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Illustration of a Memory: Lustration and Memorialization

as Joint Mechanisms for Transitional Justice in Estonia

"Hunt hunti ei murra."

Introduction

Mechanisms for reparations are often of a legal and exigent nature that requires assistance from external actors such as states, international courts and international organizations. To be sure, such noble interference can be welcome and achieve democratic results. However, in the case of Estonia, I would like to consider the existence of a harmonization between legal and extra legal mechanisms over a longer time frame, and how this may be instrumental in fostering healing, steered and owned by the nation itself. The purpose of this paper is to evince the juxtaposition of memorialization and lustration; I also question if this was effective in offering redress to a nation in transition. After offering some disadvantages and advantages of these two mechanisms, I aim to defend them and show how they can be instrumental in redressing past wrongs by legitimizing a collective narrative. By memorialization, I mean the public rectification of a wide spectrum of memorials, but more specifically the museums erected to archive and research information during occupations in acknowledgment of the social need for justice that overlaps memory and regional identity. By lustration, I mean the sequential adoption of legislature that seeks to develop a nascent political culture, while addressing local concerns and political anxieties of historical repetition. The development of legislation alongside memorialization can be seen as a way to legitimize the memorialization process. The inclusion of memorialization in transitional justice movements has become increasingly popular although not a new mechanism by any means; it goes beyond physical memorials and should be employed sincerely with the involvement of the public. When employed in this way, such mechanisms can be seen as preventative as it attempts to foster awareness through collective memory that precludes future mass human rights violations with the rule of law.

Background: *What does it mean to be Estonian?*

As Estonia remained under the control of the Soviet regime until 1991, the concept or actualization of transitional justice was impossible until that point. Upon gaining its independence, the people initiated what would be a long process of understanding through research and dialogue through memorialization alongside the political restructuring through legislation, since they had no existing, autonomous structure. In absence of such a pre-existing structure, Estonians – once unoccupied, were faced with a blank canvas and a philosophical dilemna: *quid custodiet ipsos custodies*. The response of the nation has been exemplary in its neutrality, inclusion, motivation and response to mass human rights violations.

Ever since, Estonia has defined itself as many things – Nordic, European, Eastern European, Baltic, etc. but if one were to reduce this nation into a wider category, that category would be indigenous. And that is exactly the term that President Toomas Ilves used in a speech addressed to the Human Rights Conference in Tallinn two years ago. Ultimately, Estonians are an indigenous group that has lost and regained itself many times in the course of its history. Meike Wulf insightfully points out that this has had a profound impact on the collective perspective of their myth and identity as a nation, manifesting in the concept of "the other." It relates to the greater understanding of new EU member states in their integration: that they are *the other*, or at least new Europe, that they must conform in preparation to pledge allegiance and assume the overall history and legal system of a country that is not their own – the original Europe. But Estonia is not new, it has its own history and this should be celebrated rather than drafted or re-invented, it could be concentrating on regional collaboration in its desire for strength, security and identity.

Lustration

The initiation of lustration is not unique to Estonia; it was a common tool for post Communist territories in their path to self-determination and transition from authoritarian regimes. What is unique about it is its gradual implementation and empowering effect of deciding and protecting the nascent domestic legal system. The designation of reparation through the legislation process took place in Estonia from 1990 to 2008. This graduation of law was first invoked by the *Decree to rehabilitate all individuals convicted for political crimes in the Soviet Russian criminal code*[1]. This decree along with subsequent acts and laws from 1991-1994 were focused on rehabilitation and compensation while effectively building a legal foundation to prevent future repression and human rights violations. The language used in this legislation was specific and intentionally neutral as it defined citizenship, violations, subjects of violations and grounds for political exclusion, *inter alia*. The *Law on Citizenship*[2] offers certain requirements that are nearly identical with the requirements for United States citizenship, such as citizenship by birth, naturalization, permanent residence, lawful income, etc. And it was not until 1995 that an officially titled "*Lustration Law*"[3] was passed with an explanatory subtitle as: "*Law on Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Intelligence or Counter-intelligence Organisations of Security Organisations or Military Forces of States which Have Occupied Estonia*."[4] This stipulates that any one subject who worked in a high level of political office or military intelligence for *any* previously occupying State, be made known publically before they re assume a high level of office in the current Republic. This law also encouraged the subject to confess their previous status or loyalty, which may preclude

[1] "Transitional Justice and Memory in the EU." *Estonia: Transitional Justice and Memory in the EU*. Legislation. Web. 1 Dec. 2015.
[2] Ibid.
[3] Ibid.
[4] Ibid.

publication of previous office. This in and of itself is a powerful legal instrument for catharsis both psychologically and legally.

The Great Race: *Politics of Identity*

There is significant scholarship that is ambitious in explaining the role lustration has played in the race to democracy among formerly totalitarian regimes. I don't wish to add to this catalogue – I simply want to expose the more salient disadvantages or critiques in order to build a comprehensive view on the effects of lustration. First, there is the critique of lustration as "democracy as a civilization beauty contest."[5] Cynthia Horne provides sufficient evidence to support the claim that democracy and lustration are positively correlated, but the critique of shallow motivation is still ignored. It is a critical point to question if this is a genuine transition or just a way to westernize and garner affections from major powers. Certainly Estonia has taken the steps necessary to adjust external perceptions by declaring both European and Nordic heritage; and in their memberships to Western supranational organizations, such as NATO and the EU. Even as I intend to show that Estonia has been exemplary in its genuine and sustainable emergence from occupation; it is important to maintain skepticism on the political self-identification as Nordic and European, ultimately originating a new category of macro-regional and political identity: the Baltic.

The second critique suggests a more malevolent intention that concerned researchers at the time of its consideration in the 1990s: "…[that] lustration and legislation of transitional justice

[5] "Re-Inventing Eastern Europe (The Fifth Edition)." *Euroacademia*. Web. 10 Dec. 2015.

were replicating totalitarian methods."[6] Let us acknowledge the claim that lustration *can* be discriminatory and vengeful legislation. It would be difficult to deny either of these, but I will say that in considering them, one must do so against a backdrop of the individual state's temporal and political context – I will speak more to this later.

In contrast, the advantages of lustration that I will mention are two fold: first, they offer the opportunity for a nascent government without prior foundation to take ownership of political restructuring while institutionalizing non-reoccurrence for citizens. In the case of Estonia, this has built the legitimacy and transparency that is crucial to seed trust between domestic government and civilians that enables further transition. It did not build transparency and trust byway of discrimination or purging – as is often associated with lustration. Legislation was specific yet did not directly target any one State or political system. Moreover, it was careful not to create a divide between victims and perpetrators especially since there is a large Russian minority still present in Estonia today. In fact, the legal language is neutral and does not use the term *victim* or *perpetrator*, substituting these monochromatic roles with terms such as "unlawfully repressed persons"[7] and "persons having been in the service of or having collaborated with the security, intelligence or counterintelligence services of the countries which had occupied Estonia."[8] By the same token, an official public apology speech, regretfully held responsible both Soviets as well as Estonians in violating the human rights of Estonians during the Soviet occupation.

The temporal aspect of legislation is illustrated by the gradual implementation of 14 laws as a

[6] Zake, Ieva. "Memory and Pluralism in the Baltic States." *Politics vs. Intellectuals in the Lustration Debates in Latvia and Estonia*. Ed. Eva-Clarita Pettai. (London: Routledge, 2011) p.108.
[7] Persons Repressed by Occupying Powers Act, § 1-1.2 (2003).
[8] Soro v. Estonia, § 2.8 Council of Europe. European Court of Human Rights. 3 Sept. 2015.

process that stretched over 18 years, which speaks to the rational decision and maturation of certain laws and acts in order to support their political transition. And this piecemeal codification had no external assistance by States or international organizations that may have influenced the desire for democracy and expediency. This had a great effect on the perspective of the utility and objectivity of legislation, which was subsequently reexamined by the same researchers who assumed this process to be equally totalitarian.

Memorialization

The point of bringing memorialization into reasoning is its role as counterpart to hard law that offers civilians the ability to engage publicly in their expression and reconstruction of past wrongs during occupation that overlaps memory, identity and collective narrative. It is interesting to me as one who appreciates the importance of legal order, yet finds that the logic and semantics of law often falls short when dealing with the nuances of mass human rights violations on minority cultures and the youth of nations. This is so because logic supports law, which supports order, but we are finding that law need be more pragmatic and evolve as language does. Yet, while language evolves logic remains the same, and the laws we need today are not the laws we needed yesterday although we still employ logic to support emerging legal frameworks. Theoretically, law is not capable of creative interpretation, it is not allowed any sort of prejudice and that guarantees us equity but it also limits its purview in transitional justice and human rights cases. Instead of eradicating law or assuming it useless, it is advisable to use this tool in conjunction with another tool that is capable of including the highly variable, emotional and subtle nuances of humanity.

Again, there is significant scholarship exploring the role memorialization has played; I will briefly point to two main critiques. First, that memorialization is an optional, aesthetic add-on that uses "empty rhetoric"[9] as a transitional justice mechanism. Second, that it often creates a role division between *victims* and *perpetrators,* in turn fostering division and antagonism in socio-cultural interactions.

Memorialization may be widely considered as a soft approach within transitional justice that does little in offering redress to the extent that it is nearly optional, empty or a sort of aesthetic add-on. I do not believe this is an accurate understanding of memorialization since its strength lies with the fact that it *is* indeed a soft approach. The hardness of law, which only serves to define through legislation what is legally allowed, is limited by its own object and purpose. The counterpart to this is memorialization and how it can realize its object and purpose in a multiplicity of ways. Statues, films, plaques, museums, research centers and public spaces are examples of the gamut memorials can run. This is duly recognized by the Human Rights Council: "As they are able to recreate displays and exhibits from a collection of items that can be reinterpreted, museums of history/memory have greater flexibility for addressing the complexities of narratives and for integrating various perspectives."[10] The report goes further in support of memorialization by showing how it can be fecund rather than empty; and that it is becoming nearly an imperative policy instead of an aesthetic add-on.

Estonia has concentrated on museums and research centers to understand and prevent re-occurrence. In 2008, this was crystallized through the final law in the series, which addresses memorialization and commences this latter process with *the Estonian Institute of Historical*

[9] Shaheed, Fareeda. *Report of the Special Rapporteur in the Field of Cultural Rights and Memorialization Processes*. (Human Rights Council: United Nations General Assembly, 2014) p. 6

[10] Ibid., p.17

Memory: "The facts that will be identified by the institute shall have no legal consequences. Our mission is to understand."[11]

Conclusion: The Allegory

Overall, lustration and memorialization share the critique that they can be superficial, ineffective and lack pluralism. This can be also be antagonistic and suppressive as it creates monochromatic roles and places people into them involuntarily. The temptation to neaten up history by creating these definitive lines and develop a neo-myth for the nation is strong and malleable by great powers. However, with the internal action, gradual legislation with neutral language and chance of confession, potential for public engagement and objective research through memorialization – this flaw can be overcome and offer a way to suture the past and present socio-political wounds.

There has been a pattern of response to mass human rights violations that seem to be concerned with adjudication as a short-term goal by external and international actors. Peoples who have experienced crimes against humanity are penetrated by international criminal courts and ad hoc tribunals, which seek to collect evidence in order to punish perpetrators of these crimes. Yet it is not so simple as that and this legal mechanism is viewed with skepticism for their superficial, blanketed approach that upon departure may take the supra-imposed stability with it. The Western superhero approach is often not a good fit, especially on its own since it is by nature bureaucratic, expensive and top heavy. This is not a condemnation of the

[11] Ives, Toomas. *Estonian Institute of Historical Memory Will Continue to Investigate Human Rights Violations during the Soviet Period (accessed December 9, 2015); available from Https://www.president.ee/en/index.html*.

international legal system or defense of *jus cogens* – even those in support of the international legal system will acknowledge this as a valid critique. Still, codification of social norms is an important public stage for a nation in transition.

And if we consider memory as stored information with each individual offering a different perspective or angle of that memory, then we are left with not a monochromatic version of history or collective narrative, but a kaleidoscope. Memorialization can help to root and ground the mutability of such situations while offering a nation the chance to express itself in a larger context, in this instance a small state in the new E.U. The Estonian Institute of Historical Memory is paramount in its objective storage of information and suspension of the gamut of remembrance into a cohesive and inclusive narrative. The Institute uses the *Universal Declaration of Human Rights* and the *Rome Statute* as yardsticks to maintain an equitable viewpoint in its research objectives while also exploring new areas of human rights abuses that are not legally defined in these international instruments.

The aim of this paper is to elucidate the use of complimentary mechanisms for reparations in the case of Estonia to illustrate how they accomplished a custom fit through an internal legal approach coupled with the equally important, humanistic reparation of memorialization. I found that while the use of lustration and memorialization as joint mechanisms was effective in it's objective to offer redress to Estonians, it is an on ongoing process and this formula doesn't necessarily serve as standards to be adopted. It is the internal ownership, rehabilitation and neutral approach that are critical in developing trust, pluralism and a blank canvas from which to truly transition. The work does not stop here, while I feel I have shown that lustration can be non-discriminatory and trust building for an oppressed nation, the role of memory in moving a

nation forward begins where lustration ends.

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