



# Vetting Public Employees in Post-conflict Settings

## Operational Guidelines



United Nations Development Programme  
Bureau for Crisis Prevention and Recovery  
Justice and Security Sector Reform;  
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UNDP is the UN's global development network, advocating for change and connecting countries to knowledge, experience and resources to help people build a better life.

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**Vetting to ensure minimum standards of integrity** in public service is widely recognized as an important institutional reform measure in post-conflict settings. Little systematic attention, however, has been paid to the topic, and there exists a broad variety of views about, and approaches to, vetting. This dearth of analysis affects the practice of vetting as well, and many countries emerging from conflict handle such processes poorly, and often unfairly. These operational vetting guidelines build on systematic research that included country case studies, an assessment of related United Nations practice, and a review of relevant literature.

The operational guidelines are divided into six sections. The first defines the concept of vetting and situates it in the context of institutional reform and transitional justice. The second discusses conditions for a vetting process and risks of undesirable consequences. The third section describes different types of vetting processes. The fourth proposes a methodology to design a vetting process. The fifth section presents institutional reform measures that generally need to accompany a vetting process to safeguard its results and ensure the effectiveness and sustainability of the overall reform effort. The final section provides sources of additional information on vetting within the United Nations system. Further resources and tools on vetting are provided in the six annexes to these operational guidelines.

While institutional reform to prevent the recurrence of human rights abuse is an obligation under international law and vetting is a measure States are encouraged to undertake, there is significant flexibility regarding the form of vetting processes. Vetting strategies need to address the unique historical and political challenges of each society emerging from conflict. Different types of institutions also raise specific concerns, and vetting strategies need to respond to the particular requirements of the institution in question. The fundamental rights of the persons subject to vetting need, however, to be respected and the political misuse of vetting must be prevented (see section 4.E).







# 1

## Why VET Public Employees in Post-Conflict Settings?

Vetting ordinarily refers to a process of assessing integrity to determine suitability for public employment. Integrity refers to a person's adherence to relevant standards of human rights and professional conduct, including her or his financial propriety (see section 4.C). In post-conflict settings, vetting has the specific aim of transforming institutions involved in serious abuses during the conflict into public bodies that enjoy civic trust and protect human rights. The public, and particularly victims of abuses, are unlikely to rely on institutions that retain or hire individuals with serious integrity deficits. Vetting processes aim at excluding from public service persons with serious integrity deficits in order to reestablish civic trust and re-legitimize public institutions, and to disable structures within which individuals carried out serious abuses. Vetting public employees, in particular in the security and justice sectors, is now widely recognized as an important measure of governance reform in countries emerging from conflict.

But to maximize its impact and ensure its sustainability, vetting generally needs to be part of a much broader reform of the institution concerned. More often than not, integrity deficits of public employees are not the only shortcomings of public institutions in post-conflict settings, and the exclusion of persons who lack integrity may not bring about the changes necessary to build a fairly and efficiently functioning public institution. While a detailed discussion of comprehensive institutional reform goes beyond the scope of this document, the following guidelines situate vetting in the broader context of personnel reform and introduce other key institutional reform measures (see section 5).

Institutional reform is an integral component of a comprehensive transitional justice policy and an obligation under international law in response to serious abuses: reforming institutions is not only critical to prevent the recurrence of human rights abuse but it also enables institutions in the security and judicial sectors to provide criminal accountability for past abuses. Vetting and excluding abusers is an institutional reform measure States are encouraged to undertake under international law in post-conflict settings. Under circumstances of limited or delayed criminal prosecutions, vetting can also help to fill the "impunity gap" by ensuring that those responsible for past abuses at least do not continue to enjoy the rewards and privileges of public office. Vetting should, however, not be used as a pretext for not pursuing criminal prosecutions. But the scarcity of resources in a post-conflict context, as well as legal impediments and large numbers of crimes, often preclude the criminal prosecution of all abusers.





# 2

## What Factors Determine the Design of a Vetting Process?

Post-conflict circumstances represent extremely challenging settings, and often also provide unique historical opportunities, for institutional change. In these contexts, a number of critical factors should be considered during the design of a vetting process. On the one hand, several basic conditions should be met before a vetting process is set up (A). On the other hand, the design of a vetting process should seek to prevent certain undesirable consequences (B). A thorough analysis to determine the conditions for a vetting process and to assess the risks of undesirable consequences is recommended before designing a vetting process.

### A | Ensure Basic Conditions

#### 1. Political conditions: is there government authority and political will?

A vetting process requires a measure of stability, actual government authority and political will. Any particular transition has its own characteristics and context that might make it either more or less open to vetting. Vetting processes regulate access to positions of power and are highly political undertakings, in particular in post-conflict situations. Resistance to reform is a regular feature in countries emerging from conflict and the position of post-conflict governments is often tenuous. Individuals who risk losing power through a vetting process will resist its implementation. Public employees who were involved or complicit in past abuses have an interest in covering up these abuses and protecting their positions. Both actual government authority over the targeted institution and political will are necessary to implement a vetting process. The nature of the transition should be carefully analyzed, potential resistance to the vetting process should be considered in advance, and reform-minded constituencies who may assist in the design and implementation of a vetting process should be identified.

The level of political commitment will also influence the design of a vetting process. For example, a review of serving employees may result in the removal from positions of power, which is likely to raise significant political resistance. The softer option of merely screening new appointments, on the other hand, is generally politically less controversial and requires a lower level of governmental authority or political will.

## **2. Institutional conditions: what are the positions subject to vetting?**

A clear definition of the positions subject to vetting is a prerequisite for any vetting process. At the end of a conflict, the public sector is generally in crisis. Frequently, the sector continues to operate within the organizational structures that perpetuated the conflict. The institutional context is often fragmented. Some institutions are not functioning, leaving a governance gap. Other institutions have overlapping mandates, leading to competing responsibilities and redundant capacities. The number of public employees is often inflated. The organizational structure of an institution is often distorted and does not meet the needs of a country governed by the rule of law. Commonly, an institution's personnel do not represent the population it is mandated to serve.

In such a context, the entire public sector may have to be changed in order to meet the needs of a country governed by the rule of law. Institutions might have to be merged or consolidated, reduced in size or enlarged, newly created or abolished. The personnel composition of an institution might have to be modified to reflect the composition of the population, and ex-combatants might have to be integrated. Public sector reforms and internal organizational changes determine the number of positions, affect the job requirements for individual positions, and limit the number of posts available for persons from each gender, ethnic and religious group, and geographic region. In most cases, organizational changes should be taken prior to establishing a vetting process if they affect positions that will be subject to vetting. Otherwise, individuals might be vetted for positions that are subsequently changed or eliminated, and the vetting process might have been superfluous or even counter-productive, which would undermine the credibility of the entire reform effort. In some instances, however, where the process of organizational change might be protracted or lengthy, some form of targeted vetting might have to precede organizational change, provided such vetting does not prejudice or compromise the underlying reform process. While public sector reform and internal organizational changes might represent conditions for a meaningful vetting process, they also constitute significant reform achievements in themselves. *The Capacity and Integrity Framework* (CIF) is a simple tool to assess institutional reform needs in post-conflict settings (see annex 2).

The type of institution concerned will also affect the design of a vetting process. Vetting judges, for example, will have to give due consideration to the independence of the judiciary and the separation of powers. Vetting processes for elected officials or candidates for elected office should be designed so as to minimize the risk of interference with the will of the electorate. Vetting security agencies usually elicits significant challenges concerning the processing of large numbers of employees.

## **3. Individual conditions: who are the persons to be vetted**

In addition to defining the positions that will be subject to vetting, the individuals to be vetted have to be identified. A post-conflict situation also raises significant and peculiar challenges in this regard. In many instances, membership in a public institution is not clearly defined and the number of personnel is unknown. In other instances, membership in an institution may not be accessible—such as in clandestine organizations operating within or at the behest of the state. Often, the boundaries of institutions are fluid and porous in countries emerging from conflict. If the target group of a vetting process—i.e. the personnel of an institution or a specific group within an institution to be vetted—is not clearly known, it needs to be identified by means of a census or registration process, and informal access to and departure from the group of persons to be vetted have to cease. A failure to identify the target group prior to establishing a vetting process would allow circumventing it and might render the entire process obsolete. The identification of personnel, in particular in the security sector, often represents a relatively non-contentious start to a reform process and constitutes a significant reform achievement in itself.

A personnel census will also provide reliable data on the shortcomings of the employees; assist in planning a realistic and viable vetting and personnel reform process; and might be used to establish a proper personnel management system for the institution in question. Annex 3 provides basic guidelines for a personnel census.

Identification is not enough. Reliable records about the integrity of the persons to be vetted are a condition of any meaningful vetting process and need to be established. During periods of conflict, information about abuses is often covered up and evidence destroyed. Frequently, personnel files have not been established or have been improperly maintained, manipulated or destroyed. Commonly, the police, prosecutors and courts failed to investigate or prosecute abuses and indeed may have maintained a climate of impunity. Frequently, non-governmental organizations monitoring and investigating human rights abuses have been suppressed.

A vetting process may be broadened beyond existing personnel to include external candidates. The pool of potential external candidates, as well as their general competence and integrity, should be assessed and their availability determined in order to minimize the risks of governance gaps and to measure the time and resources needed to identify, prepare and train replacements.

To collect reliable integrity data in the post-conflict period, background information might have to be collected pro-actively from a variety of sources. Sources of information include, among others, personnel files, court records, party files, election registers, United Nations reports, NGO reports, truth commission reports, media reports, and independent investigation reports. Providing the public with an opportunity to come forward with information is another useful avenue to collect information on the integrity of serving public employees and external candidates. Provided the security situation permits, lists with the names of employees and candidates could be broadly publicized and a contact point could be established to receive information on the background of employees and candidates.

#### **4. Legal conditions: what is the vetting mandate?**

A firm legal basis will significantly facilitate the establishment of a vetting process. Any vetting process will be contested and provide some political resistance. An explicit commitment to vetting in a peace agreement or a Security Council resolution will be more difficult to circumvent. Peace negotiators should encourage the inclusion of specific vetting provisions in peace agreements in order to place a clear obligation on the parties. If special domestic legislation is required, it should be clear, precise and in compliance with constitutional requirements and international standards.

#### **5. Operational conditions: are the resources adequate**

The success or failure of vetting processes significantly depends on a thorough evaluation of operational needs and the provision of adequate time and resources. Capacities are generally limited and resources scarce in a society emerging from conflict. Various reform projects compete for scarce resources and the requirements of vetting processes are generally underestimated. Vetting processes are complex, time-consuming and resource-intensive exercises requiring multi-disciplinary skills, in particular when they concern institutions with large numbers of employees. International support to a post-conflict vetting process will often be a condition for its successful implementation (on the role of international actors in the vetting process itself see section 4.D).

#### **6. Temporal conditions: how is the timing?**

Post-conflict contexts are determined by various and often conflicting agendas and timetables, and a vetting process may compete with other transitional processes. A political transition may, for example,

rely on individuals that could be affected by a vetting process; an electoral process could benefit from or be restricted by a vetting process; or the findings of a truth-seeking exercise might feed into a vetting process. The timing of a vetting process raises complex questions of sequencing and interrelations with other transitional processes, and the process has to be adapted to the political developments. The timing will also condition strategic design choices such as the institution or group targeted by a vetting process (see section 4.B), the type of mechanism selected (see section 3), or the composition of a vetting commission (see section 4.D).

## **B | Avoid Undesirable Consequences**

### **1. Political misuse**

A vetting process can be misused for partisan political purposes. For example, vetting of judges could be used to undermine the independence of the judiciary. Removals can be based on group or party affiliation, rather than on individual conduct, target political opponents, and degenerate into political purges. Such processes undermine, rather than reinforce, human rights and the rule of law, create resentment among those affected by the process, and are unlikely to achieve the necessary reform goals. International human rights standards have to be respected in the implementation of a vetting process itself in order to avoid its political misuse (see section 4.E).

### **2. Governance gap**

The public service needs in the post-conflict period have to be considered. Vetting, by removing larger numbers of public employees (in particular senior or expert), may disrupt the functioning of public service and create a governance gap. In the interim, imperfect public service is usually preferable to no service at all. Interim arrangements with existing institutions might have to be put in place, a vetting process might have to be implemented in phases, and replacements might have to be identified pro-actively in order to avoid a governance gap.

### **3. Destabilization**

Removed public employees who do not find alternative employment and are not integrated into society may drift into criminality and destabilize a sensitive political balance. In particular a large number of removed security personnel may turn to armed opposition or organized crime and create a security threat. The potential destabilizing effects of removals should be assessed prior to designing a vetting process, and options to provide severance pay and other temporary assistance should be explored. Vetting processes may also be linked with disarmament, demobilization and reintegration programs (DDR). However, care should be taken to consider the rights of victims, and assistance to removed employees has to be balanced with the needs of victims.





# 3

## Types of Vetting

The type and scope of a vetting process can vary considerably. The following describes different ways of vetting in post-conflict settings. These types are neither exhaustive nor necessarily exclusive. Concrete examples for each type can be found in annex 3.

### A | Vet All or Vet Certain Positions

A vetting process can target all positions or only certain positions of a public institution or a certain category of positions across institutions. In general, a vetting process that targets all positions might be desirable to ensure that all employees and candidates meet minimum standards of integrity. For operational reasons, a general vetting process might, however, not be feasible, in particular when the institution in question has a large number of personnel. In such a context, a vetting process might prioritize senior managers. Such a process requires fewer resources and can be implemented quicker than a vetting of all personnel. Improving the quality of senior managers is likely to have a catalyzing effect because their authority provides them with significant leverage over the entire reform process and because it sends a clear message that the reform will move forward. Once the managers of a public institution meet minimum standards of integrity, the normal internal discipline and appointment mechanisms might be able to address the integrity deficits of the regular employees. Vetting senior managers is, however, likely to meet significant resistance because it affects positions of power and requires considerable political will for its implementation.

Rather than prioritizing senior managers, a vetting process could also target the personnel of a specific unit that has a well-known history of human rights abuse or professional misconduct. The personnel of these units might constitute a liability to the reform process. A failure to exclude persons with serious integrity deficits undermines the trustworthiness of the entire public institution and might contravene international law (see section 4.C).

### B | Review or Reappoint Serving Employees

In a review process, a special mechanism is established to screen serving public employees with the aim of removing those who are unfit to hold office. Basic due process standards apply, the burden of proof falls on the reviewing body, and balance of probabilities will be the appropriate standard of proof. A



review process should generally be established when regular discipline and appointment mechanisms would be overwhelmed or unavailable, and when broader personnel reforms are not necessary.

In a reappointment process, on the other hand, the public institution is first disbanded, a successor institution is established, and there is a general competition for all posts with the aim to select the most suitable. All serving employees have to apply if they want to continue working and external candidates can also apply. To avoid a governance gap, the serving employees may remain in office until such time as a final decision is made about their future employment status. A reappointment process turns all employees into applicants and shifts the burden of proof to the applicant, who has to establish that he or she is the most suitable for the post. Unlike employees who are terminated in the course of a review process, applicants in a reappointment process generally have no right to a hearing or judicial review if they are not selected. These procedural simplifications streamline the vetting process significantly. A reappointment process also offers a better opportunity to undertake fundamental personnel reforms (such as modifying the gender or ethnic balance, and downsizing or merging institutions).

A reappointment process represents, however, several serious risks. Reappointment could enable political interference by the executive branch of government in otherwise independently operating sectors, undermine basic due process rights, and leave a governance gap while the process is ongoing. It might also require a large number of qualified replacements. A reappointment process should therefore be limited to circumstances when the institution is fundamentally dysfunctional or compromised, and needs to be changed significantly. The process should be carried out as quickly and as early as the circumstances permit in order to avoid protracted periods of legal uncertainty.

## **C | Vet Serving Employees or External Candidates**

Rather than vetting serving public employees, a vetting process could be limited to new appointments, including transfers and promotions, and only screen candidates for positions that are or become vacant. The political stakes are lower in vetting processes for candidates of new appointments, which regulate access to public posts, rather than in vetting processes of serving public employees that will result in the removal from positions of power of those who are unfit to hold office. Limiting a vetting process to new appointments, transfers or promotions is generally less intrusive, politically less controversial and can constitute an important long-term measure to professionalize the public institution.

This softer option of vetting does not, however, ensure the removal of serving public employees with serious integrity deficits, significantly slows down the renewal of personnel, and is unsuitable for fundamental reforms of the institutional framework. Yet vetting candidates for new appointment, transfer or promotion might constitute the first phase of a vetting process that is later expanded to vetting serving employees when the political circumstances are more opportune.

## **D | A Special or a Regular Mechanism**

In general, a special, ad-hoc commission has to be established to implement a vetting process (see section 4.D). In certain instances, it may also be possible to use regular procedures to remove public employees with serious integrity deficits. Unlike any special process, regular procedures do not infringe on the certainty of the law and are less costly and disruptive. Regular procedures could take the form of

either internal disciplinary mechanisms or of executive decisions when the positions concerned are political appointments.

Regular disciplinary procedures can be used when the percentage of individuals affected by the vetting process is small; when the institution remains functional and there is no urgent need for wider reform; and when there is sufficiently strong political will to implement self-reform. However, the challenges of a post-conflict context generally overstrain regular disciplinary procedures, and the capacity and will of public institutions to self-reform are particularly limited in post-conflict situations.

Appointments by executive order are reversible informally without due process concerns and removals by executive order provide an opportunity for quick personnel changes. Executive decisions are, however, more open to abuse and the lack of formality may lead to perceptions of bias. Replacing political appointees by executive order is generally also highly contested in a post-conflict context, especially where delicate peace processes have resulted in power-sharing relationships. The establishment of a more formal vetting process to accompany executive appointment and removal processes should be considered.





# 4

## How is a Vetting Process Designed?

The following suggests several steps to design a vetting process. While this approach will not answer all questions that arise in the development of a vetting process, following these steps will help in designing vetting processes that respect both specific contextual needs and international standards. The assessment of the conditions of the process and of the risks of undesirable consequences (see section 2) should inform the entire design of a vetting process. Section 1 provides a checklist for the design of a vetting process.

### **A | Inform and Consult the Public**

To reestablish civic trust and re-legitimize public institutions, the public needs to be aware of and trust the reform process itself. Transparency about the vetting process and consultation about its objectives will help in building confidence in the process, in reducing uncertainty experienced by the personnel subject to the process, and in ensuring that it effectively responds to the actual needs of victims and society in general. There is no 'one-size-fits-all' response to vetting and public consultations help in designing context- and institution-specific vetting strategies. Public awareness can also help in preempting later efforts to cast doubts on the validity of the process. Not only should a vetting process, therefore, include a public information mechanism but the design of the process itself should be informed by broad consultations with civil society, in particular with victim groups and other reform-minded constituencies. Opportunities should be provided to victims of abuses and civil society organizations to provide background information about public employees and candidates, as part of the data collection process on which to base vetting decisions.

### **B | Establish Vetting Priorities and Select Vetting Type**

In a post-conflict context, the entire public administration might benefit from a vetting process. Vetting processes should, however, prioritize the military, the civilian security sector, intelligence services, the judiciary, and other institutions that underpin the rule of law. In general, these institutions were involved in the most serious abuses in the past. At the same time, they have primary responsibility for

maintaining stability and security, and for protecting basic human rights. Reforming these institutions creates important conditions for an effective and expeditious transition to peace and the rule of law.

On the basis of an assessment of the basic factors that determine the design of a vetting process (see section 3), the most appropriate type of vetting process for the institution in question (see section 2) should be selected.

## **C | Define Vetting Criteria and Outcomes**

The integrity of a public employee or a candidate for public employment refers to the person's adherence to international standards of human rights and professional conduct, including a person's financial propriety. The precise kind and scope of integrity required for public employment depend on the circumstances of the particular post-conflict context, as well as on the requirements of the specific position. Criteria should be based on a thorough assessment of what is required and realistic in the particular situation, with the aim of establishing fair and efficient public institutions. For example, a very high integrity standard may result in the exclusion of an unacceptably large number of employees. Or an integrity standard that is difficult to verify is unlikely to be usable in practice. A number of international codes and guidelines provide standards and indicators that may assist in the development of integrity standards for post-conflict vetting (see annex 4).

But to be efficient, effective and credible, a vetting process should not be disconnected from broader personnel reform measures that are needed in the post-conflict situation. More often than not, integrity deficits are not the only shortcomings of public employees in post-conflict contexts, and the exclusion of persons who lack integrity may not bring about the necessary personnel changes. The employees of a public institution may, for example, not only include human rights abusers, but also lack qualifications and skills, and the personnel as a whole may fail to represent the population it is called to serve. A vetting process may, therefore, also include criteria of individual capacity (professional competence, physical aptitude, etc.) and of representation (gender, ethnicity, geographic origin, etc.). For a list of proposed categories for vetting criteria in post-conflict settings see annex 5.

Criteria may compete with each other and the design of a comprehensive personnel reform program may require difficult trade-offs between different reform objectives. Generally, the legitimacy and effectiveness of personnel reform will depend on attaining minimum standards in each of the three categories of integrity, capacity and representation. However, as a general rule, involvement in gross violations of human rights or serious crimes under international law should always disqualify a person from public employment. These include in particular genocide, war crimes, crimes against humanity, extrajudicial execution, torture and similar cruel, inhuman and degrading treatment, enforced disappearance and slavery. These are serious crimes which indicate a lack of integrity at a level that fundamentally affects a person's credibility to hold public service. If a person were convicted and punished for such crimes—and, in fact, States have an obligation to prosecute these crimes—exclusion from public service would be a normal consequence.

Substantive criteria (integrity, competence and representation) may be complemented by formal criteria such as compliance with the vetting process, appearance at the announced interview time, full completion of the registration and vetting forms, submission of required documents such as birth or school certificates, and appearance on a personnel list. Such formal criteria take on increasing significance in processes where reliable information on the background of the persons to be vetted is limited. Individuals with significant integrity deficits are often reluctant to subject themselves to the

scrutiny of a screening process and may, therefore, exclude themselves from the formal requirements of a vetting process.

The outcomes of a vetting process for public employees who do not meet the minimum criteria for continued employment should depend on the reasons for removal as well as the specific context. An employee with integrity deficits could be disqualified from a certain category of posts, from all posts in an institution or from public service in general. The disqualification could be permanent or temporary, and reintegration could depend on the fulfillment of certain conditions, e.g. the acknowledgement of or compensation for certain acts of misconduct. The employee could also be reassigned, put on probation, demoted, or barred from promotion. While employees who were involved in gross violations of human rights or serious crimes under international law should be banned from public employment, the determination of appropriate outcomes depends largely on the specific circumstances of the post-conflict context.

If an employee is removed for lack of professional competence, the employee could apply for another position or reapply for the same position as soon as she or he has acquired the missing skills. If an employee is removed only as a result of changes to the composition of personnel, the employee could immediately apply for another public post. While rewarding abusers should be avoided, care should also be taken to prevent, or at least alleviate, the detrimental effects removals might have on employees who are removed for reasons other than integrity deficits. The personnel reform process might, for example, foresee the provision of alternative employment, severance pay, reintegration assistance, or the provision of retraining.

## **D | Develop the Mechanism**

Generally, regular discipline mechanisms are inadequate to conduct a vetting process in a post-conflict context and a special, ad-hoc commission has to be established (see section 3.D). This special, ad-hoc commission should be independent to ensure an impartial and legitimate implementation of the process. Establishing an independent commission may not be an easy task in a country emerging from conflict. The members of the commission should be distinguished and broadly respected individuals who are not associated with a former warring faction. Broad consultations should precede the appointment of the members by a high and independent authority, such as the constitutional court, the head of state, or an international institution. The senior members should be appointed for the duration of the personnel reform process and should not be removable during this period.

The ad-hoc commission will need a well-staffed secretariat to prepare the necessary information and support the decision-making process. The staff of the secretariat should be multi-disciplinary and include project managers, information system managers, lawyers, and technical experts. The commission and its secretariat should also be given adequate financial and material resources. Given the scarcity of resources in a post-conflict situation and the importance of an effective and fair vetting process, international support to establish and run an ad-hoc commission will often be necessary.

The ad-hoc commission is likely to make unpopular decisions that could lead to security risks for its members. Arrangements need to be put in place to provide security for the members of the commission.

Domestic ownership, where possible, is preferable to internationalized processes, as it contributes to the legitimacy of the process, ensures the application of local know-how, and provides a better basis for domestic buy-in and sustainability of the process. Vetting will, however, inevitably meet resistance, in particular when representatives of former warring factions continue to wield authority in the post-conflict period. Strong international support, both political and operational, will often be critical. The

inclusion of international members may be considered to increase the independence and legitimacy of the ad-hoc commission.

In some instances, international leadership may be unavoidable. In an internationally-led process, every effort should be made to involve domestic actors as broadly as possible, ensure incorporation into domestic law, and make provision for a seamless changeover from the ad-hoc vetting process to regular domestic recruitment and disciplinary procedures.

## **E | Respect International Procedural Standards**

Vetting processes that fail to respect international standards may undermine, rather than reinforce human rights and the rule of law and are unlikely to build civic trust. International standards require, in particular, that vetting processes are based on assessments of individual conduct, rather than on membership of a group or institution. Purges and other large-scale exclusions on the sole basis of group affiliation not only violate international standards but also tend to cast the net too wide and to exclude persons of integrity who bear no individual responsibility for past abuses. At the same time, group exclusions may also be too narrow and overlook individuals who committed abuses but were not members of the group. Such collective processes are unlikely to achieve the intended reform goals, may exclude employees whose expertise is needed in the post-conflict period, and may create a pool of discontented persons that might undermine the transition.

What specific rights apply in the vetting process itself depends on the type of process used. In a review process, minimum due process standards required in administrative proceedings should be respected: initiation of proceedings within a reasonable time and generally in public; notification of the parties under investigation of the proceedings and the case against them; an opportunity for the parties to prepare a defense, including access to relevant data; an opportunity for them to present arguments and evidence, and to respond to opposing arguments and evidence, before the vetting body; the opportunity of being represented by counsel; notification of the parties of the decision and the reasons for the decision; and the right to appeal to a court or other independent body. An exception to this is that employees who were unlawfully appointed, in violation of procedural or qualification requirements, can be removed without any need to establish other reasons for their removal.

A balance of probabilities standard will generally be appropriate in a review process and the burden of proof falls generally on the vetting body. Under exceptional circumstances, the burden may be reversed when the group or unit the employee belonged to during the conflict has a well-known history of human rights abuse. In such instances, the employee would have to prove non-involvement in the abuse.

Special international and constitutional protections safeguard the independence of the judiciary including the separation of powers, guaranteed tenure of judges, inability to be removed by executive order, prohibition of interference with the judicial process, etc. Particular care has to be taken to protect the independence of judges both in the process by which judges are vetted and in formulating the criteria according to which they are reviewed. In general, vetting judges should be carried out by their peers, through a regular or ad-hoc judicial review commission.

In a reappointment process, an employee is turned into an applicant who has to establish that she or he is the most suitable for the vacant post. As in any selection and recruitment process, an applicant who is not selected has generally no right to a hearing or judicial review, as there is no right to be appointed to public office.

Appointments by executive order are reversible without due process concerns. A political appointee who is removed by executive order has generally no right to a hearing or judicial review.





# 5

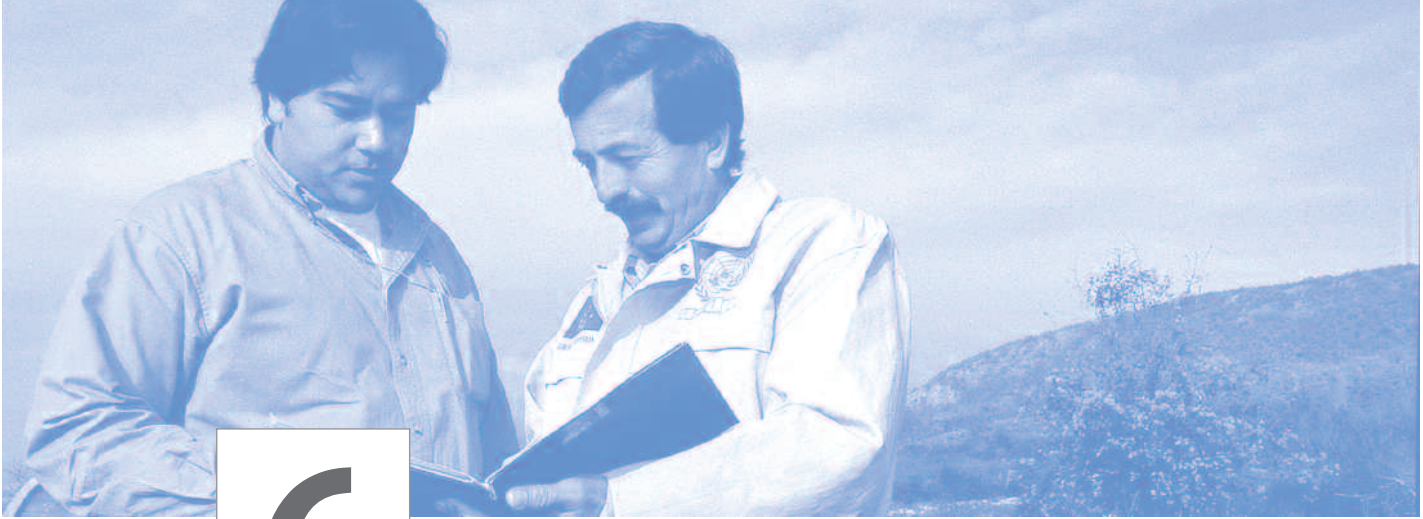
## What Other Institutional Reforms are Necessary?

A comprehensive approach to institutional reform is critical to ensure its effectiveness and sustainability. More often than not, the shortcomings of a public institution in a post-conflict situation are multifaceted and represent complex and interrelated causes of malfunctioning and abuses. Generally, vetting and personnel reform are important but insufficient reform measures and need to be accompanied by broader institutional reforms to safeguard the results of the vetting process and to ensure the quality of public personnel in the future. These include, in particular, measures to remove political interference in and partisan control from public institutions, and to establish operational independence and public accountability. While a detailed discussion of these measures goes beyond the scope of these guidelines, key reform measures include the following:

- Terminate inappropriate interference by informal authorities such as warlords, ethnic groups, clans or paramilitary groups;
- Initiate institutional culture change, including appropriate modifications in training methodology and content;
- Change symbols that are associated with abusive practices (e.g., uniforms, insignia, flags);
- Create a sense of identification of employees with their public institution. Allow, for example, employee participation in the choices defining the institution (values, motto, symbols, etc.), or offer extra-institutional incentives and services such as schooling and housing;
- Establish effective civilian oversight (constitutional, parliamentary, ministerial, public, community-level, ombudsperson);
- Provide effective redress for misconduct (internal disciplinary and public complaint procedures);
- Reform appointment procedures (merit-based, ensure effective representation of particular groups, ensure due process, create professional career path, limit appointment powers of the executive branch of government);
- Ensure the separation of powers, build in particular the independence of the judiciary and the operational independence of other public institutions (e.g., the police and the prosecutor's offices); and
- Establish effective representation of public employees (professional associations).







# 6

## Sources of Additional Information

There is limited information available on vetting. Within the UN system, the Department for Peacekeeping Operations (DPKO), in particular its Civilian Police Division, and the Office of the High Commissioner for Human Rights (OHCHR) have been involved in vetting processes. The International Center for Transitional Justice (ICTJ) is acting as consultant on vetting to the UN in several countries (for contacts see [www.ictj.org](http://www.ictj.org)). UN documents with useful general references to vetting include:

- UN Secretary-General, “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies”, 23 August 2004, UN document S/2004/616.
- Report of the Independent Expert to update the Set of Principles to Combat Impunity, Diane Orentlicher” and “Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity”, 8 February 2005, UN document E/CN.4/2005/102.Add.1.



# Vetting Checklist

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## A | Factors to be Considered before Designing a Vetting Process

### 1. Ensure basic conditions

- Is there a minimum level of stability, government authority and political will?
- Are the positions subject to vetting clearly defined and will the positions not have to change as a result of necessary institutional or sectoral reforms?
- Do the positions subject to vetting raise specific institutional concerns (e.g., the independence of the judiciary)? If so, are they taken into account in the design of the vetting process?
- Are the persons to be vetted clearly identified? If not, has a census been conducted to identify them?
- If necessary, have (provisional) measures been taken to stop informal access to and departure from the group of persons to be vetted?
- If the process is open to external candidates, has the pool of potential external candidates been assessed?
- Do reliable records about the integrity of the persons to be vetted exist? If not, how are they established?
- Do reliable records about the competence of the persons to be vetted exist? If not, how are they established?
- What is the legal mandate of the vetting process?
- Is any special domestic legislation required?
- Are the necessary personnel and material resources available?
- Is there international commitment to support the vetting process, both politically and operationally?

## 2. Avoid undesirable consequences

- Is there a danger of political misuse of the vetting process? If so, how can it be avoided?
- Is there a danger of a governance gap? If so, how can it be avoided?
- Is there a danger of destabilization as a result of the process? If so, how can it be avoided?

## B | Critical Steps during the Design a Vetting Process

- Consider the conditions and the risks of undesirable consequences (see above A).
- Broadly consult the public, in particular the victims of abuses, about the reform needs.
- Prioritize the institution(s) to be vetted.
- Select the type of vetting process that is most appropriate for the institution and situation in question.
- Define the vetting criteria.
- Define the outcomes.
- Develop, if necessary, an independent ad-hoc vetting commission.
- Throughout the design, respect international standards.
- Identify broader institutional reforms that are essential to safeguard the results of the vetting process and to ensure the quality of public personnel in the future.

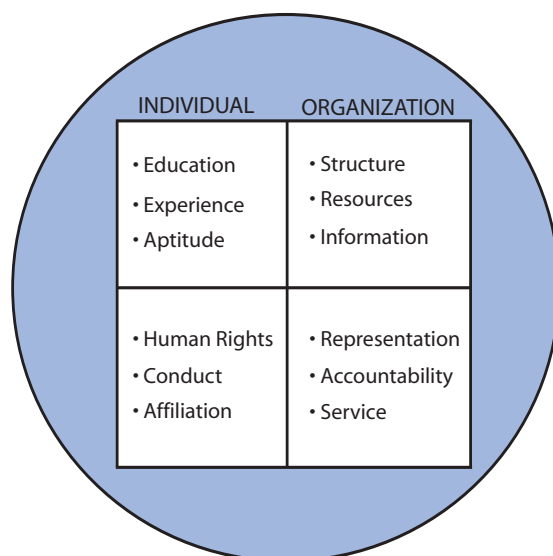
## Capacity and Integrity Framework (CIF)

The Capacity and Integrity Framework (CIF) provides a simple methodological tool to assess institutional reform needs in post-conflict contexts and to develop realistic reform programs. The CIF identifies two fundamental dimensions of public personnel, the individual and the organizational, and uses two basic categories to describe the qualities of public personnel: capacity and integrity.

The personnel of a public institution has an individual and an organizational dimension. On the one hand, an institution's personnel consists of individual employees. On the other hand, the personnel as a whole is organized structurally to implement the institution's mandate.

The qualities of public personnel fall into two basic categories, capacity and integrity. Capacity refers to the qualities that enable personnel to fulfill the technical tasks of the institution's mandate. Integrity relates to the qualities that enable the personnel to fulfill the mandate in accordance with fundamental human rights, professional, and rule of law standards.

### A PUBLIC INSTITUTION



Capacity and Integrity Framework: a simple tool to assess and plan.

The two vertical columns represent the individual and the organizational dimensions. The horizontal rows correspond to the two basic qualities, capacity and integrity. The resulting four fields represent a basic framework to comprehensively assess the status of an institution's personnel:

- **Individual capacity** relates to an employee's qualifications such as general education and professional training, professional experience and competence, as well as her or his physical and mental aptitude.

- **Individual integrity** refers to an employee's adherence to international standards of human rights and professional conduct, including a person's financial propriety.
- **Organizational capacity** refers to institutional qualities such as the number of staff, the organizational structure, resources, and information systems.
- **Organizational integrity** relates to procedures employed to institutionalize the principles and values of an institution, including disciplinary and complaint procedures, oversight mechanisms, ethical guidelines, codes of conduct, and representation (gender, ethnicity, geographic origin and religion).

The circle around the rectangle signifies the mandate of the institution: defining the tasks and responsibilities of the institution, the mandate provides the substantive parameters for the organizational structure, as well as for the terms of reference of each individual position.

Institutional reform in post-conflict contexts requires rapid intervention. At the same time, effective reform can be neither haphazard nor piecemeal but has to take a comprehensive and long-term perspective. In a post-conflict environment, the CIF is a useful diagnostic tool to quickly analyze the current status of the public institution in question, to identify and understand the critical reform needs, and to design the necessary measures for an effective reform program. The CIF can also help to measure progress in the implementation of the reform program. In its simplicity and clarity, the CIF can facilitate the communication between all stakeholders including members of the public institution, political actors, civil society actors, representatives of international organizations, and donor representatives. Nevertheless, while the CIF is simple, it applies a holistic and inclusive approach ensuring that institutional reform is not narrowly technical and one-dimensional but is widened to the broad range of good governance principles.

Applying the CIF in post-conflict settings requires a two-step approach. First, the CIF can help to assess, in each of the four fields (individual capacity, individual integrity, organizational capacity and organizational integrity), the current status of the public institution and identify the critical reform needs. Second, the CIF can serve to develop, in each of the four fields, the crucial reform measures and design reform projects that specify implementation responsibilities, resource requirements, time lines, and implementation indicators.

## Personnel Census and Registry

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In countries emerging from conflict, membership in a public institution is often not clearly defined and the number of personnel is unknown. Commonly, the boundaries of institutions are fluid and porous. Often, personnel files have not been established or have been improperly maintained, manipulated or destroyed. This is the case in particular with large institutions in the security sector that informally took on and dismissed personnel during the conflict.

Before establishing a vetting process in such circumstances, a census of all personnel has to be carried out and a personnel registry should be put in place to determine the persons to be vetted. A personnel census will provide reliable data on the personnel of a public institution. As a result, a census will allow decision makers to assess the personnel needs and develop appropriately designed vetting processes and training programs. A census also represents a useful tool for donor coordination and fundraising. It allows donors to identify and target specific program areas and facilitates the coordination of international assistance from different donors. A census can provide decision makers with key baseline data at two levels:

### 1. At the organizational level:

- Total personnel strength;
- Composition of personnel (gender, geographic origin, age, ethnicity, religion, political affiliation, etc.);
- Ratio between regular personnel, mid-level and senior managers, and an actual personnel structure (which is often top heavy in post-conflict settings);
- Average level of education, experience, etc.

### 2. At the individual level:

- Educational and professional standards;
- Professional conduct and background;
- Employment status, etc.

On the basis of the census, a personnel registry should be established. A personnel registry comprises the data collected during the census and other existing personnel information. For each public employee identified during the census, a personnel file is established, and the census forms and other existing personnel information are placed in the personnel files.

A personnel registry represents a tool to determine the personnel and formalize access to and departure from the institution. All personnel identified through the census and included in the personnel registry constitute the personnel of a public institution and should be issued new identification cards. Inclusion in the personnel registry and issuance of an identification card constitute, however, no more than a *prima facie*



determination of de facto membership in a public institution and do not confer rights and status on those who have been appointed unlawfully. On the other hand, an individual who has not been issued an identification card should not be considered an employee of the public institution and could join the institution only through the regular application and selection procedures. This determination allows a clear identification of the target group of a vetting process: all personnel, certain groups of personnel, or candidates for public service.

The personnel registry also constitutes a tool to manage the vetting process ensuring its transparency and accountability. In the personnel registry, the files of all public employees are maintained (starting with the census forms that include basic personal and professional data), any information relevant to the vetting process has to be registered, and any decisions related to the vetting process have to be taken on the basis of information stored in the personnel files.

Conducting a census and establishing a personnel registry constitute significant reform achievements in themselves. On the basis of a personnel registry, an effective personnel management system can be put in place. Maintaining a registry and issuing identification cards will also fulfill a critical regulatory function in a country emerging from conflict: it allows a clear identification of who belongs to an institution and who does not, and helps to prevent persons from illegally impersonating public officials. Moreover, establishing a personnel registry provides international actors with a useful reporting mechanism, as the registry will provide quantifiable and verifiable data on the current condition of the public institution in question and make the measurement of progress on reform possible.

Compared with other reform measures (such as professional training programs or a comprehensive vetting process), a census and the establishment of personnel registry can be carried out with comparatively limited means and constitutes a relatively non-contentious start for a reform process. However, the personnel and material resource needs, as well as the planning and preparatory requirements, should not be underestimated. Given the importance of conducting a census and establishing a personnel registry, international support, both financial and in-kind, should be seriously considered.

## Relevant Conventions Codes and Guidelines

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The following conventions, codes and guidelines comprise standards and indicators that can assist in the development of integrity standards for vetting in the security and judicial sectors:

### A. International Conventions, Codes and Guidelines

- International Covenant on Civil and Political Rights (1976)
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987)
- International Convention on the Elimination of all Forms of Racial Discrimination (1969)
- Convention on the Elimination of all Forms of Discrimination Against Women (1981)
- Four Geneva Conventions (1949) and the two Additional Protocols (1977)
- Draft International Convention for the Protection of All Persons from Enforced Disappearance (2005)
- UN Code of Conduct of Law Enforcement Officials (1979)
- Basic Principles on the Use of Force and Firearms (1990)
- Body of Principles for All Persons under Any Form of Detention or Imprisonment (1988)
- Basic Principles for the Treatment of Prisoners (1990)
- Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1989)
- Basic UN Principles on the Independence of the Judiciary (1985)
- UN Guidelines on the Role of Prosecutors (1990)
- UN Convention against Corruption (2003)

### B. Other Codes and Guidelines

- Council of Europe, "European Code of Police Ethics" (2001)
- Home Office, Police Standards Unit, "Guidance on Statutory Performance Indicators for Policing 2005/06," Version 3
- Independent Commission on Policing for Northern Ireland (often referred to as the Patten Commission), "A New Beginning: Policing in Northern Ireland" (1999)
- Amnesty International, 10 Basic Human Rights Standards for Law Enforcement Officials (1998)



## Proposed Categories for Vetting Criteria

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The following is a list of proposed categories for vetting criteria. The actual criteria should be as clearly defined as possible to allow for an impartial and transparent process.

### 1. Individual integrity

- Human rights record
- Professional conduct
- Financial propriety
- No links to an illegal organization

### 2. Individual capacity

- Citizenship, minimum age
- Educational standards
- Professional qualifications, competence and experience
- Physical and mental aptitude

### 3. Representation

- Gender
- Ethnicity
- Religion
- Geographic origin
- Former warring faction

### 4. Procedural criteria

- Compliance with the vetting process
- Completion of forms and statements
- Submission of required documents
- Appearance at the announced dates and times
- Appearance on a personnel list



## Case Study Summaries: Bosnia and Herzegovina

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### Historical Background

Bosnia and Herzegovina declared independence from Yugoslavia in 1992, with no one nationality having an absolute majority, and conflict quickly erupted among the Bosniaks, Serbs, and Croats. There were assaults on civilian populations, especially the forced migration of populations based on ethnicity, which served as a central political goal of the war. During the three and a half year war, in which Bosnian Serb and Bosnian Croat forces dispossessed, displaced, interned, raped, and killed populations to enlarge the territory they controlled, an estimated 250,000 people were killed and 2.2 million people—more than half of the population—were displaced.

The 1995 Dayton Peace Agreement was negotiated under strong U.S. pressure in Dayton, Ohio and signed in Paris in December, 1995. However, the Agreement was only signed under tremendous political pressure and did not mark a domestic political will for change and reconciliation. In fact, the warring factions largely resisted the implementation of the agreement. The agreement's two objectives were to end fighting and to build a viable, democratic state. Although the parties had primary responsibility to implement the agreement, the Stabilisation Force in Bosnia and Herzegovina, a multinational force led by NATO, was to oversee compliance with military provisions, and a High Representative—nominated by and receiving guidance from the Peace Implementation Council—was assigned to oversee implementation of civilian aspects.

The Dayton Peace Agreement was designed to reverse the war's outcomes and ordered the right to return of all displaced persons, and yet it relied on those responsible for the conflict to implement peace. The agreement mandated two equal "entities," the Federation of Bosnia and Herzegovina and the Republika Srpska, each controlling its own law enforcement, judicial, and prosecutorial functions, leading to highly fragmented sectors vulnerable to interference by local leaders with nationalist agendas. The agreement designated an International Police Task Force (IPTF)—run by the UN Mission in Bosnia and Herzegovina (UNMIBH)—to reform the police, but no international organization was specifically tasked with coordinating judicial reform.

### Vetting the Police: a Review Process

At the end of the conflict there were approximately 44,750 police officers in Bosnia and Herzegovina, a threefold increase of the police's pre-war size. These figures far exceeded generally accepted practice in Western European democracies. The post-Dayton police continued to support nationalist separatist agendas and operated in ethnically-based forces, each operating under direct control of respective ethnically-based political parties. Minority returnees were not protected by the police during home visits and minority-related incidents were not investigated. War criminals were within the ranks of the police and the absence of functional law enforcement created a climate of impunity,

subverting the clause of the Dayton Peace Agreement promising that all refugees and displaced persons could voluntarily and safely return.

Security Council Resolution 1088 of 1996 gave UNMIBH the power to conduct investigations into abuses by local police. On the basis of this resolution and the 1996 Agreement on Restructuring the Police Federation of Bosnia and Herzegovina and of Security Council Resolution 1088, UNMIBH developed the power to decertify officers responsible for human rights abuses or other serious violations of duty. Finally, in 1998, the Framework Agreement on Police Restructuring, Reform, and Democratization in the Republika Srpska authorized the UNMIBH to vet the police. UNMIBH issued five policies that determined the maximum strength and ethnic composition of the police services and established a three-step personnel reform process: registration, provisional authorization, and certification. To vet the police force a review process was implemented through which current employees of the police services were screened.

The certification process was implemented by the Local Police Registry Section of the Human Rights Office of UNMIBH, comprised of 2 UN professionals (one international lawyer and one project manager), 28 international police officers, and 20 national staff (lawyers, translators, electric data managers, and administrators). The three-step personnel reform process began in 1999 and almost 24,000 employees of Bosnia's police services had to be vetted over the next three years.

From 1999-2000 UNMIBH registered all police personnel. The registration form included comprehensive information on qualifications, current assignment, professional history, and background, all of which was recorded in the UNMIBH local police registry and served to define the pool of persons to be vetted and prevent manipulations of personnel lists by political leadership.

Provisional authorization was then granted to registered personnel who met minimum criteria, such as minimum age, citizenship, and minimal training requirements for service. Criminal records, indictment, or previous removal by UNMIBH precluded provisional authorization. Identification cards were issued to officers who were provisionally authorized.

The third step of the process was certification: provisionally authorized officers were subjected to extensive background checks and performance monitoring by UNMIBH and those who passed the checks received full certification. The final decision rested with the UNMIBH Police Commissioner, but the circumstances that excluded officers from certification generally were independent evidence of a serious breach of duty or law, material misrepresentation to UNMIBH that affected consideration of suitability, a violation of property legislation, and acts between April 1992 and December 1995 that demonstrated unwillingness to uphold internationally recognized human rights standards. An officer would not be certified if there were "grounds for suspicion"—a very low burden of proof—that he or she had committed a war crime. A higher standard of proof did not seem feasible because of the urgent need to vet human rights violators from the police but officers denied certification could request in writing a review of his or her case. The final decision ultimately rested again with the UNMIBH Police Commissioner.

Of the 23,751 police officers registered, 16,803 were provisionally authorized (not authorized were administrative Ministry of Interior personnel), and only 15,786 were subsequently certified, leaving 481 uncertified (with 228 officers pending at the end of UNMIBH's mandate in December 2002). The process resulted in an overall reduction in the number of officers and an improvement in the ethnic composition of the police. In post-conflict Bosnia and Herzegovina

the police were essentially mono-ethnic and without female officers, and after the vetting process there was an average of 10% minority officers and 3% female officers. No comprehensive assessment has been made, however, of whether there has been an overall improvement in the performance of the police as a result of the vetting process. Limitations of the vetting process were caused by resistance from domestic actors, UNMIBH's failure to put in place an appeals mechanism for challenges to the certification process, a lack of synchronization between domestic laws and UNMIBH guidelines, and the abrupt termination of UNMIBH and removal of all files related to the certification process.

### **Vetting the Judiciary: a Reappointment Process**

Similar to the police force, the post-Dayton judicial system continued to serve conflict-era agendas: property rights were not protected, cases relating to attacks on returnees were not completed, and war criminals were not indicted. During the first years after Dayton was signed, judicial reform hardly took place at all since the parties to the agreement did not make serious efforts to reform the courts and prosecutors' offices and the international community failed to intervene. Because initial efforts to review serving judges and prosecutors and remove those unsuitable for office failed, the international Independent Judicial Commission (IJC) developed a strategy to replace the ongoing review process with a reappointment process. All judges and prosecutors were made to re-apply for their current posts. The reappointment aimed not only to ensure the quality of judges and prosecutors but also to restructure the court system, reducing its size and ensuring ethnic representation.

The reappointment process and the restructuring of the court and prosecutorial systems were implemented by the High Judicial and Prosecutorial Councils (HJPC) that were independent and mixed bodies. The three councils had a total of 17 national members and 8 international members, two of whom served as the President and the Vice President. The restructuring of the courts examined three principal criteria: caseload of judges, population served by the court, and distance from the next largest court. 30% of all first instance courts were immediately closed. The number of judges and prosecutors was calculated by the inflow of cases, resulting in a reduction of almost 30% in judges but only a reduction of 1% of prosecutors.

In the reappointment process, all judicial and prosecutorial posts were declared vacant and all qualified professionals were eligible to apply in an open competition. Sitting judges and prosecutors also had to re-apply for their positions and Entity constitutions had to be modified by the High Representative to remove life tenure guarantees for judges. 2,000 people applied for 953 posts, with most applicants applying for more than one post, resulting in around 5,000 applications. 4,800 complaints were received from the public against judges and prosecutors and as of May 2004 the Office of the Disciplinary Prosecutor had reviewed 4,514 complaints but only 750 complaints were deemed founded.

Applications for posts provided information on compliance with property laws, political affiliations and personal assets, and applicants had to submit information on military or paramilitary service. Appointment decisions were based on individual merit but the councils tried to ensure proportionate ethnic and gender representation and applicants had the right to review and comment upon their application dossiers. The council filled 878 of 953 judicial and prosecutorial posts by May 2004, with about 30% of the incumbent applicants not being reappointed and 18% of those appointed being applicants at large.



With the completion of the restructuring and reappointment processes in mid-2004, the international members left the HJPCs, which turned into permanent bodies regulating the selection, appointment, transfer, discipline, training, and removal of judges and prosecutors. The level of confidence in the judiciary increased from 41%-68.4% to 60.2%-74% during the reform process but it was too early at the time of writing to assess the overall impact of the reappointment process.

The scope of opportunities to replace public employees and restructure a public administration is limited necessarily by the pool of applicants, and Bosnia and Herzegovina suffered a “brain drain” during and after the conflict, which also limited the pool of applicants for judicial and prosecutorial posts. There was also an insufficient number of qualified minority applicants, causing a high percentage of reappointments of incumbents and 75 unfilled posts at the end of the transitional period.

### Key Systematic Questions

**Vetting and institutional reform:** The principal rationale for both the UNMIBH certification process and the HJPC reappointment process was comprehensive personnel reform in order to build fair and efficient institutions. Both processes pursued broad institutional reform goals. By means of the certification process, UNMIBH reduced the number of police officers; set the maximum personnel strength of each law enforcement agency; terminated paralegal police activities; raised the number of minority officers in the police; and determined its gender composition. The HJPC reappointment process was part of a comprehensive restructuring of the judicial and prosecutorial systems, in particular a reduction of the number of courts and prosecutors’ offices. By means of the reappointment process itself, the councils defined the number of judges and prosecutors and determined their ethnic and gender composition in each court and prosecutor’s office. A vetting process that takes place in the context of comprehensive personnel reform will have to involve a wide-ranging assessment of the suitability of each individual, and might have to be accompanied by other institutional reform measures to effectively improve the performance of a public institution.

**Review and reappointment:** The UNMIBH certification process was a review process. Serving police officers were screened to determine their suitability for continued service. The HJPC reappointment process reversed the fundamental dynamics of a review mechanism. In the context of the reappointment process, the courts and prosecutors’ offices were reconstituted, and there was a general competition for all posts of judges and prosecutors that was open to external candidates. A serving judge or prosecutor also had to apply if she or he wanted to continue to work in the profession. If the serving judge or prosecutor was not appointed to a post, she or he would cease to hold office. While the goal of the UNMIBH certification process was to remove those who were deemed unfit for service, the aim of the HJPC reappointment process was to select for office the most qualified candidates.

In a review process, fundamental due process requirements apply. A failure to respect basic due process standards and UNMIBH’s abrupt departure led numerous challenges of UNMIBH certification decisions. Applicants in a reappointment process, on the other hand, have no right

to a hearing or judicial review if they are not selected, as there is no right to be appointed to public office. In a review process, the burden of proof falls on the reviewing body to establish that an official is unfit to hold office. A reappointment process shifts the burden of proof to the applicant, who has to establish that she or he is the most suitable for the vacant post. These procedural simplifications streamline the process significantly. A reappointment process facilitates the selection of the most suitable employees, provides a better opportunity to implement institutional reforms, such as modifying the ethnic or gender composition of a public institution, and facilitates the reduction or reassignment of personnel. A reappointment process could, however, seriously undermine the rule of law and represents a serious risk of arbitrary interference in the workings of otherwise independently operating sectors. Therefore, the institution of reappointment processes should be limited to exceptional circumstances when the public institution in question is fundamentally dysfunctional and when an overall improvement of the rule of law is unlikely to be accomplished without it; it should be implemented by an independent body that follows clearly defined, transparent, and fair procedures; and it should be implemented as early as possible in the transition to avoid protracted periods of legal uncertainty. The HJPC reappointment process was rightly criticized for the fact that it only started in 2002, seven years after the signing of the Dayton Peace Agreement.

**The role of international organizations:** In general, vetting processes under domestic leadership will be the preferable option to internationalized processes because they prevent resentments against external imposition, provide a better basis for local buy-in and sustainability of the process, and ensure the application of local know-how. Vetting processes are, however, often contested in the fragile political environment of a country emerging from conflict or authoritarian rule, as they affect access to and exclusion from governmental power structures. Considerable international pressure or involvement might be required to implement an effective and fair vetting process under such circumstances. When an internationalized process is established, every effort should be made to involve domestic actors as broadly as possible, ensure its integration into domestic law, and to put in place provisions guaranteeing a seamless changeover from the extraordinary transitional vetting process to regular domestic selection and recruitment procedures. In this regard, the shortcomings of the UNMIBH certification process were significant. The HJPC reappointment process, on the other hand, was better integrated into the domestic system, ensuring a smooth transfer to a domestic follow-on mechanism.

**Resource requirements:** Early efforts to vet the police and the judiciary in Bosnia and Herzegovina collapsed, inter alia, due to a lack of qualified staff, inadequate resources, and insufficient time. Both the UNMIBH certification process and the HJPC reappointment process were hugely resource-intensive. Both review and reappointment processes are immensely time- and resource-consuming exercises, in particular when they involve background investigations and the assessment of past conduct. The success or failure of such processes significantly depends on a thorough evaluation of operational requirements and the provision of adequate time and resources.



## Case Study Summaries: The Czech Republic

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### The Lustration Law

The Czechoslovak lustration law was formulated in Act No. 451/1991 and Act No. 279/1992, which determined the conditions for holding specific offices in state bodies and corporations of the Czech and Slovak Federal Republic, the Czech Republic and Slovak Republic, as well as in the police force and prison guard service in the Czech Republic. The lustration law arose from the idea that post-communist Czechoslovak society had to deal with its past and facilitate the process of de-communization through legal and political means. It specified top offices in state administration that would be inaccessible to those who had political responsibilities and exercised power during the communist regime. The law also responded to the practice of 'wild lustration,' which had been going on since 1990. In 1991, Act No. 451/1991, which included some 100 amendments, was enacted with the support of only 49.3 percent of the members of the Federal Assembly (passing as a result of the abstention of 70 MPs).

Based on a person-by-person specific vetting principle, the law provided two lists of offices and activities liable for vetting: the first contained offices requiring lustration before the individual could take the position; and the second enumerated power positions held during the communist regime which disqualified candidates from applying for jobs listed in the first.

Despite a wide range of public offices subjected to the lustration procedure, positions contested in the general democratic elections have not been affected by the law. Offices protected by the lustration law included: all ranks of the judiciary and the prosecution office; the civil service at the head-of-department rank and higher, and senior administrative positions in all constitutional bodies; the army and police force positions of colonel and higher; all intelligence services specialized in political surveillance and persecutions (exceptions could be granted by the Minister of Interior on national security grounds); all management positions in the national bank, state media, press agencies and state corporations or corporations in which the state is a majority shareholder; university administrative positions at the head-of-academic-department level and higher; and the board of directors of the Academy of Sciences.

Disqualifying positions and activities were linked to the following: a) political bodies; b) repressive secret police, state security and intelligence forces; and c) individuals collaborating with the forces. Political disqualifying positions included: Communist Party secretaries at the district-secretary rank and higher; members of the executive boards of district Communist Party committees and higher; members of the Communist Party Central Committee, and political propaganda secretaries of those committees; members of the Party militia; members of the employment review committees after the communist coup in 1948 and the Warsaw Pact invasion in 1968; and graduates of the Communist Party propaganda and security universities in the Soviet Union and Czechoslovakia. These jobs and memberships were assumed to constitute a risk for the post-1989 democratic regime. Exceptions were made for those party secretaries and members of the executive boards of the party committees holding their positions between January 1, 1968 and May 1, 1969, that is, during the democratization period of the 'Prague spring 68.' Regarding the security, secret police and intelligence service positions, the following were

enumerated by the law: senior officials of the security police from the rank of departmental chiefs upwards; members of the intelligence service; and police members involved in political persecutions. Nevertheless, the law originally allowed the Minister of Interior, the Head of the Intelligence Service, and the Head of the Police Force to pardon those members of the former secret police whose dismissal would cause 'security concerns.'

The category of secret police collaborators was divided into three sub-categories: a) agents, informers and owners of conspiratorial flats; b) trustees or conscious collaborators; and c) candidates for collaboration, who did not necessarily consciously collaborate and often were just the subject of police surveillance and interrogation.

### **The Lustration Law in Action**

The listing of activities of citizens related to the secret police (category C) generated serious controversy because it was difficult to determine whether a person's actions represented conscious collaboration with the police, un-intentional cooperation, or victimization. It was often technically impossible to distinguish secret police collaborators from their victims. After a public outcry and numerous legal complaints, the Constitutional Court annulled category C in 1992. However, the Court upheld the law's constitutionality in general, and stated that it did not violate the major international human rights conventions.

The Independent (Appeal) Commission, established to review positive lustration certificates, consisted of the following members: a Chair, a deputy Chair, one member appointed by the Chair of the Parliament, two members appointed by the Minister of the Interior, one member appointed by the Minister of Defense, six members appointed by the Chair Committees of national Parliaments, and one member from the Czech Minister of the Interior and one from the Slovak Minister of the Interior. The appointment procedure, a strange mixture of democratic elements, administrative hierarchies, and attempts at equal representation of both nations, demonstrated the control of the lustration process exerted by the executive branch and Parliament.

The staff handling the lustration process consisted primarily of administrative staff from the Ministry of Interior, which was responsible for the archive and protection of the communist secret police files. The position of the Independent Commission was specific because it was to deal with citizens' complaints within the framework of an administrative procedure, before any judicial review, and on the basis of a rigorous and confidential fact-finding process. After the judgment of the Constitutional Court in 1992, which declared the incorporation of the category C into the law unconstitutional, the Commission's work became unnecessary and the body was dissolved. The lustration process subsequently became fully administered by the Security Office of the Ministry of Interior, which issues the lustration certificate. The certificate is an administrative act against which a citizen can file an administrative complaint and even a civil suit.

Regarding the procedure, an individual has to apply for the lustration certificate at the Security Office of the Ministry of Interior. Any person can apply for the certificate and the Ministry has a duty to issue it. The certificate is mandatory only for those holding or applying for jobs listed in the lustration law. An organization can apply for lustration of its employee only if her job is subject to the lustration law. In the case of a 'positive lustration' result, an applicant can submit an administrative complaint to the Ministry and, if the original finding remains unchanged, file a civil suit against the Ministry demanding the protection of 'personal integrity.'

The law targeted Communist Party officials and Party militia members, but not general Party members. Even individuals who ended up with a 'positive lustration' record could apply for any office contested in the general elections, as those positions were not subject to the law. However, an overwhelming majority of the political parties introduced self-regulatory policies, which demanded all candidates to submit a 'negative lustration' certificate before running.

Available figures show that around five percent of all lustration submissions resulted in 'positive certificates' disqualifying the applicant from office in the mid 1990s. The most recent figures indicate a decline in 'positive lustration' results of the screening to approximately three percent of all applications received by the Ministry of Interior since the enactment of the lustration law in 1991. The Ministry currently receives between 6,000 and 8,000 lustration requests per year and the total number of lustration certificates issued between 1991 and 2001 was 402,270.

The lustration law, originally enacted for five years, has been extended by Parliament several times, even though one of the main justifications for the law was its temporary effect. The Constitutional Court upheld the prolongation of the lustration policy in 2001, stating that the law should be perceived as a temporary measure, but that it still protects an 'existing public interest' and 'legitimate aim.' The lustration rules have become an intrinsic part of the Czech legal system, and were supplemented by further vetting procedures required for NATO membership. In 1998 the Parliament set up the National Security Office to be responsible for the protection of all secret data and vetting all individuals with access to them. This act de facto expanded the lustration law restrictions to other parts of civil service and state administration due to the security checks required by NATO's internal directions.

Public opinion polls indicate a steady decline in support for the prolongation of the lustration law. However, a proposal to abolish the law was defeated in Parliament in 2003, although it spurred major disputes. The contrast between the disinterested public and heated political debates captures the current state of the policy.

## The Lustration Act and 'a democracy defending itself'

Czechoslovakia's revolutionary history greatly informs the current lustration policy. The logic of the political conflict was based on the concept of the 'enemy' who needed to be neutralized and removed from power. The absence of any round table talks, power concessions or negotiations before the outbreak of public protests resulted in the regime change being dominated by an opposition of 'us/friends/revolutions' and 'them/enemies/*nomenklatura*.' This 'urge to purge' state institutions and individuals linked to the communist regime reinforced the legal justification of the law as "a democracy able to defend itself."<sup>1</sup> The general principle was to strengthen public trust and the legitimacy of the new liberal democracy. Despite its concern for democratic legitimacy, however, the lustration law proved highly controversial because it violated the first precondition of justice and the rule of law—equality of all before the law. The lustration policy weakens equality because it *administratively* discriminates against specific groups of citizens by denying them access to public offices.

<sup>1</sup> Quoted from the Judgment of the Constitutional Court No. 9/2001Pl US, 17.

## Lustration and other forms of 'dealing with the past'

Post-communist Czech society opted for parliamentary legislation, both pragmatic and symbolic, instead of other transitional justice methods such as truth and reconciliation commissions. However, the 1993 *Act of Lawlessness of the Communist Regime and the Resistance to It* condemned the regime, made communist supporters responsible for its injustices, and praised those who resisted the regime. Although primarily symbolic, the concept of 'responsibility' raised both hopes and fears of prosecutions for political crimes. Upon review by the Constitutional Court, the Act was upheld as a symbolic law that could not have any practical impact on the criminal law statutes.

In place of a body such as a truth and reconciliation commission, Parliament established the Office for Documentation and Investigation of the Crime of Communism in 2002 as a 'moral institution.' The office was charged with collecting and archiving information to map all injustices, atrocities and crimes related to the communist regime and its officials, and to create a memento for future generations. In addition, it had the criminal justice task of filing cases and prosecuting individuals who are still subject to criminal liability, acting as both a symbolic and pragmatic institution.

In 1996, Parliament enacted the *Act of Public Access to Files Connected to Actives of Former Secret Police*, No. 140/1996, which granted access to persons potentially affected by the secret police. In 2002, the main registers of the secret police and collaborators became available to the general public. However, the Ministry protects the constitutional rights of personal integrity and privacy, and therefore the information given to applicants must be related to the activities of the secret police, and not related to, for instance, their marital life or health problems. This policy resulted in a number of legal cases, in which individuals demanded their names be removed from the registers and their moral reputation re-established.

Parliament also enacted laws with practical purposes which benefited the individual victims of the communist regime. The *Act of Judicial Rehabilitation*, No. 119/1990, legislated full rehabilitation of individuals unjustly prosecuted and imprisoned, and various restitutions for properties unlawfully confiscated by the communist regime.

## Lustration and legal 'retrospectivity'

The lustration law was criticized for weakening the principle of legal certainty, encouraging the arbitrary use of law, and having a retrospective effect. The law has a dual character of both prospective and retrospective legislation: it regulated conditions for future jobs and office applications, and defined actions and positions held in the past that have become ground for administrative discrimination in the present and future. It is not retrospective in the sense of criminal liability. Jurisprudence describes retrospective legislation as a possible remedy of past injustices and a form of punishment for crimes that could not be prosecuted in the past. Lustration must be treated as a controversial element of the emerging rule of law and not as its mere denial due to retrospective elements. Some critics also claimed that the law incorporates the principle of collective guilt and responsibility unacceptable to the rule of law. However, individuals are held *prima facie* responsible for their past political engagements, and the law remained far short of banning all communists and communist policemen from access to public offices.



## Oppressors and victims

Totalitarian systems have the power to make all individuals more or less part of their machinery. In the moral sense, almost everyone was a perpetrator and a victim at the same time. In any critique of the lustration law, it is therefore necessary to start by focusing on the personal aspect of the legislation and distinguishing two different groups of individuals: oppressors and their victims. It is one of the worst moral consequences of the statute that it made both groups subject to the same lustration process and subsequent discrimination.

## Conclusion

The lustration law could not separate victims from their oppressors and its moral and symbolic effects were therefore extremely controversial. It set up a paradoxical strategy of discrimination in an emerging democracy, although this is the case in a number of political transformations from totalitarianism to liberal democracy. The lustration law fulfilled its role as a filter, separating former political enemies from new democratic institutions, and, contrary to claims that the statute instigated an atmosphere of fear and suspicion, the policy has contributed to the stabilization of the Czech post-communist society. It contained the process of 'wild lustration' and reduced social anxiety about new political elites.

However, because the lustration process was handled by state bureaucrats, it has inhibited public discussion of the country's past. The lustration policy has also isolated the old political enemy, and strengthened opposition and communist extremism. But taken from the perspective of jurisprudence, no reconstruction efforts proceed without contradictions and logically paradoxical solutions. Lustration must be taken as part of the broader policies of de-communization, which targets the personal aspect of the whole process of post-communist political and legal transformations.





## Case Study Summaries: East Germany

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The rapid dissolution of the Socialist Unity Party (SED) and the German Democratic Republic (GDR) in 1989-1990 was largely unforeseen. By the late 1980s emigration and dissent had increased dramatically, with each one enforcing the other. In 1989 waves of demonstrations began against the rigging of the May 1989 elections and by mid-October the Ministry for State Security, commonly known as the Stasi (from *Staatsicherheit*), and the police gave up on trying to repress the demonstrations. Erich Honecker, the head of state since 1971, was then replaced by a moderate reformer, leading to the opening of the borders on 9 November 1989.

Opposition groups and the SED, which had secured a leading role through bureaucratic mechanisms, started dialogues to facilitate change and the political arrangements increasingly began to depend on the assent of the citizens' movement. Occupation of the Stasi headquarters began on 4 December 1989 and halted the continuing destruction of Stasi files. The creation of Office the Federal Commissioner for the Stasi Records (*the Gauck Behoerde*) was a direct result of this citizens' movement.

The Stasi had been a key player in the monitoring and suppression of dissent since the 1960s. At the time of its dissolution it had 85,000 full-time employees and 180,000 unofficial informers. The Stasi combined information-gathering with acting on that information. The Stasi became famous for *Zersetzung*, which was the subversion of people who raised their alarms. This practice refrained from outright physical repression but a hidden network of informers and collaborators would re-shape a person's life to organize personal and professional failure. The popular ire concentrated, therefore, on the Stasi rather than the SED, which had at least a partially genuine desire to reform the country.

In December 1989, the new chair of the SED, Gregor Gysi, launched a strategy to insist that SED members were just normal citizens doing their jobs, whereas Stasi informers were still hidden and surrounded by an aura of secrecy and betrayal. The initial focus on the Stasi was cemented in laws that preserved and secured Stasi files and regulated their use for vetting purposes, whereas no similar provisions were put in place for corresponding SED files.

### General Considerations

Two different rationales for vetting competed throughout the process in Germany. On the one hand, East German civil rights activists demanded vetting in 1989 and later as a form of civil sanction for past misconduct. This rationale was consciously retributive. It focused on past misconduct, and not on whether a person had changed her or his ways after 1989. The prevalent legal conceptualization of vetting, on the other hand, emphasized a person's loyalty to the basic liberal-democratic order and discounted past misconduct if there was evidence that the person had changed her or his ways. The gap between these two understandings was critical, as the local vetting commissions often operated according to the quasi-retributive understanding, while the administrators in the state ministries, and later the courts, operated under the rationale of vetting as a judgment of loyalty to the liberal democratic order.

For the conceptualization of misconduct, collaboration with the Stasi was elevated to a central position in the matrix of culpability because the Stasi was perceived as enemy number one during the 1989 revolution. Therefore citizens took special measures in securing Stasi files that later became evidence in the vetting process. The cases examined here are of very different institutions—public universities and city administrations in Dresden and Greifswald. Dresden is located in a conservative state with about 512,000 inhabitants, whereas Greifswald is located in a social democratic state with only 58,000 inhabitants. The entire study is preliminary because much basic data on vetting in East Germany has not even been published and procedures of vetting commissions are still confidential.

The two universities examined required a high degree of public legitimacy as morally elevated institutions, whereas the two city administrations were less in need of legitimizing procedures. The universities undertook comparatively thorough three-step vetting procedures, performing their renewal in public. The scope of their inquiries and the standards employed were stricter than anywhere else because universities need the appearance of heightened moral authority. In contrast, the municipal administrations had a relatively streamlined and bureaucratized vetting procedure. In cities, vetting was clearly subordinated to the task of reforming the city. These two different types of institutions are used as models for the vetting of institutions that need to establish different degrees of legitimacy. Notably, the most stringent vetting processes were conducted by the judiciary since it had to re-gain public trust whereas the police were quite lenient and kept many pre-1989 employees, apparently for reasons of necessity. Although the university processes represented perhaps not the most important cases of vetting, they show how institutions trying to regain legitimacy use vetting to distance themselves from former collaborators.

Vetting was only the first step in a large-scale process of restructuring and personnel reduction in the public sector after 1989; it was not the quantitatively most important part of the public sector downsizing and renewal.

The most contentious aspect of the vetting process was the search for appropriate vetting norms. The opposition movement in the fall of 1989 demanded vetting to establish trust in the public sector, to identify police informers, and to openly reckon with the past. Early impulses for vetting came from East Germans; West Germans felt that it did not concern them. Judicial interventions in the vetting process followed, however, exclusively West German precedents while paying scant attention to the specifics of the context, and opponents of the process characterized it as an imposition of Western norms onto inapplicable conditions.

The vetting process was decentralized but followed similar patterns in all jurisdictions. First, a public sector employer decided on procedures within the constraints of the law. Usually, employers required employees to fill out a questionnaire about their political functions in the GDR or any contacts they may have had at the Stasi. Commissions were then set up to examine all employees within the institution and then compared the questionnaires with the personnel files and other sources to recommend either retaining or dismissing the employee. If no evidence of misconduct was found, the commission would automatically suggest that the employee be retained under the condition that their non-participation in the Stasi be corroborated by Stasi files. Employees against whom potentially damaging evidence or allegations had been found were granted individual hearings to respond.

Two basic models of vetting commissions emerged in response to different institutional demands and structures: the administrative model and the pluralistic model. In the administrative model, the commission was composed of members from within the institution by virtue of their function, and not as a result of an election. This model fitted vetting into the daily functioning of an institution but possessed neither the democratic legitimacy of an election nor an independent control from outside the institution.

In contrast, commissions operating under the pluralistic model had a diverse membership drawn from representatives of the institution and outsiders with professional expertise or high moral standing such as lawyers and civil society representatives. Often, commission members were elected by their peers or appointed by state parliaments. Although this model demanded more resources and time, the resulting commissions were viewed as more independent from the government and the institutions they screened and therefore commanded greater legitimacy. The recommendations made by these commissions were reviewed by the head of a public sector or by a special task force. Sometimes, employees to be dismissed were granted a second hearing before a different committee. When a commission decided to terminate an employment contract, it usually offered a consensual termination to prevent the stigma of dismissal. Consensually terminated contracts could, however, not be challenged in court.

There were huge evidentiary problems because many compromising records were removed or destroyed, and vetting commissions had often to rely on self-reporting and independent information to verify questionnaire responses. The only files accessible in any type of managed procedure were the Stasi files; therefore, they were used most and were the most reliable sources for vetting. The search for Stasi informers then became a dominant theme in the vetting process due to the limitations of evidentiary resources.

The only area where it is possible to assess consistency of vetting commissions' work is regarding Stasi informers because for each institution, the number of queries to the Office of the Federal Commissioner for the Stasi Records is known, as well as the number of notices issued in response. The notices said essentially that, according to the Stasi files, the employee in question had or had not worked for the Stasi. The rates of informers ranged from 3% in universities and municipal administrations, to 14% for the Ministry of Defense, to 20% of GDR soldiers, to 16-18% of State Ministries of Interior personnel, and to 13-18% in the police forces. However, a sizeable number of persons on whom the Federal Commissioner's office returned evidence of collaboration had, however, not intended to damage anyone or indeed caused any harm, and others had been pressured into signing a declaration. At the same time, not all acts of informing the Stasi or taking instructions from them were formally recorded. The commissions were therefore mandated to conduct an individualized review of the cases, to invite the employees for hearings, and, if they were still undecided, to study the complete files.

Overall dismissal rates for Stasi informers were between 30% and 45%, with higher rates in the beginning of the vetting process. These relatively low rates of dismissal for Stasi collaboration reflect the fact that commissions did genuinely try to judge each case on its individual merits. Individualized criteria for vetting allowed for considerable discrepancy in the percentage of "Stasi-positives" who were actually dismissed, which also led to some arbitrariness in the decision-making process.

The vetting process relied on two basic pillars of law: laws governing the dismissal of public sector employees and laws on the use of the Stasi's files. Laws on public sector employees supplied a rough framework for vetting criteria whereas the laws on Stasi files provided means of obtaining evidence for an area of misconduct. The Unification Treaty of 1990 introduced bold language of indignation that was also vague and impracticable, and was therefore rarely applied. The laws about extraordinary Stasi dismissals in the Unification Treaty addressed what criteria to use to disqualify a person from public sector employment. However, in the early years of vetting, the task of establishing and applying vetting criteria was left to the individual commissions, in accordance with the decentralized nature of the vetting process in Germany. Courts, however, did not refer back to the legal guidelines for vetting; instead, the guidelines were updated to reflect changes in jurisprudence.

Under the Unification Treaty, employees could be dismissed if they lacked "personal suitability" for continued employment—this was not a guilt-focused approach. Those involved with the Stasi had to show concrete examples that they now subscribed to the principles of the German Constitution in order to be found suitable for public employment. Disagreements about vetting were also rooted in deeper differences about the human ability to change and the continuity in personal identity. West Germany representatives insisted on a greater human capacity to change and advocated a focus on future suitability rather than on guilt for past misconduct.

The Unification Treaty mentioned work for the Stasi as a form of grave misconduct but did not specify other misconduct that could indicate a lack of suitability. There was major disagreement about whether occupying a certain position was enough for a dismissal or if concrete evidence of misconduct was necessary for a dismissal. From 1992 to 1996, the jurisprudence slowly shifted towards principles that were careful to limit dismissals to persons who had committed exceptional and harmful misconduct, and that would factor in how well an employee had adapted to the new democratic conditions. The courts held that holding a Party function was in itself not a proof of unsuitability.

The Unification Treaty provided the framework for the development of the vetting criteria but did not equip the commissions with means for securing the necessary evidence to prove misconduct. The Stasi Records law established a Federal Office to administer, sort, and reconstruct the Stasi files. The Federal Commissioner for the Stasi Records is elected for five years. During the first two terms, Joachim Gauck, a pastor from Rostock, served as Commissioner, and the office soon became known as the Gauck Authority. The Stasi Records law established an elaborate system of making parts of the Stasi's files available to restricted and specified audiences.

There were different access rights to Stasi files for different groups because the law empowered individuals to choose the audience with which they wanted to share their personal files. Persons who had worked for the Stasi were, however, less protected. Public employers were authorized to obtain information on all activities of former Stasi members.

### **Vetting in the Cities**

The situations in Dresden and Greifswald were quantitatively different: Dresden's city administration had 18,000 employees in 1990 whereas Greifswald's had only 300 but the restructuring of the public administration moved other departments into the jurisdiction of the city. At one

point, Greifswald suddenly had 3,000 public employees; through staff reductions that number decreased again to 1,260 by the end of 1997.

The vetting process in Greifswald was split in two parts: first, the newly elected officials at the top of the administration reviewed the higher employees for Stasi cooperation, for politically motivated aspects of their job performance, and for their position in the SED hierarchy. Almost all department heads had to leave their current positions, but many were later employed in lower positions in the same department. The replacement of department heads was motivated by both their conduct in the previous administration and the feeling that they would not be capable of leading departments in dire need of change.

The second step was the screening of all other employees for ties to the Stasi, but not for other forms of misconduct. The city formed a small working group to evaluate employees who had worked for the Stasi. One of the three members of the working group was from the employees' council, one from the human resources department, and the third was someone with good knowledge of Stasi issues, preferably someone who had participated in the organized dissolution of the city's Stasi headquarters in December 1989. This working group was authorized to make final decisions, although no automatic decisions were permitted, after hearing the employees. The commission resembled an administrative process rather than the pluralistic commissions that evaluated judges, university employee, and police officers. The city screened 1,553 employees, of whom 1,495 had not worked for the Stasi and only 58 had, of which the working group decided to continue employment for about half. Eighteen were dismissed, a number which is miniscule in comparison to other sources of job losses in the city administration; therefore, there were no concerns that vetting would deprive the city of irreplaceable personnel.

In Dresden, far larger numbers of employees were vetted but, as in Greifswald, the upper echelons of the administration were treated differently from the ordinary employees. The first stage of the process screened for non-Stasi-related misconduct and was limited to the upper levels of the municipal administration. Fifteen members of a preliminary vetting commission sifted through the personnel files and SED archives, conducted hearings, and recommended 11 dismissals in 1990, 67 in 1991, 148 in 1992, and 21 in 1993. These numbers demonstrate that screening for abuses of power by SED functionaries required a significant commitment, but the commission felt that the procedure was justified because otherwise the citizens of the city would not trust the city's administration.

In 1993, the Unification Treaty clauses allowing for dismissals of non-Stasi related misconduct expired, and vetting shifted to the Stasi files. A regular personnel commission was formed in 1992 to continue the vetting process. The members of this commission were almost exclusively from within the human resources department, and dealt with about 500 cases in depth. The employees about whom there was evidence of activities for the Stasi were invited to a hearing with the commission. In 264 cases there were no sanctions. 201 employees were dismissed, 30 of whom were not given prior notice. 44 employees chose to leave in a mutual agreement. Thus only 18% of those eligible to leave in mutual agreement chose to do so, and the others almost uniformly sued for reinstatement.

The vetting procedures applied by the city administrations followed the administrative model of vetting, with the commissions primarily staffed with members of the administration. The stress on the employees' democratic credentials and the citizens' capability to develop trust in them was less pronounced than it was in discussions about the vetting of police, university employees, and the judiciary. All that the new administrations asked for was an outward behavioral adaptation and a willingness to study and apply the new regulations diligently. The only lower-level employees who were explicitly denied a "second chance" of behavioral adaptation were those who had not only worked for the Stasi but had also actively harmed fellow citizens.

### Vetting at the Universities

Over the course of the 1989 fall semester, the universities' role as pillars of the SED regime was gradually undermined. The ensuing crisis of legitimacy soon triggered calls for vetting the remove the corrupting influence of the SED and of Stasi research and teaching. The universities wanted to reinvent themselves as quickly as possible into independent and apolitical institutions of research and learning. The rate of Stasi informers was small in comparison to other sectors, but the influence of the SED and the access of the Stasi to the universities' officials were undeniable. As in other institutions, the moral demands for vetting intersected with the need to close down certain academic departments and reduce staff in others. In Greifswald, six departments were dissolved in the "unraveling" (*Abwicklung*) without individual review before dismissal of employees. In Dresden, the "unraveling" affected a larger number of employees—all departments in the social sciences and humanities departments since these two were seen as the epicenters of ideological corruption—were dissolved and some were later opened with new personnel. However, the 43 unofficial Stasi informers that the Greifswald Commission of Inquiry found among university personnel were spread across departments but concentrated in the departments of Marxism/Leninism, Northern European Area Studies, and History.

The downsizing process of university employees proved to be a much larger threat to careers than vetting: the Dresden Technical University had 9,000 employees in 1990, of which only 3,400 could be retained. Thus in the end vetting played a small role in the process of personnel reduction at universities: at the beginning of the vetting process, 3,000 employees had already left the university through "unraveling," mutual agreements, or dismissals, and among the 5,000 employees that had to be laid off, only 2% were dismissed as a direct result of vetting. In Greifswald the personnel reduction was less dramatic—from 5,650 to 3,600 from 1990-1998.

Although vetting did not significantly contribute to the quantitative personnel reduction, it introduced much needed moral equity to the downsizing process and lent an air of legitimacy and neutrality to the emerging university personnel. Vetting ensured that those who were retained had not taken part in the abuses of the pre-conflict era. The Academic Senate in Greifswald formed an Integrity Committee and the Medical School's newly elected Council resolved in its first meeting in April 1990 to have each member sign a declaration stating that they had never been a secret informer for the Stasi and that they also agree to have their files examined by an elected and independent commission. However, in a situation of increasing competitiveness for a decreasing number of jobs, the open discussion about responsibility for past injustices never took place.



With Unification in October 1990, the initial impulses towards vetting and reform had acquired a legal basis. The state governments, which are responsible for the public universities, each passed a Law on the Renewal of the Universities to regulate restructuring and vetting processes. The process had three steps: first all members of the university would be evaluated regarding their political and moral integrity; then they would be evaluated regarding their professional qualifications; and finally the remaining jobs would be matched with the existing candidates. No job was reserved and all employees had to re-apply for the positions that they had already had. By putting the vetting process first the government wanted to ensure that those who were “deeply entangled in the system” would be the first to be laid off regardless of their professional qualifications. The timing was, however, thrown off because the January 1993 deadlines in the Unification Treaty for streamlined dismissals were too early for the Federal Commissioner’s office, which was only established in 1992 and could not provide the Stasi clearances by summer 1992. The Federal Commissioner’s office had received 86,526 screening requests and had only responded to a third of them by the end of 1992. Since a rigorous vetting process would be impossible without notices from the Federal Commissioner, local vetting began with evaluations, mostly based on self-reporting, with the condition that the Commissioner’s notices had not yet arrived. Because of this, the vetting commissions could not attain the goal of first letting go those whose prior misconduct disqualified them from holding public sector jobs.

Although some hoped that vetting would help the universities face the past, this did not occur. The process took place within the parameters of the labor law, which barred a public discussion of the cases examined by the commission. Neither the voting nor the particulars of any case were made public. Those who were free to talk about these issues, the employees themselves, did not do so either because their careers and reputations were at stake. The vetting process allowed those who kept their jobs to disassociate themselves from past injustices, often unjustifiably so. Yet as the new professors from West Germany came to the universities, the East German staff who could keep their jobs could point to the vetting process to remove suspicions that their West German colleagues never had to face.

### Key Systematic Questions

After 1989, there was a public desire to know who had been an informer and who had abused power, as well as desire to deny these people public sector employment. But vetting only provided sanctions without publicizing what they were based on; the facts in each case were kept confidential. Vetting benefited from a general policy of exposing the truth about one institution at the center of the security apparatus, but it did not by itself lead to more truth-telling. Therefore the public desire for exposure of past misconduct was never satisfied.

The two most contentious issues in the East German vetting process were the rationale for vetting and, closely related, the vetting criteria. At first vetting was conceptualized simply as a response to past misconduct, and not much thought was given to employees’ behavior after 1989, but the legal basis for vetting did not accord with this rationale: it framed the vetting process as an effort to assess employees’ current and future reliability in a democratic public



sector. Vetting according to a suitability rationale inherently produces progressive leniency. But if vetting is seen as retributive, the progressive leniency that occurred in East Germany would not be permissible because the same form of misconduct should meet the same sanction, no matter when it is discovered, and progressive leniency simply turns into random unfairness. The East German vetting process took to implement than anticipated. It therefore serves as a good demonstration about the importance to choose standards that do not carry the seeds for troubling inconsistencies over time. Standards that rely on employees' current attitudes as a measure of how far an employee has distanced her or himself from the past also run the danger of rewarding opportunistic adaptations.

The limitations on available evidence and personnel files greatly limited the scope of vetting and focused vetting on collaboration with the Stasi. These pragmatic reasons cast the group of unofficial Stasi informers as the main culprits. Other forms of Stasi collaboration, as well as, the abuse of power by the SED, the trade unions and other organizations receded in importance behind the activities of the secret Stasi informers. The vetting process might have taken a different direction if other evidence had been more readily available.

## Case Study Summaries: Greece

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The post-World War II Greek crown democracy, which lasted from 1946 to 1967, was a 'disciplined democracy,' characterized by limited freedoms and political participation. Professing a nationalist and anti-communist ideology, the Greek Colonels staged a successful coup on April 21, 1967, and the Greek junta stayed in power until July 1974. In November 1973, Brigadier General Dimitris Ioannides overthrew the Colonels' regime, imposing an even stricter authoritarian rule. The final blow to the regime came when the junta of Ioannides staged a coup in Cyprus on July 15, 1974. Turkey reacted by invading Cyprus and occupying its northern part; the Greek military proved unable to resist. On July 24, the Generals resorted to Konstantinos Karamanlis and the pre-dictatorial conservative political party to salvage the situation, initiating the transition to a government of 'National Unity.'

The government that came to power in July 1974 was not preoccupied with punitive measures against members of the deposed authoritarian regime and even less so with vetting. The priorities of Karamanlis, the first post-authoritarian prime minister, were first to preserve political stability in a period of tense relations with Turkey, and second to close all issues related to the country's authoritarian past in order to prepare for Greece's integration into the European Economic Community.

More than 30 years after the fall of the Greek junta, it is still difficult to know how many people worked for the Colonels. One may count among the junta collaborators all those who were appointed to the top ranks of the state apparatus after the 1967 coup through 1974. After seizing power, the Colonels carried out sweeping purges and appointed a new Cabinet. Gradually, the Colonels swept the highest ranks of the judicial system, universities, and local government. They appointed new mayors, replaced all prefects—government-appointed heads of the country's regions—and placed new general managers and boards of directors at the top of state-run companies and public bodies. The Colonels changed the leadership of confederations of workers and civil servants, Greek Orthodox Church associations, and professional associations of lawyers.

It is very difficult to find data on most of the people who collaborated with the Greek junta. Archival research about the seven-year authoritarian rule has become sparse. Research about how the Colonels came to power abounds, but there are only a few sources on the Colonels' regime itself. There is also an unspecified but probably large number of officials who did not resist the junta and continued working in and for the state apparatus, effectively contributing to the stability of authoritarian rule. After April 1967, thousands of Greeks continued discharging their duties in the armed forces, police, public administration, local government, and state-run companies, obeying orders 'from above' as if any normal government turnover had taken place. It is impossible to know if these individuals actually supported the junta or if they were simply continuing with their occupations.

In July 1974, when military leaders handed power over to Karamanlis' transitional government, they could not control the scope or pace with which he would vet institutions. What played a

large role in resolving the problem of where to draw the line in vetting were the precarious conjuncture of tensions in Greece's external relations from 1974 to 1976, and the traditionally strong role of institutions such as the judiciary and the police. Although the military was completely discredited after its defeat in Cyprus, vetting in the military was rather slow and limited. As long as tensions between Greece and Turkey remained high, vetting was dangerous in that it could weaken the military as an institution and in so doing, endanger the country's defense. While considerations of national defense constrained vetting of the military, considerations of political stability prevailed in vetting the rest of the state apparatus. Karamanlis aimed to build a strong executive at the expense of the other two branches of the government. He also aimed to attain social demobilization to allow elites to rule without pressure from the masses.

### **Vetting the Government**

After the fall of the junta, the Court of Cassation decided that the crime of high treason was started and completed on April 21, 1967, meaning that the events of that date were deemed to be a 'momentary' coup and not a 'revolution,' as the Colonels had labeled them. Therefore, the political officials who had collaborated with the junta were not held accountable since they had held their posts after the crime had taken place. Initially Karamanlis did not draft legislation to prosecute or vet the principals and subordinates of the junta. Between July and October 1974, the transitional government, fearful of provoking the army, did not take any action against junta's leaders or those associated with the junta. The rationale was that an elected, not a temporary, government, should decide that issue; therefore Karamanlis only pursued punitive and vetting policies after he won the first post-authoritarian elections in November 1974.

Events beyond the government's control precipitated measures taken against the junta's political leaders. Trials against junta leaders were initiated by the suit of a private citizen on September 6, 1974. The suit's legal basis was a criminal act of high treason and the government reacted with punitive policies rather than with vetting. Old legislation provided for deportation of political dissidents to isolated places and in October 1974, Karamanlis used this legislation to deport the five most prominent leaders to a small Greek island. About 1,000 lawsuits were filed by private citizens at the end of 1974 but there was, at the time, no law for torture, and the 'junta trials' resulted in 98 police, 34 gendarmerie, and 99 army employees being prosecuted. Of those prosecuted, 184 were tried and 113 convicted. Of those prosecuted, 57% of police, 73% of gendarmerie, and 60% of army employees were convicted.

The Constitutional Act of October 3, 1974—which assigned the responsibility of investigating those 'primarily responsible' for the authoritarian rule to the Athens Court of Appeals—and the first Resolutions of the post-authoritarian Parliament limited their focus to the conspiracy of military leaders who led the coup on April 21, 1974, and the arrest and detention of 6,500 civilians on the day of the coup. No one who had served in the Cabinets between 1967 and 1974 was brought to trial. The three leaders of the coup received death sentences (that were later turned into life sentences) when tried at the Athens Court of Appeals and the other protagonists received long sentences for the crime of high treason.

All general secretaries of Ministries and all prefects were replaced in the first weeks after the transfer of power. All presidents and general directors of public bodies, state-run companies and state-owned banks were replaced by new personnel who were loyal to the emerging democrat-

ic regime. All mayors and members of town councils appointed by the junta were fired. The records of these officials were not checked individually. All were replaced outright simply for having worked for the previous regime. The transition government appointed new officials to all the above posts, with the exception of local government, where it re-instated the mayors and town councils elected in 1964, the last time municipal elections were held before the breakdown of democracy.

### **Vetting the Judiciary**

The first short-lived government imposed by the junta in the spring of 1967 was headed by a higher-ranking judge, and nine percent of all ministers from 1967 to 1974 were former judges of public prosecutors; therefore it was pertinent to vet the judiciary. Two Constitutional Acts comprising the legislation for vetting the judiciary were issued in August and September 1974, almost immediately after the collapse of the junta. They provided for the functioning of the Higher Disciplinary Council and both restored legality in the system and restituted those judges who had been purged by the junta. Those judges who were called back to service were assigned rank and post individually by the Service Councils, the part of the justice system that was in charge of promotions and retirements. In parallel, the second Act referred those judges promoted by the junta to the Higher Disciplinary Council, but the cut-off point for promotions was placed too high, exempting the vast majority of middle- and high-ranking judges and prosecutors who were promoted within the hierarchy of the justice system from 1967 to 1974. Judges who had benefited from the junta's purges by occupying their purged colleagues' posts were not touched by restituting legislation.

The criteria applied by the Higher Disciplinary Council in vetting were the conditions of promotion to the post of President, Vice President, or General Prosecutor; the professional conduct of the person vetted; and his conduct outside the confines of the justice system, which implied involvement with the junta. These criteria were not, however, established in a systematic fashion. The penalties imposed were forced retirement, annulment of promotion, or temporary suspension of duty. Those judges who were already retired at the time of the authoritarian regime's collapse were exempted from these penalties. The legislation also gave the Minister of Justice a three-month deadline to sue any other judges who had committed any other disciplinary fault between 1967 and 1974, or had served at a political post during that same period. Judges who helped formulate junta policies were not covered by this legislation, illustrating another way in which the transitional government chose not to widen the scope of implicated persons in the vetting process

Another Constitutional Act placed the restitution of purged judges in the hands of the Cabinet, rather than the usual competent organ within the judiciary, making the process highly political and opening possibilities for political discrimination. However, the Higher Disciplinary Council was comprised of non-political members: two law school professors, two higher judges from the Council of the State, two higher judges from the Court of Cassation, and two higher judges from the Audit Office. This Council decided all cases in the first and last instance, with no right to appeal.

Although the Prime Minister of the transitional government replaced the leading judges of all three high courts after the demise of the junta, only 23 judges were charged with disciplinary offenses by the Higher Disciplinary Council, producing meager vetting results. The middle- and lower-ranking judges were not included in the vetting procedure, and there was no pressure from the post-authoritarian governments of Karamanlis to vet pro-junta judges. The reluctance to vet the judiciary was related to the traditional role of judges in the Greek postwar political system: the judiciary had played a prominent role in building an anti-communist, semi-democratic regime during the period between World War II and the breakdown of the Greek democracy.

### **Vetting Academics**

The Constitutional Act of September 3, 1974 was drafted to reconstitute academics who had been dismissed by the junta and also to evaluate the cases of academics who had openly collaborated with the junta. Academics who had been dismissed or forced to resign by the junta were automatically re-hired; academics who had collaborated with the junta were separated into those who were appointed by the junta and those who actively sided with the junta within the university system. The Special Disciplinary Council was set up to deal with those who were appointed by the junta, but the restitution of professors purged by the junta took place before the re-evaluation of appointed academics. The criteria for evaluation were denouncing left-wing students to authorities and participating in administrative organs staffed by the junta. The Act was less lenient in regard to lower-level academic personnel; any academic below the level of associate professor who had been hired after April 1967 was subject to re-evaluation. Each lower-level academic had to attain two-thirds of the votes of the professors in their department to keep his post.

A Presidential decree was passed to choose the nine members of the Special Disciplinary Council. A Legislative decree was also passed to exempt from vetting those full or associate professors who were elected to old chairs, made available between 1967 and 1974, only because the previous holders had been purged by the junta. This made the way in which academics had obtained their posts irrelevant in the vetting process.

The Special Disciplinary Council examined 92 cases of academics. Only 78 of them suffered some disciplinary measure, such as temporary suspension. An unverified, but small, number of professors were fired. Given that in the universities there was mobilization for 'dejunification,' vetting did not extend very far. There are several reasons for this meager result. Some collaborators of the junta among the academics had quickly changed sides and had approached the democratic factions within the universities. Others claimed that their low rank obliged them to follow the orders of higher-ranking academics who had collaborated with the authoritarian regime. In other cases, it proved impossible to show that particular professors had denounced members of the resistance to the police. Even when and where vetting did not result in the expulsion of pro-junta academics from the universities, the general climate in these institutions was hostile to any professors who had not resisted the junta.

### **Vetting the Military**

In August 1974, in order to vet army officers, the government resorted to the Supreme National Defense Council, a government organ that had existed for a long time and had the jurisdiction

to promote or retire officers. Eleven generals were forced to retire and an unverified number of middle- and lower-ranking officers were put on temporary suspension. The criteria used in this process were whether the officers occupied top-ranking posts on the eve of the fall of the junta (in the case of generals) or had taken active part in the coup of April 1967 or in the coup of November 1973 (in the case of the rest of the officers).

Vetting in the military, which paralleled punitive policies, included temporary suspension of duty, re-assignment to insignificant posts or forced retirement. Military vetting proceeded in a gradual and stepwise fashion until the abortive *coup d'état* staged by middle- and low-ranking officers in February 1975. It is reported that in the aftermath of the coup, 500 military officers were forced into early retirement and another 600-800 were transferred to various posts. Among the cashiered officers were 14 generals and 12 brigadiers.

Today, neither the details of the vetting process nor the exact number of officers who were subjected to vetting are public information. One source claims that in the mid-1970s, the Greek army had approximately 15,000 officers, of whom between 500 and 1,500 were subjected to vetting.<sup>2</sup>

### Vetting the Police and Security Forces

Vetting in the police and security forces involved the replacement, re-assignment to positions of minor importance, or 'pensioning off' of officials who occupied high-ranking posts under the junta or had become notorious for violating human rights. The decisions on whom to vet were taken by the prime minister and the competent ministers of the transition government.

In mid-summer 1974, the transition government replaced the chiefs of the urban police and gendarmerie, the Greek intelligence service, and the National Security Service. These officials were discharged of their duties because they had identified with the deposed authoritarian regime and could not be trusted in a period of democratic transition. In August and September 1974, the government re-assigned three police and security officers to insignificant posts and relieved another 17 of their duties for a period of four to 12 months. The re-assigned or relieved officers were notorious for torturing members of the democratic resistance. In the aftermath of the attempted coup of February 1975, vetting was accompanied by prosecutions against officers of the urban police and the gendarmerie. An unspecified number of police officers were forced to retire, while 25 officers of the gendarmerie and 19 of the urban police were prosecuted.

While vetting in the police picked up after February 1975 (eight months into the transition), it did not go very far. This may be attributed to the traditional role of the police in the Greek state apparatus. Even before the 1967 coup, police and security forces held a primary role in monitoring political forces of the center and the left.

### Key Systematic Questions

The case of Greece offers an example of the importance of political agendas and constraining conditions for the scope of vetting in post-authoritarian periods. With the exception of the military and university systems, 'dejuntification' was largely restrained. The vetting process was

<sup>2</sup> Constantine P. Danopoulos, "Democratizing the Military: Lessons from Mediterranean Europe," *West European Politics* 14, no. 4 (1991): 137-38.

generally swift and gradual, but it was also fragmented. There was no general procedure suitable to vet all political and administrative institutions, nor was there a central institution entrusted with the process of vetting. The criteria used in vetting in post-authoritarian Greece were related to specific instances of behavior of the vetted individuals.

The effects of vetting in Greece varied, depending on the specific institution. Vetting in the military and in universities was deeper than vetting in the judiciary and the police. In the central and local government and the wider public sector, vetting was limited to the uppermost echelons of the hierarchy. It is doubtful that vetting touched the ranks of the civil service at all; it was only with the mobilization of socialist and communist trade unions towards the end of the 1970s and the advent of the socialist party (PASOK) in 1981, that important state sectors, such as the security apparatus and the central public administration, were eventually cleansed of most pro-junta elements.



## Case Study Summaries: Hungary

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A lustration process in Hungary was not explicitly considered during the Round Table talks in 1989 at which Hungary's transition from a communist regime to a democratic system was negotiated. However, government and public support grew slowly out of a fear that the communist state's security services retained influence in the new democratic system, and that the existence of security services documents and files from the communist era might disrupt the functioning of the new democratic system. The initial motivation for lustration was to prevent blackmail and other abuses, and only after 1995 did the debate become more concerned with a general moral cleansing of society.

Demands for a lustration law occurred first in 1990 and consistently over the following years, although the first one was not passed until 1994 and lustration was thereafter implemented in a rather patchy and reluctant manner. Between 1992 and 2002 public opinion surveys suggest that there has been a consistent demand for some kind of lustration policy from the Hungarian population, with 50 percent of the population supporting the publication of information regarding former secret agents.

### Legislation and Debate

The first parliamentary election in 1990 brought together a coalition of three center-right parties. The first draft of a lustration law focused on disclosure by creating a register of all people who had served as top-secret officers or network members for the Ministry of the Interior Section III, Directorate III (III/III), and individuals who remained in public office. This bill was voted down, due to fear of political abuses associated with the lustration process in which disclosure could be used to discredit the opposition.

On April 5, 1994, the parliament adopted Act XXIII/1994, initiating the vetting process. The public positions determined to be liable included a broad sweep of offices from parliamentarians to senior public administrators. Investigation was intended to establish whether these individuals had engaged in specified activities relating to the Ministry of the Interior III/III directorate. If the investigation found that a person had been involved in relevant activities, s/he was given the opportunity to resign from his public position, in which case the information would not be made public; if s/he chose to retain his position, the court could issue a decision and make the information public. Thus, the only sanction of the law was the threat of disclosure. The Constitutional Court proclaimed the main provisions of the law unconstitutional.

In 1996 Act LXVII responded to the rulings of the Constitutional Court, and established a Historical Office (HO) where all documents of the III/III career officers not relevant to contemporary national security issues were to be placed. This law provided the sufficient legal conditions for exercising the right of informational self-determination. Act XCIII, adopted in 2000, extended the list of those who should go through lustration, mainly to media representatives. In 2001, Act LXVII converted the HO into archives where the documents of the present public security organizations should be placed in addition to the documents of the former security organizations.



On June 18, 2002, it was disclosed that current Prime Minister Peter Medgyessy had served as a top secret officer in the III/III directorate. Two new drafts, adopted in December 2003, established a new Public Security Services' History Archive and brought together all of the security service directorates' documents in one location. The new legislation represents a significant shift in policy, changing the focus from the process of vetting those in public positions to how the state should deal with information gathered by the former regime's security services. The law provides for the disclosure of information rather than just the threat of disclosure. It states that anyone can request data and files collected by the former secret service related to him or herself; anyone can request the files of people who are or have been in public office; and in the case of those in public office, some very limited information about an individual's relationship to any of the security service directorates can be published.

## Implementation and Consequences of the Vetting Law

### VETTING BODIES

According to the 1994 law, vetting is carried out by two or three commissions, composed of three judges per commission, nominated by the National Security Committee in agreement with the President of the Supreme Court and elected by parliament for a fixed period (renewable indefinitely), normally two years. Of the six judges elected in 1995, four remain Commission Members, reflecting a high degree of consensus across the parties. In 2000, five new judges were appointed, bringing the total to nine.

### VETTING PROCESS

The law determines the order of those to be investigated by categories of 'importance,' beginning with Members of Parliament (MPs), the President, and members of government, through high-ranking public servants, media representatives, and members of local governments and the judiciary. In December 2003, the Lustration Commission reported that 7,872 persons had been vetted, of whom 20 were not suspected of serving as agents but rather were people who had received information from agents, and that 342 had volunteered for self-screening; 14 requests were refused because the positions were not liable for vetting.

In only 141 cases (concerning 115 former agents), were any suspicious or incriminating data found. Of these, 24 individuals left office and ceased to be liable for vetting, and 14 investigations were terminated. The Lustration Commission issued a 'dispensation' in 42 cases, and in only 15 cases were the decisions published. Two cases are currently before the courts and 29 are being investigated. The Report of the National Security Committee stated that there remained 43,983 No. 6 cards (the card of every agent in the III/III registry) relating to 27,133 network persons. Of the 8,000 individuals investigated, the Commission proved III/III related activity in only 29 cases. Twenty-four of those persons resigned from office and the Commission published decisions relating to five people.

In sum, incriminating data have been found in 114 cases, of which almost one-third chose to resign from office. The Commission has screened every member of three parliaments, as well as the highest-level officials in public service and the media.

## VETTED INSTITUTIONS

Members of parliaments are subject to vetting, but because only a tiny fraction of the Commission's work is made public, it is impossible to say who was vetted. The Commissions have published only two decisions relating to MPs, both in 1997. Five people who later became MSZP politicians were initially vetted; when they subsequently became MPs, the Commission re-published these decisions. As of June 2004, Members of the European Parliament became liable for vetting.

According to the 1994 law, party officials and members are not to be screened. In 2000, regional and county-level party presidiums can be investigated, but only those from parties that are supported by the central budget. No judges or prosecutors have been screened, and the group was omitted in the 1996 modification. Ombudsman, members of the Constitutional Court, the President and Vice-President of the Supreme Court, the Chief Prosecutor and his deputies can be investigated. In 2000 an amendment reintroduced the categories of judges and prosecutors. To date, only the judges serving in the Commission have been screened.

At the level of public administration, the 1994 law also ordered the screening of heads of ministerial departments, including mayors of local governments and heads of universities and colleges (if the state is the majority owner). In 1996, the scope of public administration screening was limited to the highest levels of public administration: the President of Hungary, the members of the Cabinet and other high-level public administrators. The 2000 law did not extend the vetting categories. The police were to be vetted down to the level of chiefs, and were treated as a subset of public administration. At no stage did any movements for a deeper vetting of the military or police occur. The Commission did not publish any decision in the public administration category.

Although the 1994 law included a more expansive screening of the media, the 1996 law amended the mandate to encompass only the presidents and vice presidents of the Hungarian Public Television and Radio, and the Head Manager of the Hungarian New Agency. In 2000, the scope was widened to "those, who have the effect to influence political public opinion either directly or indirectly," although the interpretation of this provision was left to the Commission. The Commission created a list of newspaper owners, journalists, radio and television stations, and in 2000 allowed journalists, who did not fall under the purview of the law, to apply voluntarily for screening. In 2003, of the estimated few thousand journalists investigated, only three were found to have performed relevant activities.

## PROCEDURE OF THE COMMISSION

The procedure of the Commission is based on the 1996 Administrative Procedure Act and comprises the following steps:

**Identification of persons who should be vetted under the law:** Although the law determines what kinds of positions should be screened, the individuals to be vetted must be identified. In the case of civil servants, the law is very clear about the positions. However, the process of identifying those who fall under other less clearly defined categories, such as the press, is sometimes problematic.

**Collection of data from the register of the III/III:** Judges did not collect data relating to the person under investigation themselves, but received it—initially from the Ministry of the Interior, and since 1997, from the HO. The Commission provided a list of the individuals to be vetted, after which the officials of the Ministry and later the archivists of the HO searched the register. They were required to send to the Commission data which indicated involvement in the activity defined in Section 1 of the law. The Commissions have undertaken additional research in other archives, in some cases turning to the previous employer of the vetted individual for old personal files. It has also been able to find witnesses. The HO submitted a report annually to parliament, including an account of work done for the Commission.

**Hearings:** Hearings were preformed in all cases until 2000, when the policy was changed to hear only those cases in which incriminating data was found. The vetted person is first informed that incriminating data have (or have not) been found, and the relevant documents are presented at the first hearing. The individual is given the opportunity to question the validity of the case. Legal representatives are able to attend the hearings, and the individual may have legal representation during the court procedure.

**Evaluation of Evidence:** According to the Administrative Procedure law, the judges have an unlimited right to evaluate evidence and the Commission requires at least two kinds of data for proof of activity with the III/III directorate. The most commonly found document, the No. 6 card (the card held by every III/III agent), is not legally sufficient without a second piece of evidence, for fears of falsified No. 6 cards and forced registration with the III/III. The Constitutional Court recognizes that the current files are incomplete, and in some cases inauthentic, and makes it clear that the burden of proof does not rest with the person being vetted. In 1994, the Constitutional Court allowed additional evidence, including witness statements, but gives primary importance to Ministry of the Interior documents. Documentation has rarely proved indisputable, and the Commission has been mostly limited to using No. 6 cards and indirect evidence, i.e., financial documentation showing that an agent received a payment or reward.

**Decision of the Commission:** The Commission can issue a declaratory decision, dispensational decision, or a decision to terminate the procedure. It declares whether the person preformed the activities, states those facts, and communicates the decision to the person without delay, and the decision is made by secret majority voting. If the individual is found to have preformed the activity, the Commission calls upon the person to resign within 30 days or initiates a procedure to relieve him or her from office. In the event that the individual does not resign, the Commission informs the person that the decision will be made public, and gives the person the option of appealing the decision. Thus, according to the law, those who leave their offices voluntarily are exempt from the sanction of the law. Of the 21 decisions published by the Commission, five are related to former agents (two post-transition MPs and three journalists) and one to a former career officer; the remaining fifteen received data from agents.

**Appeals to the Court:** The 1994 law provided access to judicial review of the Commission's decisions, which has the capacity to delay the publishing of the decision. If the court finds that the Commission ruled against legality, the Commission starts a new procedure.

## LENGTH OF PROCESS

Both the investigation and Commission procedure can take several months, and the Court procedure usually lasts for one year. In total, the whole process can take up to two years.

## Specifying the Scope of the Law

The debate surrounding the scope of the lustration policy has centered on two issues: which public offices are liable for vetting, and what activities performed by the security services are to be regarded as relevant.

Although some offices are clearly within the scope of the law, such as parliamentary members and the President, other positions have proven more problematic. A 1994 resolution sought to clarify the positions, and allowed for non-state posts to be vetted. This extension included the media; it was further amended in 1996, requiring only those media representatives who were appointed by parliament to be vetted. In 2000, an amendment broadened liable positions to include professional judges and state attorneys, and debate shifted towards the possibility of vetting church officials. The final version of the law in 2003 limits the scope to persons falling into the category of 'public activity.'

The decision to limit lustration to the Ministry of the Interior Section III, Directorate III (III/III), reflects both the limited public knowledge of the extent of the security services during the communist era, and the reluctance on the part of the main political parties to extend the scope to other branches and personnel of the security services.

## Conclusions

Accusations that lustration has been used for political competition abound, and often changes in the law reflect shifts in the political interests of the parties promoting them. Although the politicization of lustration is perhaps inevitable, it has been exacerbated in Hungary because of the absence of a generalized public disclosure of files. Lustration has not increased transparency in the political sphere because citizens cannot be sure that a serving MP did not work for the communist-era security services. Only with the passage of the 2003 law will the wider public be more involved since it will gain access to the files.

Lustration will not fulfill the aspiration of a moral cleansing of society. However, other outcomes cannot be determined, such as the deterrent effect the lustration laws had against former agents taking public positions. It is also not clear whether another form of historical justice would have been preferable, although a combination of methods might have proved most appropriate. As the lustration process comes to an end, debate continues about how to handle the information gathered by the security services after the completion of the vetting. Some argue for unlimited access, while others prefer destroying all the documents of the communist-era security services.



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