe more important challenge, is **whether the officials (i.e., the judges, prosecutors, policemen, soldiers etc.) serving the dictatorship may be punished for the immoral deeds they committed, which were, at the same time, legal under the legal system of the dictatorship**. This problem was, of course, broadly discussed after World War II, when German philosopher of law, Gustav Radbruch proposed his famous 'Radbruch formula'

quoting the Latin paremia *'Lex iniustissima non est lex'* which means that the statutory law, even legally adopted by parliament, should not be applied if it is so unjust that it should be considered 'erroneous'. This formula is very much in line with human rights ideals, which are based on the assumption that fundamental rights are inherent and derived from human dignity, not from the political will of a country's rulers.

This formula was applied by German courts not only with regard to Nazi criminals, but also during the trials of Mauerschützen, i.e., the soldiers who were shooting and killing the people escaping Eastern Berlin through the Berlin Wall. In contrast to this, Polish courts refused to apply this formula against the judges who were convicting opposition activists on the basis of the unjust Decree on Martial Law in 1981-1983.

Apart from the criminal *sensu stricto* sanctions, there is also a wide range of administrative or constitutional sanctions that may be imposed on the officials of the *ancien regime* and their collaborators. The two most popular sanctions, applied, to differing extents, in many countries of the former Eastern Bloc, were lustration and decommunization. The former refers to the revelation of individuals who were involved in collaborating with the secret police of the communist regimes. The rationale behind this sanction was to reveal the historical truth and to prevent the possibility of blackmailing individuals later holding important positions of state with materials from the communist past. The latter refers to the prohibition of some politicians and officials of the Communist Party and state from participating in public life (i.e., running in an election or holding important offices).

There were several ways to approach this problem. In the Czech Republic a law was implemented that denied top-ranking communists from running in parliamentary elections, while in most of the countries decommunization was limited to positions in the secret services and judiciary. In most Eastern European Countries, post-communists were already back in power by the 1990s (this did not, however, reverse the course of democratic change). The scope and the timing of lustration also varied (i.e., in Germany in 1990s, all the files of the Stasi were made accessible, while in Poland a limited lustration process started in 1998).

Of course, the aforementioned problems do not exhaust the list of the issues concerning transitional justice. An important aspect of transitional justice concerns the problem of the re-privatization of goods improperly (or illegally) taken by the communist state. While in most post-communist countries there were special legal acts concerning this very complex social problem, in Poland the 'normal' provisions of civil law were applicable (which led to many irregularities and crimes).

To sum up, transitional justice is a very complex and multi-faceted problem. It consists of numerous 'sub-problems' which were, and still are, solved in differ-

ent ways. The choices of which concrete solutions to implement in this matter are some of the most important political decisions which must be taken by each society undergoing transition. These choices and its effects weigh on the lives of many members of these societies for decades.

SOURCE B: Real cases of transitional justice from Bulgaria, Germany, Lithuania, and Poland

- Bulgaria: THE CHERNOBYL CASE (Momchil Metodiev), available at: *https://transition-dialogue.org/teaching-transition/*.
- Lithuania: THE CASE OF JANUARY 13th (Aiguste Starkutė), available at: *https://transition-dialogue.org/teaching-transition/*.

Germany

THE CASE OF THE MAUERSCHÜTZEN ("WALL-SHOOTERS")

The erection of the Berlin Wall, and the shooting of those who tried to flee the GDR, is a key aspect of the history of divided Germany. After reunification, the country was faced with the question of who should be held responsible for murders on the border between East and West Germany. The case of the so-called "Mauerschützenprozesse" is especially significant because they dealt with a noteworthy controversy: Can certain actions be punished in unified Germany, even though there were not punishable under the law of the GDR? This included the Schießbefehl considered in the so-called "Politbüroprozess" as well as its execution.

The last fatality at the Berlin Wall was Chris Gueffroy – he was shot by border guards in February 1989. In January 1990, his mother, Karin Gueffroy, turned to the East Berlin prosecutor's office and demanded the prosecution of her son's murderers. The first trial of the shooters finally began in unified Germany in September 1991 at the criminal court in Berlin. The defendants were four border guards who had participated in the shootings that led to the death of Chris Gueffroy.

In preparing for the trials of the Mauerschützen, a 1953 ruling by the Federal Constitutional Court came into focus. In sentencing officials of the National Socialist regime, the judges invoked the ideas of the jurist and political scientist, Gustav Radbruch, and argued for the so-called "legal exemption". This means that actions that do not violate existing laws can and should be prosecuted if individual provisions of these laws contradict the notions of justice enshrined in legal systems. Accordingly, a law that blatantly violates the foundations of the rule of law should not be recognized as legitimate merely because it is applied by state authorities. The legal force of any law can be questioned if its basis is in open contradiction to fundamental principles of justice.

In deciding between prison sentences or suspended sentences for the Wall shooters on January 20th, 1992, the Berlin judges provided a precedent for proceedings in other cases. The verdict was groundbreaking for most of the subsequent Mauerschützen trials. They confronted the fundamental question of whether members of the former GDR border troops could be prosecuted in court, even though the use of firearms was legal under GDR law, and the Basic Law, the German Constitution, states that there cannot be retroactive prosecution. The courts did not consider the ex post facto law to have been violated, but merely postponed it in favour of establishing justice. The case law was also confirmed by the European Court of Human Rights in Strasbourg in the spring of 2001.

According to the court, the deliberate killing of refugees by gunfire or mines was an intolerable violation of the elementary precepts of justice. Even if it was hotly debated among lawyers in unified Germany, the verdict had great symbolic value: a German court had ruled that neither the conditions of an authoritarian regime, nor enforced military discipline could override responsibility for the killing of defenseless people.

Three Border Troops guards in a watch tower on the Inner German border in 1984.
Credits: SPC5 Vincent Kitts, Public domain, via Wikimedia Commons.
Source: *https://bit.ly/3CzHYfV*.

Poland (Stanisław Zakroczymski)

MARTIAL LAW UNDER TRIAL

Martial law was introduced by the Communist leaders of Poland (first by General Wojciech Jaruzelski, then the First Secretary of the Polish Workers Party and the Prime Minister) on the night of 12-13th, December 1981. Its goal was to stop the so-called 'Carnival of Solidarity', the peaceful revolution led by the only independent trade-union in the Eastern Bloc (to which about 10 million Polish citizens belonged) and its leader, Lech Wałęsa. During that fateful night thousands of opposition activists were arrested, 'Solidarity' was banned and many severe restrictions, concerning freedom of speech, movement, and assemblies, among others, were introduced. Over the following days hundreds of thousands of people took part in protests against this immoral decision. The most infamous events took place at the 'Wujek' Coal Mine in the Silesia Region, where nine protesting miners were fatally shot by police special forces troops. Numerous activists protesting against the introduction of martial law were sent to prison after sham, *ad hoc* trials (often by military judges).

Settling accounts with the instigators of this Martial Law and the officials taking part in its implementation and execution took more than two decades in free Poland. The history of this process reveals the complexity, and the paradoxes, of criminal transitional justice.

The Legality of the introduction of Martial Law and trials of the top Communists

Let's start with the most important question. It is clear that the very introduction of the Martial Law was immoral and unjust, but was it illegal within the existing legal system? Of course, the judges at that time generally were not in doubt and implemented the legal acts of Martial Law (however, some attempted to do so in such a way as to avoid harming the opposition activists). In 1981, the independent Constitutional Tribunal who would decide on the legality of this action did not yet exist. But in 2011, the Constitutional Tribunal of free Poland proclaimed that the decrees introducing Martial Law were unconstitutional with regard to the Constitution of Communist Poland and infringed upon the Human Right Acts of the United Nations. This verdict should be understood as symbolic: free and democratic Poland does not recognize and condemns the decision of the Communist Polish state.

General Jaruzelski and his collaborators in the government were never found guilty of introducing Martial Law. They were prosecuted and accused of being a part of the armed criminal group running the *coup d'etat* but the trial proceeded slowly and they all died before a verdict could be reached. There were many controversies surrounding this criminal trial. Numerous public figures, including

former anti-communist activists were against treating Jaruzelski as a criminal, because, at the end of the 1980s he was a key figure in the peaceful transition, one of the authors of the Round Table Agreements and the first president of free Poland. Others raised the argument that his later actions did not negate Jaruzelski's role in 1981.

The legal responsibility of policemen and judges

The other controversial problem was the responsibility of those who took part in suppressing the protests against Martial Law. The most eminent example of this issue was the urgent need to punish the armed policemen who had fatally shot the miners from 'Wujek' Coal Mine. The trials lasted 15 years – from 1993 to 2008. Initially, the policemen were acquitted due to a lack of evidence, many of the relevant official documents had been destroyed or were never produced. Directly following the massacre, the policemen were cleared as having taken the 'necessary defence' (a position which was obviously untrue, as the protesters did not have guns). The effect of these judgements made it difficult to say precisely which policemen had murdered the miners. The breakthrough in this criminal process occurred when three polish alpinists who had been conducting mountain training for the policemen in the 1980s admitted that during that training some of the policemen had confessed to them that they had shot at the miners. These new testimonials led to the conviction of 15 policemen for their participation in a fight with the use of firearms with a fatal outcome. Because of the lack of sufficient evidence, it was impossible to convict any of the higher-ranking commanders of the police.

Another group responsible for the execution of Martial Law and the oppression of participants of the resistance against it were the judges who sent them to prison. Here the problem of the Radbruch formula was present in its entirety. None of the judges was criminally convicted for his deeds. When it comes to administrative punishment, 63 judges-pensioners were denied the right to the special pensions for their activity in the years of communism. The process of 'purification' of the judiciary system was generally seen as unsatisfactory.

T-55 tanks on the streets of Zbąszyń under martial law.
Photo by J. Żołnierkiewicz, public domain, via Wikimedia Commons.
Source: *https://bit.ly/3vRzUFT.*

Wojciech Jaruzelski preparing to read a speech informing citizens of the introduction of martial law; Warsaw, December 13, 1981. Jaruzelski was a Polish army general and political leader who served as premier (1981-85), chairman of the Council of State (1985-89), and president (1989-90) during the final years of Communist rule in Poland.
Author unknown, public domain, via Wikimedia Commons.
Source: *https://bit.ly/375nGPE.*

SOURCES – Unit II

SOURCE C: Lustration processes

- Twists and turns of lustration and decommunization in Poland (by Stanisław Zakroczymski), available at: *https://transition-dialogue.org/teaching-transition/.*
- Lustration in Germany – quick and systematic (by Stanisław Zakroczymski), available at: *https://transition-dialogue.org/teaching-transition/.*

Lithuania (Aiguste Starkutė)

CONTROVERSIES AROUND LUSTRATION IN LITHUANIA

Lithuania never underwent full lustration. According to data available from 2005, there were around 4000 former KGB agents whose identities had not yet been disclosed. The process of decommunization had not gone smoothly and, even today, it is seen as a very complicated and highly controversial topic.

After the declaration of Lithuania's independence, the part of the Communist Party that had separated from Moscow and had become independent changed its name to the Democratic Labour Party of Lithuania (LDDP) and won the 1992 parliamentary elections, gaining 73 seats (out of 141) in the Seimas (Lithuanian Parliament). Hence, Lithuania was departing from communism with a strong ex-Communist Party which even won the elections and ruled Lithuania during the transition to a free market economy. This could be the reason why legislation related to the rights of victims of the communist system developed very slowly and the basic laws were adopted only after 1996. Though the former Communist Party (LDDP) and its government did not return to its communist roots in the political and economic sphere, they were pursuing a policy of "gradual reform".

It was only when the anti-communist Conservative Party won the election that the adoption of the main legislative acts related to the situation of victims of the communist crimes began. This period lasted from 1996 to 2000, during this time the law "on the registration, confession and record of natural persons in the Lithuanian Republic, who collaborated with the secret services of the former USSR, and on the protection of the personal data of those who confessed" (The Law of Lustration, November 23, 1999) was passed. This law declared the formation of the so-called Lustration Commission and was the legal basis for the start of the process of lustration.

This conception of lustration was chosen according to guidelines released by the Supreme Council of Lithuania in 1990. It stated that the quarrels and disagreements between both sides, victims and perpetrators, were not conducive to the recreation of the new state. Such inner divisions were seen as dangerous because they could play into the hands of the forces seeking to destroy Lithuanian independence and to restore its status as part of the USSR. Thus, the document states that there cannot be a division between the "bad" and the "good," and "even those

who degraded, relentlessly crushed, misguided, made mischief, who spied, [...] and deceitfully accused" their neighbours, colleagues, family members, and so forth, "are the children of the very same mother Lithuania". Moreover, "no one should be prevented from taking the chance to rise up, confess their guilt and come back to the path of justice". Therefore, extra-judicial institutions, in which the perpetrators are directly confronted with the victims, do not exist in Lithuania.

The institution responsible for the rights of victims, investigation of all kinds of genocide, crimes against humanity, and war crimes, as well as the persecution of Lithuanian inhabitants during the occupations and the processes of armed and unarmed resistance is called The Genocide and Resistance Research Centre of Lithuania (LGGRTC). It also initiates the legal evaluation of the organizers and executors of the genocide and other crimes, as well as crimes of the communist regime, and coordinates the work of other institutions that is related to these issues. LGGRTC was established in 1997 after several other institutions responsible for the research and commemoration of the occupation period were merged.

The activity of this centre often sparks debate and controversy. For instance, from 2012 to 2018 the LGGRTC published a list made up of former KGB agents. However, at the end of September 2020 it was decided to remove the document from LGGRTC website, justifying this decision by arguing that, while the KGB had attempted to recruit all the people included in the list, not all of them were actually collaborating with the KGB. Publishing the list would make it too easy to manipulate the data and mistakenly accuse individuals. Meanwhile, other historians point out that it is a KGB document, so while it may be understandable that it is unpleasant, people still have the right to see it. Hence, not only historians and politicians, but also Lithuanian society is still very much divided over what to do with its Soviet past.

The Genocide and Resistance Research Centre of Lithuania (LGGRTC).
Photos by Aiguste Starkutė (private).

Bulgaria (Momchil Metodiev)

TRANSITIONAL JUSTICE IN BULGARIA: TOO SLOW AND TOO LATE

In the early stage of transition, Bulgaria was unable to provide justice, a fact that contributed to the spread of nostalgia for the communist past and to cynical social attitudes regarding justice in general. While lustration, the declassification of the archives of the former State Security, finally happened in 2007, attempts at decommunization remained unsuccessful.

In the 1990s, several unsuccessful attempts were made at opening up the State Security archives. In 1990, parliament created a Special Parliamentary Commission to examine them, but it was unable to survive the public scandal following the publication in a minor newspaper of a list of members of parliament with ties to the State Security, allegedly obtained by the Commission. In 1997, parliament adopted the Law on Access to State Security Documents, which made it possible for Bulgarian citizens to access their own secret files. The Law also created a Commission, authorized to unmask State Security informers from within the post-communist political elite. Its authority, however, was seriously limited by a Constitutional Court ruling which forbade the Commission to publicly release the names of tainted people for whom there was only a name card in the State Security card-index, but for whom no file was found in the secret archive, because their files were destroyed in 1989-1990. In 2001, parliament revised the Law and created a Commission, active between April 2001 and March 2002, which prepared nine reports revealing the identity of some State Security informers and officers. In its final report the Commission claimed that it had investigated 7,000 individuals, verified 517 of them as former collaborators, but disclosed the names of only 208 due to the Constitutional Court ruling.

A concerted effort at lustration in Bulgaria happened as late as December 2006, when parliament adopted the Law for the Access and Disclosure of the Documents and Announcing Affiliation of Bulgarian Citizens to the State Security and the Intelligence Services of the Bulgarian National Army. Within weeks, parliament elected the Commission that became known as *the Dossier Commission,* which first created a "centralized archive" of all communist security agencies. Then it started to verify the public officials who worked for the post-communist legislative, executive, and judiciary at the national level, the members of the local government, state agencies, and the opinion makers (that is, owners, managers, and journalists of all private and public media). In the period 2007-2020, after several amendments of the Law aimed at broadening the scope of verified officials, the Commission has verified the past of 351,948 people, identified 17,958 of them as former State Security collaborators, and officially released the names of 13,921 people (the Commission is not authorized to announce the names of deceased people). The Commission reports are publicly available on its website and widely reported in the media. It could be concluded that it is the first successful Bulgarian transitional justice institution.

The disclosures of the Commission have informative and instructive effects because the attempts at decommunization in Bulgaria have remained unsuccessful. Since the early 1990s, several attempts at decommunization were incorporated in different Laws (i.e., Law on Banks and Banking, Law regulating the universities and scientific institutions, Law on Public Radio and Television) but all of them were blocked by the Constitutional court, which consistently ruled them unconstitutional, on the grounds that they represented a violation of the human and political rights of those officials. The idea of decommunization gained new momentum in late 2010, when the Dossier Commission disclosed that 50 percent of Bulgarian ambassadors and heads of diplomatic missions in the period 1991-2010 were affiliated with the Communist State Security, including 45 of acting Bulgarian ambassadors at that time. As a result, the Minister of Foreign Affairs, supported by the parliament, withdrew those ambassadors, despite the resistance of the President at that time. Although there is no legal obstacle, since then, ambassadors affiliated with the State Security have not been appointed.

The main archival building of the Bulgarian Dossier Commission.
Photo by the Bulgarian Dossier Commission.