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COUNCIL OF EUROPE
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Resolution 1096 (1996)[1]

Measures to dismantle the heritage of former communist totalitarian systems

Parliamentary Assembly

1. The heritage of former communist totalitarian systems is not an easy one to handle. On an institutional level this heritage includes (over)centralisation, the militarisation of civilian institutions, bureaucratisation, monopolisation, and over-regulation; on the level of society, it reaches from collectivism and conformism to blind obedience and other totalitarian thought patterns. To re-establish a civilised, liberal state under the rule of law on this basis is difficult - this is why the old structures and thought patterns have to be dismantled and overcome.

2. The goals of this transition process are clear: to create pluralist democracies, based on the rule of law and respect for human rights and diversity. The principles of subsidiarity, freedom of choice, equality of chances, economic pluralism and transparency of the decision-making process all have a role to play in this process. The separation of powers, freedom of the media, protection of private property and the development of a civil society are some of the means which could be used to attain these goals, as are decentralisation, demilitarisation, demonopolisation and debureaucratisation.

3. The dangers of a failed transition process are manifold. At best, oligarchy will reign instead of democracy, corruption instead of the rule of law, and organised crime instead of human rights. At worst, the result could be the "velvet restoration" of a totalitarian regime, if not a violent overthrow of the fledgling democracy. In that worst case, the new undemocratic regime of a bigger country can present also an international danger for its weaker neighbours. The key to peaceful coexistence and a successful transition process lies in striking the delicate balance of providing justice without seeking revenge.

4. Thus a democratic state based on the rule of law must, in dismantling the heritage of former communist totalitarian systems, apply the procedural means of such a state. It cannot apply any other means, since it would then be no better than the totalitarian regime which is to be dismantled. A democratic state based on the rule of law has sufficient means at its disposal to ensure that the cause of justice is served and the guilty are punished - it cannot, and should not, however, cater to the desire for revenge instead of justice. It must instead respect human rights and fundamental freedoms, such as the right to due process and the right to be heard, and it must apply them even to those people who, when they were in power, did not apply them themselves. A state based on the rule of law can also defend itself against a resurgence of the communist totalitarian threat, since it has ample means at its disposal which do not conflict with human rights and the rule of law, and are based upon the use of both criminal justice and administrative measures.

5. The Assembly recommends that member states dismantle the heritage of former communist totalitarian regimes by restructuring the old legal and institutional systems, a process which should be based on the principle(s) of:

5.1. demilitarisation, to ensure that the militarisation of essentially civilian institutions, such as the existence of military prison administration or troops of the Ministry of the Interior, which is typical of communist totalitarian systems, comes to an end;

5.2. decentralisation, especially at local and regional levels and within state institutions;

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1. Assembly debate on 27 June 1996 (22nd Sitting) (see Doc. 7568, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Severin). Text adopted by the Assembly on 27 June 1996 (23rd Sitting).

5.3. demonopolisation and privatisation, which are central to the construction of some kind of a market economy and of a pluralist society;

5.4. debureaucratisation, which should reduce communist totalitarian over-regulation and transfer the power from the bureaucrats back to the citizens.

6. This process must include a transformation of mentalities (a transformation of hearts and minds) whose main goal should be to eliminate the fear of responsibility, and to eliminate as well the disrespect for diversity, extreme nationalism, intolerance, racism and xenophobia, which are part of the heritage of the old regimes. All of these should be replaced by democratic values such as tolerance, respect for diversity, subsidiarity and accountability for one's actions.

7. .The Assembly also recommends that criminal acts committed by individuals during the communist totalitarian regime be prosecuted and punished under the standard criminal code. If the criminal code provides for a statute of limitations for some crimes, this can be extended, since it is only a procedural, not a substantive matter. Passing and applying retroactive criminal laws is, however, not permitted. On the other hand, the trial and punishment of any person for any act or omission which at the time when it was committed did not constitute a criminal offence according to national law, but which was considered criminal according to the general principles of law recognised by civilised nations, is permitted. Moreover, where a person clearly acted in violation of human rights, the claim of having acted under orders excludes neither illegality nor individual guilt.

8. The Assembly recommends that the prosecution of individual crimes go hand-in-hand with the rehabilitation of people convicted of "crimes" which in a civilised society do not constitute criminal acts, and of those who were unjustly sentenced. Material compensation should also be awarded to these victims of totalitarian justice, and should not be (much) lower than the compensation accorded to those unjustly sentenced for crimes under the standard penal code in force.

9. The Assembly welcomes the opening of secret service files for public examination in some former communist totalitarian countries. It advises all countries concerned to enable the persons affected to examine, upon their request, the files kept on them by the former secret services.

10. Furthermore, the Assembly advises that property, including that of the churches, which was illegally or unjustly seized by the state, nationalised, confiscated or otherwise expropriated during the reign of communist totalitarian systems in principle be restituted to its original owners in integrum, if this is possible without violating the rights of current owners who acquired the property in good faith or the rights of tenants who rented the property in good faith, and without harming the progress of democratic reforms. In cases where this is not possible, just material compensation should be awarded. Claims and conflicts relating to individual cases of property restitution should be decided by the courts.

11. Concerning the treatment of persons who did not commit any crimes that can be prosecuted in accordance with paragraph 7, but who nevertheless held high positions in the former totalitarian communist regimes and supported them, the Assembly notes that some states have found it necessary to introduce administrative measures, such as lustration or decommunisation laws. The aim of these measures is to exclude persons from exercising governmental power if they cannot be trusted to exercise it in compliance with democratic principles, as they have shown no commitment to or belief in them in the past and have no interest or motivation to make the transition to them now.

12. The Assembly stresses that, in general, these measures can be compatible with a democratic state under the rule of law if several criteria are met. Firstly, guilt, being individual, rather than collective, must be proven in each individual case - this emphasises the need for an individual, and not collective, application of lustration laws. Secondly, the right of defence, the presumption of innocence until proven guilty, and the right to appeal to a court of law must be guaranteed. Revenge may never be a goal of such measures, nor should political or social misuse of the resulting lustration process be allowed. The aim of lustration is not to punish people presumed guilty - this is the task of prosecutors using criminal law - but to protect the newly emerged democracy.

13. The Assembly thus suggests that it be ensured that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law, and focus on threats to fundamental human rights and the democratisation process. Please see the "Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law" as a reference text.[2]

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2. See Doc. 7568.

14. Furthermore, the Assembly recommends that employees discharged from their position on the basis of lustration laws should not in principle lose their previously accrued financial rights. In exceptional cases, where the ruling elite of the former regime awarded itself pension rights higher than those of the ordinary population, these should be reduced to the ordinary level.

15. The Assembly recommends that the authorities of the countries concerned verify that their laws, regulations and procedures comply with the principles contained in this resolution, and revise them, if necessary. This would help to avoid complaints on these procedures lodged with the control mechanisms of the Council of Europe under the European Convention on Human Rights, the Committee of Ministers' monitoring procedure, or the Assembly's monitoring procedure under Order No. 508 (1995) on the honouring of obligations and commitments by member states.

16. Finally, the best guarantee for the dismantlement of former communist totalitarian systems are the profound political, legal and economic reforms in the respective countries, leading to the formation of an authentic democratic mentality and political culture. The Assembly calls, therefore, on all consolidated democracies to step up their aid and assistance to emerging democracies in Europe, in particular as far as the support for the development of a civil society is concerned.