

**\*not submitted for publication\***

**Additional material posted on author's website**

## **Incomplete and False Evidence**

The two critiques of institutions employed in new democracies in order to uncover the truth and sanction former violators of human rights are:

1. That documentation of abuses committed in the past at the disposal of lustration agencies and truth commissions was *destroyed*
2. That some of it was *fabricated*.

Prosecuting perpetrators with incomplete evidence is unfair because it reaches only those whose collaboration is documented, leaving remaining collaborators intact. This error - *false acquittal* - can be associated with *type II errors* in statistics: the failure to accept a true alternative hypothesis. On the other hand, when falsified evidence is used, innocents may be accused. This kind of injustice - failure to protect the innocent or *false conviction* - corresponds to *type I errors* - accepting a false alternative hypothesis.

## **False Acquittal in Lustration and Truth Commissions**

In a survey conducted among representatives of archivist services from former authoritarian countries by UNESCO in Paris, 1994 several representatives reported the files to be incomplete because the same agency that produced the documents was up to the transition still responsible for their maintenance (Instytut Pamięci Narodowej 1995). The same holds true for any outgoing regime that has committed human rights violations. Jon Elster (2004) writes of the several cases following World War II. In France, the Drancy records of confiscated Jewish property were destroyed by fleeing SS officers in August 1944. According to Baruch (1997) The Vichy had also managed to selectively destroy evidence implicating them. The most dramatic cases were, where victims bodies constituted evidence: in SS extermination camps, bodies of inmates who had died by hanging or beating were cremated. This section contains evidence from Eastern Europe, Argentina and South Africa about document destruction. A Hungarian reporter described dealing with the evidence of communist secret police activity in a way that is representative of most of the post-communist region:

In 1990, when the single-party system was in its last throes before the country's first democratic elections in 40 years, state employees received whispered calls from friendly bosses to rewrite their curriculum vitae and omit the fact that they had been members of the state party. At the same time, a vast part of the secret service files mysteriously disappeared, with state party officials saying the files

had been destroyed. But people who knew they were watched and followed by the communist secret police claimed that so much material could not have been burnt. Some went so far as to go to paper mills to try to trace the fate of the documents from the amount of recycled trash paper (Szamado 1997).

Polish Communists began destroying their plans for implementing Martial Law as early as early as 1982, while they were still in power. The somewhat chaotic destruction continued into 1989 (Rzeczpospolita [Warsaw], 11 January 2001, A8). Historians have established that 297 transcripts from the meetings of the Political Bureau were created between 1982 and 1989. However only six of them survived -two from 1982 and four from 1984 (Perzkowski 1994) - after General Jaruzelski ordered their destruction upon becoming the first President in non-communist Poland, an arrangement that was part of the roundtable deal. According to the prosecutor from the Krakow branch of the Institute for National Remembrance (IPN), the agency responsible for maintaining the archives of the former secret police in Poland, the key to the files' destruction process were tape recordings from a teleconference of heads of regional police forces. The recordings indicate that Henryk Dankowski, Krzysztof Majchrowski, and Tadeusz Szczygiel ordered files of the secret political police to be destroyed with priority given to files on infiltrating the Catholic Church followed by those on infiltrating Solidarity (interview: Urbaniak).<sup>1</sup> It is not clear to what extent these orders were carried out, because considerable evidence of infiltrating both the Catholic community and Solidarity survived.<sup>2</sup> Jerzy Dziewulski, an MP reporting on the work of a special parliamentary commission drafting legislation for dealing with the secret police files, estimated in 1998 the total length of shelves with files stood upright at 12 kilometers or seven and a half miles (1998). The estimates of archivists from the IPN in 2004 were 95 kilometers or nearly 60 miles.<sup>3</sup>

John O. Koehler writes about the sacks of shredded East German documents that were discovered after the siege on the Ministry of State Security (Stasi) headquarters in Leipzig, but estimates the number of Stasi files that survived at "75 kilometers, when stood upright in a row" (Koehler 1999, 20-21). Also,

---

<sup>1</sup>All interviews were carried out by the author in the Spring and Summer of 2004 and are cited throughout the article in the form (interview: *last name*)

<sup>2</sup>According to Zbigniew Nowek, chief of one of the branches of the post-transition secret service (Urząd Ochrony Państwa, UOP), destroying the most recent files was as easy as "turning around to open a cabinet behind a secret police officer's back." However, he admits, that destroying older files was more difficult (Rzeczpospolita [Warsaw], 6-7 July 2002, A8). The case of Czechoslovakia is very similar. 65% of the elites interviewed by the author maintained that the easiest files to destroy were the, so called "active files," that is, files with which the StB officers were working up to the very beginning or even well into the transition. Files that had made their way to the archives were more difficult to reach.

<sup>3</sup>The director of the Krakow IPN branch, Ryszard Terlecki, believes that the survival of files is not a necessary condition for carrying out truth revelation procedures and claims that easily accessible payroll accounts of the Secret Police provide a sufficiently reliable register of collaborators (Rzeczpospolita [Warsaw], 6-7 July 2002, A9). However, archivists interviewed in the Czech Republic who worked on reconstructing the files from such documentation complain that it is cumbersome and expensive (interview: Gruntorad).

the Stasi used to keep duplicates of its documentation in various branches all over East Germany, so that even if a file was destroyed in Leipzig, another one may have survived in Berlin or Hamburg.<sup>4</sup> Vladimir Hysi and Gramoz Ruci, Albania's interior ministers stood trial in March 1996 along with Irakli Kocollari, head of the National Information Service for burning thousands of files testifying to the crimes of the former communist regime. Albanian Press reports have put the number of destroyed files between 27,000 and 60,000" (Deutsche Presse-Agentur, 6 March 1996). In 2001, Atanas Semerjyev and Nanka Serkejyeva, top officials from the communist Bulgarian communist Ministry of Interior were charged with destroying up to 58 percent of files from the secret police archives after communist dictator, Todor Zhivkov, was ousted in November 1989. If convicted, they faced the possibility of serving an eight-year prison sentence (Agence France Presse, 17 December 2001).

Truth commissions are also susceptible to the errors of false acquittal. The names of commissions set up in Latin America and their reports often made references to the "disappeared," indicating that very little trace of victims' whereabouts survived the authoritarian regime.<sup>5</sup> According to the finding of the Argentine Commission on the Disappeared (CONADEP), the military executive had ordered to systematically destroy plans of the, military repression.<sup>6</sup> Hayner writes that before surrendering power, the Argentinian junta issued a decree ordering the "destruction of all documents relating to military repression" (2001, 33). In addition, throughout the military authoritarianism the arrest, torture and systematic murder of political prisoners was systematically denied. A member of the security apparatus, Roberto Viola claimed in September 1978 that:

There are no political prisoners in Argentina, except for a few persons who may have been detained under government emergency legislation and who are really being detained because of their political activity. There are no prisoners being held merely for being political, or because they do not share the ideas held by government.

Six years later, CONADEP announced that there had been 8960 abducted and detained persons kept in 340 secret detention centers (Kritz 1995 vol. 3). In South Africa, the same agency that produced the secret files was responsible for their maintenance right up to the first democratic elections and even

---

<sup>4</sup>I am indebted to Christiane Wilke for pointing out this fact to me. Recently the BStU (Federal Authority for Records of the State Security Service of the Former GDR) received copies of files that had been preserved on microfiche. This has allowed it to begin processing what they have called "Lustration II" (interview: Matkowska).

<sup>5</sup>For instance: Bolivia's "National Commission of Inquiry into Disappearances," Argentina's "National Commission on the Disappeared (CONADEP)," Sri Lanka's "Commission of Inquiry into the Involuntary Removal or Disappearance of Persons," or "The Facts Speak for Themselves: Preliminary Report on the Disappeared in Honduras" (Kritz 1995).

<sup>6</sup>"Seized by force against their will, the victims no longer existed as citizens. Who exactly was responsible for their abduction? Why had they been abducted? Where were they? There were no precise answers to these questions: the authorities had no record of them; they were not held in jail; justice was unaware of their existence ... No detention center was ever located, no kidnaper ever arrested" (CONADEP 1995, 5).

later. According to Alex Boraine (2000), the creators of the TRC knew that “long before the 1994 election, instructions had been given for the destruction of documents.” Thus, the possibility of not reaching all perpetrators is considerable. Lacking documentation, commissioners’ primary source of information were public hearings of victims. However, only victims who survived could contribute to naming perpetrators.<sup>7</sup> Crimes of murder, especially when traces of the killings have been wiped out, were left unaccounted for. An additional concern is that commissions in their work have to rely on victims’ willingness to testify. Some victims look forward to the ‘cathartic’ experience of telling their story, while others find it too painful, if not intimidating. This effect is especially significant in the case of commissions which held public hearings, or as in the case of the South African commission, even allowed for the presence of television cameras. Psychological characteristics of victims may decide which perpetrators are reached.

## False Conviction in Lustration and Truth Commissions

Consider now the problem of false conviction. Relying on files produced by an ex-authoritarian regime’s secret police may lead to false accusations because of the incentives of police officers for fabricating false evidence. Officers were typically rewarded in proportion to the number of recruited informers. Members of the Polish secret police (*Stuzba Bezpieczeństwa, SB*) after failing to recruit an informer had to submit a report “analyzing the causes of a candidate’s refusal.” This was a cumbersome workload and could upset an officer’s promotion. It is not surprising that prior to performance audits, the number of persons registered as new collaborators would increase (interview: Dziejowski). Tricking dissidents into signing a document of consent to collaboration had excellent blackmail potential, as later, secret police officers would threaten the dissident with releasing the evidence of collaboration to key people in the opposition movement. This is how the officers would exert pressure on the tricked dissident to become an informant. Some of the communist political police units even maintained a special department called the “Department of Misinformation” whose task was to fabricate evidence of collaboration for popular members of the opposition. This evidence would be delivered to other opposition activists in order to disintegrate the trust-based social network of the underground opposition. The presence of this fabricated evidence may result in accusing an innocent person.<sup>8</sup>

---

<sup>7</sup> “We had to piece together a shadowy jigsaw, years after the events had taken place, when all the clues had been deliberately destroyed, all documentary evidence burned, and buildings demolished. The basis of our work has therefore been the statements made by the relatives or by those who managed to escape from this hell, or even testimonies of people who were involved in the repression.” (CONADEP 1995, 6)

<sup>8</sup> Vaclav Havel describes the ironic revenge of a dismantled police apparatus upon a former revolutionary:

“Just imagine someone who was importuned all his life by the secret police, and has learned how to take evasive action, to prevaricate and equivocate. At last, he thinks he has just about escaped their clutches, that he has successfully deceived them. After the revolution, this person feels an enormous sense of relief; now he can breathe easily because they, the secret

Truth commissions are also susceptible to false conviction errors. When authoritarian regimes control all written documentation of its abuses throughout the negotiations, forging evidence compromising members of the opposition is at least possible. Members of the Apartheid secret service testified in their amnesty applications that evidence had been “fabricated to justify cross-border raids ” and other illegal activities.<sup>9</sup> Arguably, sheer reliance on victims’ testimonies, when the lapse of time blurs memory, may lead to accusing the wrong people.

---

police, can no longer bother him ...And now suddenly there is a new fear: he hears how, one after another people who were marked as secret collaborators swore that they had never been collaborators, that someone had put them on a list without their knowledge, that on the basis of a single meeting in a cafe they were entered on a list of “candidates” for secret police collaboration or something worse, just so some cop would get to chalk up the credit.” (interview for New York Review of Books).

<sup>9</sup>See Boraine (2000,123-31) for testimonies of Nofemela, de Kock, Cronje, Venter, Mentz, Hechter and Vuuren.

## References:

- Baruch, Marc Olivier. 1997. *Servir l'Etat franais : l'administration en France de 1940 a 1944, Pour une histoire du XXe sicle*. Paris: Fayard.
- Boraine, Alex. 2000. *A Country Unmasked*: Oxford University Press.
- Bozoki, Andras. 2002. *The Roundtable Talks of 1989. The Genesis of Hungarian Democracy. Analysis and Documents*. Budapest: CEU Press.
- CONADEP, (Argentinian Commission on the Disappeared). 1995. Nunca Mas. In *Transitional Justice. How Emerging Democracies Reckon with Former Regimes. General Considerations.*, edited by N. J. Kritz. Washington, D.C.: United States Institute of Peace Press.
- Darton, Robert. 1990. Stasi Besieged. *The New Republic* 202 (7):15.
- David, Roman. 2003. Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland (1989-2001)." *Law and Social Inquiry* 28 (Spring 2003).
- Dziewulski, Jerzy. 1998. *Pierwsze czytanie (druk nr 29)*: www.sejm.gov.pl. Parliamentary speech.
- Emingerova, Dana. 1991. Uncertain Strength - interview with Vaclav Havel. *New York Review oof Books*, 15 August, 1991, 6-8.
- Frei, N. . 2002. *Adenauer's Germany and the Nazi Past*. New York: Columbia University Press.
- Gibson, James L., and Amanda Gouws. 1999. Truth and reconciliation in South Africa: Attributions of blame and the struggle over apartheid. *American Political Science Review* 93:501-517.
- Gibson, James. 2004 b. The Contribution of Truth to Reconciliation. Lessons from South Africa. In *Judging Transitional Justice: a workshop on Transitional Justice at the Center for the Study of Democracy at University of California in Irvine*. Laguna Beach.
- Grossman, Peter Z. 1994. The Dilemma of Prisoners: Choice during Stalin's Great Terror, 1936-38. *Journal of Latin American Studies* Vol. 38 (1):43-55.
- Interviews. 2004. Conducted by M. Nalepa in Hungary Poland and the Czech Republic with the following politicians: Sandor Bandi (B), Milos Calda (C), Vojtech Cepl (VC), Jerzy Dziewulski (D), Jiri Gruntorad (G), Bernadetta Gronek (BG), Jan Kavan (JK), Janos Kenedi (JaK), Katalin Kutrucz (K), Ewa Matkowski (EM), Tomek Prokop (P), Jerzy Przystawa (JP), Laszlo Solyom (LS), Urbaniak (MU), Jaroslav Weis (JW), Vaclav Zak (VZ).
- Instytut Pamieci Narodowej. 1995. *Archiwa Sluzb Bezpieczenstwa Bylych Rezimow Represji (Archives of Secret Services of Former Repressive Regimes)* Manuscript. Warsaw, Poland
- Kaminski, Marek M. 2001. Coalitional Stability in Multi-Party Systems: Evidence from Poland. *American Journal of Political Science* 45 (2):294-312.
- Kavan, Jan. 2002. McCarthyism Has a New Name- Lustration. In *Transition to Democracy in Eastern Europe and Russia*: Greenwood Publishing Group.
- Koehler, John O. 1999. *Stasi. The Untold Story of the East German Secret Police*: Westview Press.
- Lawson, Maggie Ledford. January 24, 1996. A Parliamentary Pariah is Finally Allowed to Come in From the Cold. *The Prague Post*, January 24, 1996.

- McAdams, A. James, ed. 1997. *Transitional Justice and the Rule of Law in New Democracies*. Notre Dame: University of Notre Dame Press.
- Perzkowski, Stanislaw. 1994. *Tajne Dokumenty Biura Politycznego i Sekretariatu KC: Ostatni Rok Wladzy 1988-1989 (Secret documents of the Politbureau of the Polish Communist Party (PUWP): The Last Year in Power, 1988-1989)*. London: "Aneks".
- Rosenberg, Tina. 1995. *The Haunted Land. Europes Ghosts After Communism*. New York: Random House.
- Rotberg, Robert, and Dennis Thompson, eds. 2002. *Truth v. Justice. The Morality of Truth Commissions*. Princeton: Princeton University Press.
- Rzeczpospolita. 11 January 2001. Rozkaz: Zniszczyc Protokoly (Order: Destroy transcripts). *Rzeczpospolita*.
- Schwartz, Herman. 1995. Lustration in Eastern Europe. In *Transitional Justice. How Emerging Democracies Reckon with Former Regimes. General Considerations.*, edited by N. J. Kritz. Washington, D.C.: United States Institute of Peace Press.
- Szamado, Eszter. 1997. Victims of communist secret police disappointed about slim files. *Agence France Presse*, October 16, 1997.
- Szamado, Eszter. November 17, 1991. *Emotions running high over plans to punish ex-communists*: Agence France Press. Lexis Nexis Academic Universe News Service.
- Tucker, Aviezer. 2000. *The Philosophy and Czech Dissidence: from Patocka to Havel*. Pittsburgh, PA: University of Pittsburgh Press.
- Walicki, Andrzej. 1997. Justice and the Political Struggles of Post-Communist Poland. In *Transitional Justice and the Rule of Law in New Democracies*, edited by A. J. McAdams. Notre Dame: University of Notre Dame Press.