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(In)Surpassable Barriers to Lustration: Quis custodiet ipsos custodes?

Summary

Lustration is in many aspects connected to certain legal procedures. However, there are a number of legal barriers that bar the success of this process. Some of them are procedural (e.g. statute of limitations), and some are organizational – e.g. the legitimacy of those who are supposed to be the implementers of the lustration practices. In relation to judicial practices, the particular situation in Croatia points to very weak chances that a judiciary, that is itself arising from an intransparent process of appointment, be an appropriate tool for a sensible lustration practice. On the other hand, lustration in the judiciary now appears not only as belated, but also as highly improbable.

Key words: lustration, justice system, judicial independence.

I. Introduction

The society that aspires to establish a modern democracy based on the rule of law must adhere to several primary principles of the orderly legal system. Indeed, the distancing from the heritage of the past practices and their protagonists is important. So far, the concept of lustration has a strong political and social meaning, above all as a symboli-

cal departure from the past totalitarian practices and those who were instruments in their enforcement. The ultimate purpose of lustration is to demonstrate discontinuity, the change of a paradigm in the practices of government. In various forms, the concept of lustration[1] was utilized in various jurisdictions, most prominently in Poland, Czech Republic and Hungary.[2] In a different context, it was undertaken in former German Democratic Republic.[3] In a non-European space, parallels were often drawn with the practices in South Africa after the period of apartheid.[4]

Yet, the very principles of the rule of law may be one of the important barriers to the success of lustration. In this contribution, I would like to distinguish some procedural, organizational and personal barriers to lustration, which arise from the attempts to implement lustration regulations and practices in the legal sphere.

II. Lustration Procedure and the Rule of Law – some compatibility issues

a. Lustration and retrospective application of laws

First assumption is that lustration as a process can only be imaginable as at least remotely compatible with the rule of law if it is done by legal means.[5] A purely political and informal removal of all those who are supposed to have links with the past regime does not differ

1 Generally on the concept of lustration see: Kritz, 1995; Elster, 1998; Tucker, 1999; Teitel, 2001.

2 More on lustration in these countries see: Williams, Fowler, Szczerbiak, 2005; Szczerbiak, 2002; Szczerbiak, 2003; Williams, 2003; David, 2003; Dornbach, 1992.

3 See: Adams, 1997; Kommers, 1997.

4 See e.g. David, 2006.

5 On understanding of the origins of the term "lustration" see: Cepl, 1992:24. In this text, we will consider lustration in the broader sense, e.g. not only lustration as limited to "ascertaining whether an occupant or candidate for a particular post worked for or collaborated with the communist security services" (Williams, Fowler, Szczerbiak, 2005:24) but as every attempt to disqualify by legal means a person holding (or aspiring to) public office (or other post, position, service or employment) on the grounds of its co-operation or belonging to the former regime.

at all from the totalitarian practices of the past. In this sense, direct dismissals or martial courts are as much the practices of lustration, as the *chistkas* in the times of Stalin. Therefore, we take as granted that lustration must, in a civilized environment, be undertaken by legal practices.[6]

Now, if lustration is supposed to be a legal process, the next element that has to be discussed is the nature of substantive rules and standards that have to be applied in this process. The sheer membership in a particular organization (say, a Communist party or in a secret police) is generally, by most democratic standards, not sufficient to constitute individual responsibility.[7] Even if, from contemporary perspective, we can evaluate some of such memberships (e.g. belonging to or collaboration with Stasi or KGB) as a membership in a criminal organization, it is undisputable that, at the times when such membership existed, participation in it was not deemed to be a crime. On the contrary, it was viewed as a desirable, and sometimes even as a required or compulsory activity.[8]

If we apply, however, our contemporary understanding to the practice of the past, we are in fact running against one of the fundamental principles of the rule of law, i.e. the prohibition of retrospective application of the law. The principle *nullum crimen, nulla poena sine*

6 Although this statement may be taken as self-understood, and generally is not disputed, it may be indicative that in social sciences lustration has been a process largely debated and analysed by political scientists and sociologists, and only marginally by lawyers.

7 In the same sense, the Parliamentary Assembly of the Council of Europe Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems stressed that, for a lustration to meet standards of a democratic state under the rule of law, several criteria have to be met. As first, it was stated that "guilt, being individual, rather than collective, must be proven in each individual case - this emphasizes the need for an individual, and not collective, application of lustration laws" (at 12).

8 The exclusion of "compulsory" or "required" activities was therefore provided even in the most rigid versions of lustration laws. E.g. in Section 4 of the Polish 1997 Lustration Act, it is provided that collaboration (defined as intentional and secret collaboration with operational or investigative branches of the State's security services as a secret informer or assistant in the process of gathering information) does not include an action which was obligatory under the law in force at the material time (par 1. and 2). Yet, the term "obligatory" may be interpreted in different ways, and the factual difficulties in establishing whether somebody collaborated "voluntarily", or was recruited under pressures or blackmails, may be great.

lege is today understood as one of the fundamental human rights.[9] To violate that fundamental human right in the name of the protection of fundamental human rights sounds at least contradictory, if not absurd. Therefore, in many countries that have enacted lustration laws, such as Poland, Hungary, Czech Republic, Slovenia or Slovakia, the point of retrospective (retroactive) application was often invoked in the constitutional review, and these laws were often facing the real risks of being pronounced as unconstitutional. The more radical variants of lustration legislation that provided possibility of raising criminal charges against members of former regime were rejected on constitutional grounds already in early 1990s.[10]

Some practices, such as torture or murder, can still, without much twist in legal imagination, be construed as the practices which were, or at least should have been, prohibited also at the time when they are committed, notwithstanding that they were committed in the service of the old regime. Such practices, indeed, can and should be prosecuted. Now, the question is whether such prosecutions should have any special shape and rules as those that are undertaken in the "regular", "non-lustration" circumstances. Applying double standards for the same crimes may again, at least apparently, run the risk of violating the principle of non-discrimination that demands the same offences are treated in the same way. It seems that this was in fact the insurmountable difficulty for Central and East-European legislators,

9 On application of this principle in international criminal law see Werle, 2005: 32. This principle is also embodied in Art. 7 of the European Convention on Human Rights (no punishment without law). In the practice of the European Court of Human Rights in Strasbourg, it was held that Art. 7 has not confined only to prohibiting the retrospective application of the criminal law to disadvantage of the accused. "It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to a detriment of the accused, for instance by analogy." Kokkinakis v. Greece judgement of May 25, 1993 (Series A no. 260-A, p. 22, par. 52).

10 E.g. in 1992 the Hungarian Constitutional Court overturned the Act on the prosecutability of crimes not prosecuted for political reasons. The main argument was derived from the rule of law doctrine: the certainty of laws requires that the legislative authority should make laws which are clear, comprehensible and have a predictable (= non-retrospective) effect. See Constitutional Court Decision No. 11/1992 (III.5) AB. More in Dornbach (1992) and Dillemmas (1992). More on this decision see infra, in the context of the statute of limitation difficulties.

because virtually no serious attempts to organize some kind of special post-communist Nuremberg-style trials were noted. On the contrary, the "lustration" was largely experienced as a surrogate for full-fledged criminal condemnation – it was limited to attacking the ability of current and possible office-holders to discharge their jobs (or apply for office).

A typical model of a relatively successful method, by which a system of "transitional justice"[11] attempted to evade the pitfalls of retrospective application, was the one originally developed by the Polish Helsinki Committee in 1992[12], and subsequently adopted by several Central and Eastern European countries. According to this method, the public officials and the candidates for public offices would be required by law to state in a solemn written declaration whether they were, in the past, the members or collaborators of secret police or other oppressive communist services. If the declaration would be affirmative, there would be no direct legal sanctions; however the political responsibility would most likely have sufficient negative impact for those who would admit it. If the lustration declaration would deny the past collaboration and if, subsequently, it would be proved that the declaration is untrue, this would – as a finding of a current, and not of a past offence – be a reason for moral and/or legal disqualification of the office-holder.[13] But, even if such an approach does effectively respond to the objections of retrospective application, there are further barriers to the success of such a procedure.

11 For various concepts of "transitional justice" see: Teitel (2001); Kommers (1997); Kritz (1995).

12 See: Rzeplinski, 1992:33.

13 This procedure more or less corresponds to the provisions of the 1997 Lustration Act (Poland).

b. The burden of time – issues relating to statute of limitations

Distancing from the past rarely happens in very short period of time, and the very fact that lustration is still a hot political and legal issue now, almost two decades after the fall of the past regime, demonstrates that we often have to deal with the events and offences that happened quite a long time ago.[14] In this connection, two types of difficulties are arising.

The one difficulty is connected to the statute of limitation rules. Here, again, we have to deal with the issue of retrospective application of norms, but in a different form. Namely, the "pure" retrospective laws invent new crimes and allow criminal charges for actions that were, at the time when they were committed, not criminalized. But, a lot of offences (e.g. murder, fraud or theft) were, at the time when they were committed, described as criminal, but in the course of time the prosecution for them was time-barred, because the prescribed statute of limitations periods have expired. Now, if somebody was, for political reasons not charged for a murder committed several decades ago (e.g. because they were political activists of Communists party who crushed the 1956 Revolution in Hungary), most likely the "normal" legal rules would not allow the prosecution for such a crime any more.

Although statute of limitation rules are not something that is regarded as sacrosanct, in modern legal orders they have an important place, in particular because they contribute to legal certainty. They are also regarded to be an element of substantive law. When statute of limitation period expires, it cannot generally be revived and even the extension of the limitation period can be viewed as an attempt to retrospectively change the law. In any case, ignoring the statute of limitations is something that violates the fundamental principle of the rule of

14 In Hungary, e.g. the historic events that triggered most of the lustration efforts that happened almost 50 years ago, imminently after the crash of the Hungarian Revolution of 1956, during the wave of oppression by the Soviet-installed government. In the post-Yugoslav states and some other post-communist countries, the animosities have sometimes even deeper roots, and are connected to the affiliation during the World War II.

law: the principle of legality. This was exactly the point for which the Hungarian Constitutional Court found the 1991 law that attempted to restart the expired Statute of Limitations for selected crimes committed between 1944 and 1990 to be unconstitutional.[15] The Court stated that extension of the statutory limits were unconstitutional in various forms, because it violated the requirement of certainty and predictability of legislation.[16]

c. The burden of time – evidentiary difficulties

The other difficulty that arises when we deal, exceptionally, with the crimes that were committed before several decades, is connected with the taking of evidence. The rules of evidence in legal proceedings are usually quite strict, and demand high standard of proof for the demonstration of guilt. If these high standards of proof are not met, regularly the result should be dismissal: *actore non probante, reus absolvitur*. The further we are from the disputed events, the higher is the likelihood that it will be extremely difficult, if not impossible, to reach the high evidentiary requirements, such as e.g. "beyond reasonable doubt" standard required for convictions for crime.[17]

One might ask why in such cases other legal procedures, with lower thresholds for evidence, but also with lesser consequences (e.g. dismissal from public offices or a ban from holding a public office) are not an option. Indeed, some of such attempts were noted. Yet, it might not be compatible with the principles of the rule of law if we are not

15 See Hungary: Constitutional Court Decision on the Statute of Limitations No. 2086/A/1991/14 (March 5, 1992), reprinted in 2 Transitional Justice, at 629.

16 Admittedly, in a later decision the Court approved the amended legislation, but only insofar it dealt with the prosecution of the crimes that would, under international law, not fall under statute of limitations, such as war crimes or crimes against humanity. See Decision of the Constitutional Court No. 53/1993 (X.13) AB. See also: Ellis, 1996:183-184.

17 It is also important to observe that the evidentiary standard „beyond reasonable doubt", developed in the Anglo-American jurisprudence as the concept of criminal law, in the Continental Europe (as a standard of „certainty") applies also to civil litigation. See more in Shapiro, 1993.

able to prove the guilt of the accused, and therefore attempt to punish the same crime in another process by lesser sanctions. The fundamental principle of the criminal procedure since the times of Roman law was the presumption of innocence: nobody should be held responsible for committing a crime until that was conclusively proven in the court of law. Thus, regular result of the inability to prove the guilt, in spite of some potential remaining doubts, should be full exculpation of the accused, and not a sanction that is reduced proportionally to the inability to prove the crime.

d. The challenges of a fair trial

The final, procedural challenge to the lustration procedures lies in the fact that the finding of the links with the past (be it collaboration with secret services or other individual actions) has to be established in a procedure that complies with the requirement of procedural due process of law. The standards of procedural due process of law in Europe are today encapsulated in Art. 6 of the European Human Rights Convention as the standards of a fair trial. As all of the transition countries in Europe are now members of the Council of Europe, they are all signatories of the EHRC and are submitted to the jurisdiction of the European Court of Human Rights.

In recent times, the Strasbourg Court had ruled in several cases on the human rights violations regarding lustration processes in Poland[18], Slovakia[19] and Latvia[20]. In most of these cases (with the notable exception of Ždanoka case) the Court found violation of the Art. 6(1), insofar the concrete procedures of lustration did not warrant equal treatment and equality of arms (e.g. because of the protection of "state secrets" the applicants did not have the same right of access to documents, the

18 Case of Matyjek v. Poland (38184/03), judgement of April 24, 2007; Bobek v. Poland (68761/01), judgment of 17 July 2007.

19 Turek v. Slovakia (57986/00), judgement of February 14, 2006.

20 Ždanoka v. Latvia (58278/00), judgement of March 16, 2006.

proceedings were mainly closed to public, and even the reasons of the judgements were only partially available to the applicant).

One line of argument was common to all of the cited Court decisions: although the court did not attack the legitimacy of lustration efforts as such, it has tried to define strict limits for lustration practices. The Court recognized the historical need for lustration at the end of the 1990s: "the State had an interest in carrying out lustration in respect of persons holding the most important public functions." However, was emphasized that, "if a State is to adopt lustration measures, it must ensure that the persons affected thereby enjoy all procedural guarantees under the Convention in respect of any proceedings relating to the application of such measures." Regarding the secret nature of the proceedings: "The Court accepts that there may be a situation in which there is a compelling State interest in maintaining secrecy of some documents, even those produced under the former regime. Nevertheless, such a situation will only arise exceptionally".[21]

In all cases the Court again evaluated the impact of time. Arguing that considerable time has elapsed since the events at stake (and the evidence by which such events have to be proven), the Court held that, „unless the contrary is shown on the facts of a specific case, it cannot be assumed that there remains a continuing and actual public interest in imposing limitations on access to materials classified as confidential under former regimes. This is because lustration proceedings are, by their very nature, oriented towards the establishment of facts dating back to the communist era and are not directly linked to the current functions and operations of the security services".[22]

Even in the Latvian case, in which the grand chamber did not find violation (but with numerous dissenting opinions), the conclusion of the Court was almost the same. On one hand, the exceptionality of historical circumstances was taken into account. The restriction was found to be neither arbitrary nor disproportionate at the particular place and point in time: "While such a measure [i.e. the exclusion of

21 Matyjek v. Poland, at 62.

22 Bobek v. Poland, at 57.

candidates belonging to pro-communist parties from standing as candidates to the national Parliament] may scarcely be considered acceptable in the context of one political system, for example in a country which has an established framework of democratic institutions going back many decades or centuries, it may nonetheless be considered acceptable in Latvia in view of the historic-political context which led to its adoption and given the threat to the new democratic order posed by the resurgence of ideas which, if allowed to gain ground, might appear capable of restoring the former regime."[23] On the other hand, the Court has specifically pointed to the limited nature and time concerns of such measures, thereby directly warning the Latvian authorities that it may soon change its mind: "It is to be noted that the Constitutional Court observed in its decision of August 30, 2000, that the Latvian Parliament should establish a time-limit on the restriction. In the light of this warning, even if today Latvia cannot be considered to have overstepped its wide margin of appreciation under Article 3 of Protocol No. 1, it is nevertheless the case that the Latvian Parliament must keep the statutory restriction under constant review, with a view to bringing it to an early end. Such a conclusion seems all the more justified in view of the greater stability which Latvia now enjoys, *inter alia*, by reason of its full European integration. Hence, the failure by the Latvian legislature to take active steps in this connection may result in a different finding by the Court".[24]

23 Ždanoka v. Latvia, at 133.

24 Ibid. at 135.

III. The Organizational and Personal Barriers - Lustrating the Lustrators

a. Courts as lustration bodies

From the legal barriers to lustration in the field of substantive and procedural law and the law of evidence, we will continue to the organizational difficulties. One of such organizational difficulty is related to the composition of bodies that are supposed to be responsible for the conduct of the lustration practices. As lustration practices are related primarily to those who hold the high offices, the first issue that arises is about the guarantees that the process will be conducted by competent, independent and impartial bodies.

Such bodies, as proclaimed by the Art. 6 ECHR, should regularly be courts. However, in transition countries courts were not isolated from the rest of the society. The holders of judicial functions were (and still are) appointed in the process that was not guaranteeing the appointment of the most proficient candidates. Therefore, the issue of lustration was also regularly raised in respect of the judges who have developed their career in the times of the past regime. One of such examples is, e.g. the lustration paragraph[25] that declared that those who were involved in the violations of human rights are incapable to become judges.[26]

If judges themselves are suspects of the links with the past regime, it is highly doubtful how a process in which they would have the final word in the matters of lustration would reach the goal of full legitimacy. *Quis custodiet ipsos custodes*?[27] The integrity of those who are "lustrating" can be warranted if they are impeccable; if they are not, the vicious circle of "lustrating lustrators" appears; as one of the

25 Art. 8. par. 3. of the Law on Judicial Office of the Republic of Slovenia, Uradni list 19/94.

26 This provision was subject to constitutional review, whereby the Constitutional Court approved it, setting however further guidance for its proper application. Constitutional Court of Slovenia, Decision U-I-83/93 of July 14, 1994.

27 Who watches the watchman? A Latin phrase from the Roman poet Juvenal, Satire 6, 346-348.

fundamental paradoxes that are related to the personal element of the lustration practices.

b. Judiciary and "wild lustration": the example of Croatia

From this point on, we would continue with the further organizational difficulties that are related to the current trends in the implementation of the constitutional principle of the separation of powers. The main arguments will be related to judicial branch of government, and will develop both on the general level, as well as on the level of the concrete example – the example of judicial reform in Croatia.

As Franz Neumann claimed, independent and impartial judiciary is the irreducible minimum of democracy (Neumann, 1974:53). Therefore, the lustration among legal professionals, above all among judges and state prosecutors, should have a special significance. But, such a process is particularly difficult and sensitive. In this process, the same instruments that are designed to be protectors of the rule of law may become their opposite.

This happened, e.g. with the constitutional process of appointment of judges and prosecutors in Croatia in the 1990s, what is particularly visible on the practice of the body that was due to appoint and dismiss judges, the State Judicial Council. Designed in the Constitution as a body of professional autonomy in 1991, this body was not appointed for five years, and started to operate only in 1996. In the preceding five years, a process of "silent lustration"[28] was happening, and many of the judges and prosecutors were forced to leave their judicial posts, but rarely for legitimate reasons, and rarely with a clear explanation. However, more importantly, when the new body, the State Judicial

28 The term of "silent lustration" implies, unlike the concept of "wild lustration" which happened in other Central European countries (Williams, Fowler, Szczerbiak, 2005:32) that dismissal of those who were regarded "inappropriate" happened without clear explanations, sometimes even without any explanation. Common to both is that they were "based on dubious evidence and seen to be politically motivated and deeply disruptive and damaging to public life".

Council, overtook the process of appointment, it became instantly apparent that it would not change the course of events. On the contrary, the State Judicial Council, a body composed by a majority of judges, yet those appointed by political majority of the national Parliament, proved to be even more disastrous in its activity than the preceding silent political *chistka*. Already its first appointments confirmed the judicial posts of several controversial judicial figures with a history of political subordination, while dismissing some of those who were the true heroes of judicial competence and independence. [29] As a topical example, the judge who had the most of public trust, and was the best candidate for the President of the Supreme Court, the late judge Vladimir Primorac, was at that point dismissed from the Supreme Court. Judge Primorac, who had a history of straight and upright decisions in the times of socialism, for what he was then forced to leave the judiciary, was again "lustrated" precisely for his overly independent and upright stature and opinions.[30] His uncompromising standing and independence was viewed as a threat to the monolithically unity of powers required at that point by the President Franjo Tudjman. It is only too paradoxical that his dismissal was undertaken by the body that was alleged to be the body of professional autonomy and independence of judicial branch of government, and that he, while banned again from judicial ranks, was forced to be involved in politics and subsequently was appointed as oppositional MP in the Croatian Parliament (Sabor).

After the death of President Tudjman and restoration of the balance of political powers, the political elites started to take judicial independence more seriously, not because they liked it, but because centers of political powers were not any more as strong and influential as in the 1990s.[31] This affected also the operation of the State Judicial Council. This body, slightly reformed, now is less directly interlinked and sub-

29 See in more detail in Uzelac, 2000; Uzelac, 1995.

30 His opinions can be best evaluated from his own works - see Primorac, 2000; more on Primorac in Kolo, 2001.

31 On initial attempts to reform the process of appointment of judges see more in Uzelac, 2002.

ordinated to particular political parties or holders of political powers. However, it has not radically improved the process of appointment, in particular the criteria for professional competence and ability. As a body of professional autonomy, which represents the judicial officials that are the result of the intransparent appointment process of 1990s, the State Judicial Council now operates as a lobbying machine and an instrument of *status quo* in judiciary. Instead of the telephone calls of particular politicians, the appointment of judges is now influenced by telephone calls of colleagues and relatives, and the success of lobbying and links to particular members of State Judicial Council. On the side of the responsibility, the State Judicial Council was so far not able to establish any clear and resolute criteria. On the contrary, by its very slowness and irresoluteness, it had sent a message that it conceives judicial independence as the lack of their responsibility. This has contributed to the public criticisms of judiciary, and ever louder voices that speak of the current judges in Croatia as "holy cows", "protected animals", or, even worse, "the war profiteers".

The final paradox in this context is the fact that malfunctioning of judiciary is nowadays in Croatia the topic no. 1 in the accession process to the EU.[32] The chapter on judiciary and human rights is among all chapters the one which is at the earliest stage, and the one that will most likely be closed last.[33] Therefore, the reforms, including the reforms of the process of judicial appointment and discipline, are now sorely needed. But, every move to improve the personal composition of the judicial professionals in Croatia is now being viewed within the members of the judiciary as an attack on the judicial independence and the rule of law. And, even the international community, including the EU bodies, is sending the twofold signals, advocating at the same time judicial reforms, but also judicial independence, including the support

32 See more in Uzelac, 2006.

33 Opening the accession negotiations, the European Commission found that "citizens rights in Croatia are ... not yet fully protected by the judiciary" (Opinion, 2004:16); two years later, it was found that "reform is at an early stage and the judicial system continues to suffer from severe shortcomings" (Progress report, 2006:8). It is expected that this finding will not be considerably altered in the report for 2007.

for professional bodies such as the State Judicial Council.[34]

IV. Concluding remark

Therefore, in such a constellation, it is difficult to imagine what can come next in the context of lustration. Now, just as in the 1990s, there are moments when, in Central and Eastern European countries, lustration seems desirable, but elusive. To use the words of Immanuel Kant, lustration seems to be "indispensable, yet impossible mission". Maybe we should continue to be realistic, and therefore continue to demand the impossible. Or else – in the quest for justice, the time elapsed might remain as only cure for the injustices of the past. In the words of popular culture: "The answer is blowin' in the wind".

34 On judicial councils in Europe see Voermans, Albers, 2003.

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In Search of a Theoretical Framework of Transitional Justice: Toward a Dynamic Model

Introduction

Coming to terms with the past after the fall of a dictatorship has become a theme of study for an ever-growing literature, which coined the term "transitional justice"[1]. The classical question which most studies tried to answer is: "Which are the relevant factors that influence the initiation and the successful implementation of transitional justice policies?" Why does it "work" in some countries, and in others it does not? The classical works analysing democratic transitions (Huntington, O'Donnell, Linz and Stepan), as well as the best-known studies of transitional justice in the '90s, have shown the relevance of a series of factors (and established classifications of countries according to these variables): the nature of the dictatorial regime and of its crimes, its longevity, the extrication path and the nature of the transition that followed (the "negotiated transition" or the violent overthrow).

Relevant as they are, these factors and classifications do not explain the subsequent evolution of the policies: countries that were considered unwilling or unable to deal with their past (typically Romania, but also Poland and some Latin American countries) have moved in recent years towards the most radical forms of transitional justice;

1 Perhaps the single most important contribution towards consecrating the term was the impressive 3-volume compilation by Kritz (1995).