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CIVIL AND POLITICAL SANCTIONS AS AN ACCOUNTABILITY MECHANISM FOR MASSIVE VIOLATIONS OF HUMAN RIGHTS

VED P. NANDA*

I. INTRODUCTION

Civil and political sanctions applied on an individual basis and with due process for the defendant serve an important function as one of the accountability mechanisms available to redress massive violations of human rights. I start from the premise that, as a matter of policy, there must be accountability and no political tradeoffs which result in the sacrifice of justice at the altar of perceived but illusory peace, for the dichotomy is false, as justice is a prerequisite for obtaining a peace that is to endure.

The existing legal framework, notwithstanding several gaps and weaknesses, suffices to reach the *jus cogens* violations—war crimes, crimes against humanity, genocide and torture—and other egregious and heinous human rights violations as well.[2] However, both national and international implementation and enforcement mechanisms are inadequate and ineffective, and several recommendations have been offered to remedy the situation.[3]

Any discussion on the goals of the sanctioning process has to address the four pertinent perspectives—those of the victim, the defen-

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*Vice Provost, Evans University Professor, and Director, International Legal Studies Program, University of Denver. I wish to express my deep appreciation to Professor Cherif Bassiouni and the International Institute of Higher Studies in Criminal Sciences for hosting the important conference on "Reining In Impunity for International Crimes and Serious Violations of Fundamental Human Rights" in Siracusa in September 1997 and for bringing together such an illustrious group of scholars and activists committed in the cause of human rights.

2. The development of international human rights norms in the post-UN era, both conventional norms and customary international law norms, is indeed impressive. The major difficulty is with lack of effective implementation.

3. *See generally* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 203-205 (Naomi Roht-Arriaza ed., 1995) (hereinafter IMPUNITY AND HUMAN RIGHTS); *Accountability for International Crimes*, 59 L. & CONTEMP. PROBS. No. 4 (Autumn 1996) (a special symposium issue on the subject with several recommendations from several authors to remedy the situation).

dant, the society which has gone through the trauma in question, and the world order. Based upon several perspectives, including those of the New Haven School,[4] Professor Michael Reisman has recently synthesized the "fundamental sanctioning goals for the protection, restoration, and improvement of public order" into seven specific goal programs—1) prevention of public order violations, 2) suspension of the occurring public order violations, 3) deterrence of potential public order violations, 4) a restoration of public order, 5) correction of the behavior that generates public order violations, 6) rehabilitation of victims and 7) reconstruction to remove conditions likely to generate public order violations.[5]

The criminal sanctioning process, both national and international, the inquiry and truth commissions, and the mechanisms to provide compensation and reparation to the victims advance these goals of prevention, deterrence and restoration, among others, of public order. These processes also provide redress to victims and contribute toward their rehabilitation, healing and reconciliation, and the creation of a climate and culture which actively discourage such violations in the future.

II. HISTORICAL CONTEXT

It is worth noting that the role of civil and political sanctions, that is, non-criminal sanctions, is not a new one for addressing war crimes and other egregious violations of human rights. After World War II, several European countries extensively used civil and political sanctions, in addition to criminal sanctions, against those who had collaborated with the Nazis and the fascists. To illustrate, in France, more than 11,000 alleged collaborators with the Vichy regime received some form of sanction for their wartime activities and nearly 1,000 politicians, 6,000 teachers and 500 diplomats were removed from office.[6] Judges in the occupied territories who had executed the Nazi plans enthusiastically were also purged from their positions both in the public and private sectors.[7] All 569 members of the National Parliament who

4. I had the privilege to study and work with the founders of the New Haven School, Professors McDougal and Lasswell, at Yale Law School.

5. W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 L. & CONTEMP. PROBS., at 69, 69-70 (Autumn 1996).

6. *See* PETER NOVICK, THE RESISTANCE VERSUS VICHY: THE PURGE OF COLLABORATORS IN LIBERATED FRANCE 90 (1968); Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 L. & CONTEMP. PROBS., No. 4, at 122, 134 (Autumn 1996). Kritz writes that separate purge committees were established "for writers, composers, artists, the press and entertainers, among others." *Id. See also* HERBERT R. LOTTMAN, THE PURGE (1986).

7. *See* NOVICK, *supra* note 5, at 87.

had voted in favor of delegating constituent power to Marshal Petain on July 10, 1940, were purged from serving in any political office.[8]

Italian authorities similarly dismissed nearly 2,000 government employees for their wartime activities.[9] However, these were temporary dismissals:

> Judicial applications of the purge decrees and a final amnesty adopted in February 1948 resulted in the fact that most of the 1,879 civil servants who had been dismissed . . . and the 671 who had been compulsorily retired were reinstated. Similarly, the whole process of confiscating the illicit gains of fascist profiteers and of purging compromised business leaders came close to naught.[10]

In Holland, several Dutch who had joined German-sponsored military and police organizations were deprived of their Dutch citizenship.[11] In Denmark several alleged collaborators lost political and civil rights in a separate proceeding following criminal prosecution.[12] And in Belgium, all those who, without being guilty, cannot be called innocent, will, on a simple notification of the public prosecutor, lose their vote, their right to engage in certain professions, and so on. Those who feel they have been unjustly penalized can appeal to the tribunals unless their cases have already been examined by the commissions. Those who are thus penalized will be able to request their rehabilitation and the recovery of their rights in ten years' time.[13]

In Germany, attempts at denazification were made under Allied control by prosecution not only of leading war criminals but also of those who had enthusiastically supported the Nazi ideology. But these were only short-term purges and there was no long term ineligibility attached, as it has been observed that "most of the collaborationist elite, in administration, justice, education, the economy, remained in or reentered positions held under the Nazi regime."[14]

In Japan, the Allies attempted to purge those who had been "active exponents of militarism and militant nationalism."[15] However, soon af-

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8. *Id.*

9. Kritz, *supra* note 6.

10. G. DiPalma, *Italy: Is There a Legacy and Is It Fascist?*, *in* FROM DICTATORSHIP TO DEMOCRACY: COPING WITH THE LEGACIES OF AUTHORITARIANISM AND TOTALITARIANISM 122 (John Herz ed., 1982) (hereinafter LEGACIES OF AUTHORITARIANISM).

11. NOVICK, *supra* note 6, at 212.

12. *See* Mark Gibney, *Decommunization: Human Rights Lessons From the Past and Present, and Prospects for the Future*, 23 DENV. J. INT'L L. & POL'Y 87, 96 (1994).

13. Pierre Vermeylen, *The Punishment of Collaborators*, 247 ANNALS AM. ACAD. POL. & SOC. SCI. 73, 77 (Sept. 1946), *cited in* Gibney, *supra* note 11, at 97 n.44.

14. John Herz, *De-Nazification and Related Policies*, *in* LEGACIES OF AUTHORITARIANISM, *supra* note 9, at 26, 30.

15. Arthur Tiedmann, *Japan Sheds Dictatorship*, *in* LEGACIES OF

ter Japan regained its sovereignty, the Japanese government reversed the process with pardons and by 1952 only 8,710 out of the 202,000 originally purged or provisionally purged were still under that sanction.[16]

The final case briefly mentioned here is that of Greece after the seven-year rule by the military junta from 1967 to 1974. The civilian government under Constantin Karamanlis immediately dismissed all general secretaries of the ministries and all prefects who held positions of power under the junta.[17] Further action was taken to dismiss those who held power under the junta in all agencies, organizations, and corporations operating under public law.[18] Thus, in a few months 108,000 civil servants and other officials were dismissed, transferred, or disciplined.[19] Furthermore, Karamanlis' civilian government began selectively retiring and transferring senior military officials who had been part of the old regime.[20]

III. CURRENT DEVELOPMENTS

Current developments discussed here include those in El Salvador and those in the former Soviet bloc countries, and involve dismissals or exclusions from elected or appointed office.

A. *El Salvador*[21]

Under the peace accords two commissions were appointed, the Truth Commission and the Ad Hoc Commission. The Truth Commission was designed to investigate serious allegations of serious acts of violence and make any recommendations and take any measures necessary to prevent their repetition, while the Ad Hoc Commission was aimed at cleansing the military. The three members of the Truth Commission, appointed by the U.N. Secretary General, were all non-Salvadorans. In contrast, the three members of the Ad Hoc Commission, also appointed by the Secretary General, were all Salvadorans.

AUTHORITARIANISM, *supra* note 10, at 199.

16. *Id.* at 202.

17. Harry Psomiades, *Greece: From the Colonels' Rule to Democracy*, *in* LEGACIES OF AUTHORITARIANISM, *supra* note 9, at 251, 255.

18. *Id.*

19. *Id.*

20. *Id.*

21. *See generally* IMPUNITY AND HUMAN RIGHTS, *supra* note 2; AMERICAS WATCH, EL SALVADOR: ACCOUNTABILITY AND HUMAN RIGHTS (1993); LAWYERS COMMITTEE FOR HUMAN RIGHTS, EL SALVADOR'S NEGOTIATED REVOLUTION: PROSPECTS FOR LEGAL REFORM (1993).

The Ad Hoc Commission was to hear the parties concerned and its recommendations were confined to the transfer or discharge of military officers. The Commission was able to "avail itself of information from any source which it consider[ed] reliable."[22] It recommended the transfer or discharge of 102 active-duty officers. After initial resistance by El Salvador's President Alfredo Christiani to carrying out the Commission's recommendations, eventually the government implemented them, including the removal of the defense minister, General René Emilio Ponce. Thus, the Commission was able to cleanse the army, reaching the highest level of command.

B. The Former Soviet Bloc Countries

In many countries under the former Soviet Bloc, lustration,[23] or disqualification of those formerly in power, of the agents of the secret police and their informers, and civil servants, has been the common form of mechanism of accountability and acknowledgment, which may include the loss of civil and political rights. Although, in general, this form of sanctions may accompany a criminal conviction, in most Eastern and Central European countries lustration is in lieu of criminal prosecution.

1. Czechoslovakia (the Czech and Slovak Federal Republics)[24]

Czechoslovakia adopted a stringent lustration code after the Parliament appointed a Commission of 20 of its members to investigate the November 17, 1989, incident in which many Czech students were injured and beaten under the old regime. This was the incident, in fact, that sparked Czechoslovakia's revolution. It was found, after the Commission had been in existence for a few months, that half of its members had previously collaborated with the Czech secret service.[25]

Under the Czech lustration law, former Communist officials and collaborators with the secret police were banned from:

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22. AMERICAS WATCH, *supra* note 21, at 8.

23. The word "lustration" is derived from the Latin *lustrara*, meaning "to put light on" or illuminate. It also is said to be derived from *lustrum*, described as a purifying sacrifice carried on every five years in Imperial Rome, or the Latin *lustratio*, which means purification by sacrifice or purging. *See Accountability for State-Sponsored Human Rights Abuses in Eastern Europe ad the Soviet Union*, 12 B.C. THIRD WORLD L.J. 241, 244 n.12 (1992) (remarks of Vojtech Cepl, Vice Dean and Professor of Law at Charles University, Prague).

24. *See generally* Mark Ellis, *Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc*, 59 L. & CONTEMP. PROBS., No. 4, at 176 (Autumn 1996); Cepl, *supra* note 22, at 243-246.

25. *See id.* at 244.

> holding positions in the state administration at both the federal and the republican levels; the Czechoslovak Army (the rank of colonel and higher); the federal Security and Information Service; the federal intelligence agency; the federal Police; the Office of the President; the Office of the Federal Assembly; the Office of the Czech National Council; the Office of the Slovak National Council; the offices of the federal, Czech and Slovak governments; the offices of the federal and republican Constitutional Courts; the offices of the federal republican Supreme Courts; and the Presidium of the Czechoslovak Academy of Sciences; . . . top positions in Czechoslovak, Czech and Slovak radio and television; . . . the Czechoslovak Press Agency; . . . top management positions in enterprises and banks owned by the state; . . . to top academic positions at colleges and universities; . . . and to judges and prosecutors.[26]

Professor Cepl includes among the features of the lustration act passed by the then Czech and Slovak National Assembly on October 4, 1991,[27] that every citizen may apply to a special office for the results of his/her lustration and receive a paper stating whether he or she was registered as a collaborator. This paper is a requisite for applying for employment in positions such as those listed above. Those who do not agree with the results of their lustration can seek a court review of the findings. Those who hold any position for which lustration is required must provide a copy of the paper detailing the results of their lustration or must otherwise relinquish their jobs.[28] The bar on holding a range of positions remains in effect up to the year 2000.

In November 1992, the Constitutional Court upheld the constitutionality of the law, although it struck down a "potential candidates for collaboration" category contained in the law.[29] The law has been criticized on the ground that:

> [I]t is partially based on a presumption of guilt rather than of innocence; that is, the burden is on people in certain government positions to prove they did not work for the secret police or were not Communist officials. Moreover, by barring entire categories of people, such as former Communist officials, from holding certain positions, the law espouses the principle of collective guilt. . . . Finally, the law does not distinguish between various degrees of guilt. Former secret police officials will be treated no more severely than people who were coerced into

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26. Jiri Pehe, *Parliament Passes Controversial Law on Vetting Officials*, *in* 2 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, COUNTRY STUDIES 550-51 (Neil Kritz ed., 1995), *cited in* Mark Ellis, *supra* note 23, at 177 n.5.

27. Jiri Pehe, *Parliament Passes Controversial Law on Vetting Officials*, 2 REP. E. EUR. (43), Oct. 25, 1991, at 4, *cited in* Gibney, *supra* note 11 at n.200.

28. Cepl, *supra* note 23, at 245.

29. *See* Gibney, *supra* note 12, at 124.

collaborating with or informing for the secret police.[30]

In July 1993, the Czech Parliament passed the "Law on the Illegitimacy of and Resistance to the Communist Regime." The law declared the former Communist Party "illegitimate" and "criminal," and abolished the statute of limitations for ideologically motivated crimes committed between February 1948 and December 1989. In December 1993, the Czech Constitutional Court upheld the law.[31]

2. Other Eastern and Central European Countries

Hungary adopted a lustration law in March 1994,[32] under which nearly 12,000 high-ranking officials, including members of Parliament, ambassadors, army commanders, chiefs of police, managers of state-owned banks, judges, and deans, were subject to a screening process. The purpose was to determine whether they had collaborated with the former Secret Police.

After the Constitutional Court struck down several provisions on the ground that they were vague and arbitrary, Parliament enacted a new law in July 1996, under which all persons born before February 14, 1972, must be screened before taking an oath before Parliament or the President. The purpose is to determine whether the official worked for the internal state security service. If so, the person will be asked to resign within 30 days. In 1997, several deputies were investigated under the law to determine whether they had collaborated with the former secret police.

In Poland, amendments to the law on lustration entered into force on August 3, 1997.[33] Under the law a Lustration Court was established to examine those who collaborated with the secret police. The law provides for the screening and vetting of people who seek public office to ensure that they had not collaborated with the former secret services. Those affected include candidates for office and top officials.

The Lustration Court's task is to verify the high officials' declarations regarding their collaboration or lack thereof with the former secret police. Those screened have the right to counsel and to appeal the Court's decision. A person giving false statements is to be banned from public office for 10 years.[34]

In Bulgaria, attempts to pass lustration laws began in 1992 and the Constitutional Court upheld the Law on the Temporary Introduction of

30. Pehe, *supra* note 27, at 8, *cited in* Gibney, *supra* note 11, at 124 n. 204.
31. *See* Ellis, *supra* note 24, at 178.
32. *See generally id.*, at 178-79.
33. *See id.* at 186-87.
34. *Constitution Watch*, 6 E. EURO. CONST. REV. 22 (1997), *cited in id.* at 187.

Additional Requirements for Members of the Executive Bodies of the Scientific Organizations and the Higher Certifying Commission, under which screening of all persons seeking positions in the executive bodies of scientific organizations is required. The burden of proof is on the candidate to show that s/he was not ranking members of the Communist Party.[35]

Similarly, in Albania the lustration law, the Law on the Verification of the Moral Character of Officials and Other Persons Connected with the Defense of the Democratic State,[36] was adopted by Parliament in 1995. Under the law, the government is authorized to examine former secret police files, and a candidate cannot run for office without clearance of the newly created Special Verification Commission. The administrative procedure for clearance is seen as long and cumbersome,[37] and lacking in adequate due process for prospective candidates.[38]

The Baltics,[39] Romania,[40] Russia,[41] Ukraine,[42] Belarus,[43] and Central Asian Republics[44] have also attempted to address the excesses of the Communist era by legislative measures, including attempts at civil and political sanctions.

IV. CONCLUSION

The role of civil and political sanctions is to ensure accountability and to exclude from public office and positions of influence those who are found to have committed egregious violations and abuses and also to prevent them from holding positions of influence even in the private sector, such as banking executives and school teachers. Democratic societies must have a right and the means to rid from positions of responsibility, power or influence those who have committed abuses and serious violations, as high military officials and law enforcement officers.

This is a sound accountability mechanism, for it sends a salutary signal to victims in particular and society in general that those responsible for excesses, egregious violations and abuses will not stay in office. It helps the healing process. If a prosecutor, for example, who abused

35. *See generally id.* at 182-83.
36. No. 8043, Nov. 30, 1995, *cited in id.* at 180, n.26. *See generally id.* at 180-82.
37. Constitution Watch, 5 E. EURO. CONST. REV. 2,3 (Winter 1996), *cited in id.* at 181 n.33.
38. *See id.* at 181, n.36.
39. *See generally id.* at 184-86.
40. *See generally id.* at 187-88.
41. *See generally id.* at 188-89.
42. *See generally id.* at 188-89.
43. *See generally id.* at 189-90.
44. *See generally id.* at 190.

the process, is not allowed to stay in office, this lends credibility to the new government's voice.

This process, however, has to be undertaken on an individual basis. A blanket exclusion of all who belonged to a party or of those whose names are found on some files seen by those now in power smacks of imposing collective guilt. If this results in administrative purges the executive in power could be simply indulging in a new abuse and an effort by those in power to consolidate it. Due process protections must be ensured. There must be a right to appeal, and there must be transparency. The process must be formal and proceedings open.

A critical appraisal of the Lustration Law of Czechoslovakia, the first such experiment in recent years, aptly illustrates the flaws:

> Despite the initial high hopes, Lustration does not seem to have fulfilled all of its stated aims. On the one hand, it has prevented some former communist officials and State collaborators from acquiring positions of current political and economic influence. On the other hand, it has also fostered an atmosphere of political instability in which scandals often took precedence over more important legislation. Nor, it seems, has lustration necessarily allayed the public's suspicions that former communist officials and State collaborators continue to exert political and economic influence and to reap the same benefits as were afforded the communist regime.[45]

The role of the International Criminal Court, once it is established, pertaining to civil and political sanctions by member states presents a difficult issue. Is there room, for example, for the ICC to prosecute those cases where there are also administrative civil sanctions, for these do not amount to impunity?

We must ensure that administrative vetting, civil and political sanctions are not arbitrary, nor politically motivated, but are applied fairly and serve the public order goals that I discussed at the outset.

International lawyers have not paid adequate attention to the subject of civil and political sanctions, unlike that of criminal sanctions, to address massive human rights abuses. Thus, the forthcoming initiative of the U.S. Institute of Peace to conduct in-depth research in this area is most welcome.

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45. Paulina Bren, *Lustration in the Czech and Slovak Republics*, RFE/RL/RES.REP. July 16, 1993, at 16, *cited in* Gibney, *supra* note 12, at 125, n.206.