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## Transitional Justice in Eastern Europe: Present Dilemmas of the Communist Past

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BRIANNA BROWN, APR 8 2015

Starting with the collapse of the Salazar dictatorship in Portugal in 1974, the late twentieth century has been marked with outbreaks of authoritarian regime collapse in Southern Europe, Latin America, Africa, Asia, and finally Eastern Europe. While this period is remarkable for the sheer extent of democratization, it is equally remarkable for the varied ways in which these newly democratic states addressed the legacies of their authoritarian past. This period required a changeover from regimes that had been marked by widespread violations of human rights to regimes that would embrace the liberal democratic conceptions of rule of law and protection of core human rights, presenting transitional societies with a range of complex political questions: How to hold previous regime transgressions accountable without affecting the stability of the newly democratic order? How to address demands for redress without perpetuating a system of further injustice? How to integrate individuals who had been part of the repressive apparatus of the previous regime without compromising societal demands for justice?

The debates around these questions have been captured in the emerging field of 'transitional justice,' which refers to the wide range of mechanisms that satisfy societal demands for both accountability and reconciliation, including criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms.[i] Although these mechanisms have seen increased scholarly attention in the past twenty years, there is to date little consensus as to which mechanism will prevail in national-level debate in specific circumstances, nor as to the implications of that choice for the achievement of justice in each case. This paper considers the mechanisms that were used in the countries of post-communist Eastern Europe.[1] Specifically, it seeks to understand why rather than several other well-established mechanisms of transitional justice policies of 'lustration' tended to dominate Eastern European attempts at transitional justice.[2]

There is a strong moral argument for lustration. It serves to punish perpetrators under the previous regime by excluding them from participation in public office. Moreover, it serves the specific function of removing personnel continuities from the prior regime, supporting the social conditions necessary to establish a strong democratic order. In its ideal form, lustration is well suited to provide a bridge between the dual notions of accountability and reconciliation, thus able to satisfy both backward-looking and forward-looking conceptions of justice. However, there are also strong legal and moral arguments against its use, which are often overlooked: particularly, legal principles such as individual accountability, presumption of innocence, and non-retroactivity. Moreover, lustration tends to be quite susceptible to politicization, and may be manipulated by political elites to achieve popular legitimacy and electoral gain. With attention to these ambiguities, a secondary purpose of this paper is to consider to what extent lustration was able to satisfy justice in the states in which it was pursued.

The essay proceeds with two broad arguments. It first compares the region as a whole to other recent cases of democratization, to determine the comparative record of transitional justice in Eastern Europe. While transitional justice is a relatively new phenomenon, emerging only in the third wave of democratization, by the time of the communist collapse in 1989, "the new Eastern European democracies [...] could draw inspiration from a large array of transitional justice mechanisms adopted throughout the world." [ii] Despite the availability of these other mechanisms, the post-communist states constructed a distinct form of transitional justice – lustration. As lustration appears to be a manifestly post-communist phenomenon, comparison with other regions is difficult. Nevertheless, the essay

# Transitional Justice in Eastern Europe: Present Dilemmas of the Communist Past

Written by Brianna Brown

considers the current theories on the decision to adopt transitional justice and considers to what extent these explain the exceptional case of Eastern Europe. These explanations fall into two broad categories: (a) characteristics of the previous regime, and (b) the transitional process and resultant balance of power between incumbent and opposition forces. The essay argues that these variables had a strong effect in limiting the range of options seen to be feasible in the Eastern European context. Specifically, regional characteristics suppressed popular demands for, and limited the legal feasibility of, retributive justice.

While cross-regional analysis highlights important insights, it is prone to treat each regional unit as homogeneous, obscuring important within-region differences. To address internal variation in the transitional mechanisms used in Eastern Europe (including their form, timing, and specific content), the essay proceeds in the second section to a within-region analysis. A short survey of transitional justice mechanisms demonstrates that lustration was indeed the most salient form, though countries varied significantly in the strength of their lustration legislation. To explain this variance, it looks at both structure and agency theories. The essay determines that the identity of political elites was very important in establishing lustration laws, particularly the degree to which communist successor parties were relevant political actors. While there were legitimate moral reasons for pursuing lustration, the essay concludes that political factors were the most important force in establishing lustration as the dominant framework for transitional justice.

The essay demonstrates that lustration was ultimately manipulated for political gain, limiting the extent to which it could satisfy societal demands for justice. While structure was important in shaping the broad contours of transitional justice, agency was most relevant in selecting the specific policies, leaving the pursuit of justice vulnerable to the satisfaction of purely political ends.

## Eastern Europe in the World

While there has been a substantial increase in the literature on transitional justice since the end of the third wave, little consensus has been established about which factors best determine the choice of transitional justice mechanisms. This shortcoming has been addressed by Olsen et al. (2010), who carry out the first inclusive study to analyze the empirical record of multiple mechanisms across a broad range of regions and time.[iii] While useful in making general claims about the factors that influence transitional justice, their dependent variable is limited to a choice between trials, truth commissions, and amnesties, ignoring lustration – the type of transitional justice most relevant to Eastern Europe. This is a common exclusion in cross-regional analyses due to the concentration of lustration policies in a single region. Nevertheless, such exclusion is problematic for understanding the specific transitional justice policies of Eastern Europe.

In contrast to broad empirical generalizations, other scholars have concentrated on single-case or single-region analyses (e.g. Homes, 1994; Nalepa, 2010). Grounded in the Eastern European context, these accounts have an advantage over empirical generalizations, as they are able to account for the specific mechanisms of lustration and ‘decommunization.’ However, as these do not engage in cross-regional comparison, these accounts are also limited in the extent to which they can produce generalizable theory. In light of these difficulties, the essay contends that theory on the comparative record of justice in Eastern Europe must include cross-regional comparison, while respecting the depth of understanding provided by within-region analysis.

It is clear from the literature that the decisions on transitional justice are constrained by prior structural conditions. As Richard Wilson describes in the introduction to his case study of transitional justice in South Africa:

“The parameters of justice are framed by the historical character of authoritarian legality, by the balance of power between bellicose parties, and in concrete pacts reached during negotiations [...]. Opposition movements are seldom wholly excluded, and instead are often party to decisions on amnesty, truth commissions and the limits of criminal prosecutions. Thus, the room for manoeuvre [...] is often severely limited, *as the boundaries of justice have been set at an earlier stage in the transition*” (emphasis added).[iv]

In order to understand the factors that influenced Eastern Europe’s tendency toward lustration, it is consequently

# Transitional Justice in Eastern Europe: Present Dilemmas of the Communist Past

Written by Brianna Brown

necessary to understand the characteristics that distinguished the region from other contemporary cases of democratic transition. The essay highlights two sets of explanatory characteristics, consistent with the literature. It first examines the specific characteristics of Soviet-style communist regimes in contrast with other authoritarian regimes. Next, it considers transitional factors in Eastern Europe, considering the impacts of pacted transitions and the inclusion of post-communist parties in government.

## *Characteristics of the Authoritarian Regime*

The regime transitions in Eastern Europe shortly followed authoritarian regime collapse in Latin America, Africa, and South East Asia. The essay makes no claims that these other regions were uniform in their experiences with authoritarian rule. Nevertheless, it identifies several dimensions in which the communist regimes of Eastern Europe were generally distinct. As a group, they were in place for over 40 years, in contrast with several short-lived military dictatorships. They were totalitarian rather than merely authoritarian. The rights abuses tended to be of a different character: systematic co-optation rather than widespread crimes against humanity. Moreover, the most severe rights abuses tended to be relatively remote in time. While some of these characteristics were shared by other authoritarian regimes of the third wave, the essay argues that the cumulative combination of these in Eastern Europe called for a distinct way of coming to terms with the authoritarian past.

The legacies of authoritarian regimes are likely to affect the democratic pursuits of any new regime. However, several scholars propose that the duration of the previous regime augments constraints on the new regime's ability to pursue transitional justice, because older regimes are more likely to become deeply institutionalized.[v] This argument is specifically relevant to communist regimes, whose ideology transcends mere authoritarianism to establish the totalitarian subordination of all aspects of political, economic, and social life.

The entrenched and totalitarian nature of the communist regimes posed several challenges to retributive justice. This regime type was supported by a vast network of informants, who collectively contributed to the maintenance of the repressive order. While retributive justice typically aims to go after only those at the top of the chain of command or specific perpetrators of the most egregious crimes, the institutionalization of the Soviet-style communist regimes made it particularly difficult to establish responsibility for regime repression. While it may be relatively clear to distinguish a "direct and unambiguous link between the armed forces and the commission of repressive acts"[vi] in hierarchical military dictatorships such as those in Greece or Latin America, the horizontal networks of collaboration in Eastern Europe limited the identification of who was responsible for which actions. As Monika Nalepa explains, "in the context of long-lived authoritarian regimes, the gray area between resisting and supporting the ancien régime is wider than in short-term authoritarian episodes." [vii]

Moreover, the vastness of the system meant that a large proportion of the country could conceivably be implicated in the regime. For example, in Romania, "Communist Party membership extended to one-third of the adult population, 50 percent of citizens depended on the party-state for their livelihood, and hundreds of thousands of individuals spied on their relatives, neighbours and friends." [viii] While Romania is perhaps the most extreme example, the wide networks of complicity were a defining feature of every one of Eastern Europe's communist regimes. The implications of this are well captured in a 1990 speech by Vaclav Havel, Czech dissident and first post-communist Czech president:

"We have all become used to the totalitarian system, [...] and accepted it as an immutable fact, thus helping to perpetuate it. We are all – though naturally to various degrees – responsible for the creation of the totalitarian machinery. None of us is just its victim; we are all responsible for it." [ix]

Along these lines, the pursuit of transitional justice in these countries was exceptionally complicated by the need to determine criteria for exactly "how much of their populations ought to be liable for the charge of collaboration." [x]

The long duration of the communist regimes additionally suppressed *demands* for robust transitional justice. Similar to other heavily institutionalized authoritarian regimes, civil society had been weakened by years of suppression, reducing its organizational capacity to claim justice. Moreover, because of the specific networks of collaboration, in

# Transitional Justice in Eastern Europe: Present Dilemmas of the Communist Past

Written by Brianna Brown

which many individuals could in some way be linked to some sort of compromising activity, there existed a “socially diffuse sense of complicity,”[xi] that led many to be suspicious of what retributive justice would specifically entail.

A second argument on regime characteristics concerns the nature of the rights abuses, in both their severity and their remoteness in time.[xii] Olsen et al. advance two hypotheses along this dimension. First, high levels of regime atrocities will lead to heightened demand for accountability. However, this might be mitigated by the timing of these abuses: “If the repression occurred a long time before the transition, heightened demand for transitional justice may not arise.”[xiii] As follows, the essay considers the nature and timing of the rights abuses in Eastern Europe in contrast to other contemporary cases.

In the authoritarian regimes in Latin America, human rights offenses such as torture, execution, and disappearances were routine. In Uruguay, counterintelligence reports suggested that “everyone arrested [roughly 600 000] is tortured. There is no one who is not tortured.”[xiv] Moreover, the total number of deaths and disappearances in Argentina was estimated “at anywhere between 9,000 and 15,000.”[xv] These abuses fall unambiguously under the category of ‘grave and systematic crimes against humanity,’ illegal and prosecutable under international law. Abuses of this type certainly occurred in the communist regimes; however, the type of repression most common to Eastern Europe was co-optation, rather than direct and widespread crimes against humanity.

The communist regimes of Eastern Europe certainly experienced their share of ‘grave and systematic’ rights abuses. However, these tended to be concentrated in the Stalinist (pre-1956) era.[3] When the Communist regime took over, tens of thousands of individuals in each country were killed or declared missing. This was followed by Soviet-style purges, in which people were tortured until they confessed their guilt, authentic or not.[xvi] Although these crimes were extreme, their remoteness in time places constraints on the ability to prosecute these crimes more than 30 years after the fact.

There are several practical barriers to the prosecution of distant crimes. In many cases, statutes of limitation limit the extent to which distant crimes can be reassessed. For example, Hungary’s attempt to suspend its statute of limitation on the crimes of the 1956 Uprising was struck down by its Constitutional Court.[xvii] Furthermore, the passage of time lessens the possibility that sufficient evidence and testimony will still be available. For example, the tens of thousands of murders and disappearances that occurred during the Communist takeover in Bulgaria were not investigated after the regime change “owing to a lack of documents and evidence” of that era.[xviii] In addition to these practical constraints, remoteness in time likely suppresses mass demands for justice; as O’Donnell and Schmitter identify: “The passage of time attenuates the bitterest of memories.”[xix] For these reasons, the timing of rights abuses in Eastern Europe limited the ability to pursue prosecutions against many of the most serious crimes of the communist past.

Finally, in considering the violent crimes of the Stalinist era, the post-communist societies confronted an uneasy precedent of transitional ‘justice.’ Indeed, the Stalinist-style purges of the latter 1940s and the early 1950s were carried out with the purpose of ridding the regime of prior elites. This experience left these societies painfully aware that “only a terrorist state could [...] exterminate every last germ of communism.”[xx] While the standards for justice in the new democratic orders obviously precluded such extreme purges, there was nevertheless a societal association between regime change and mass atrocities. Thus, both the remoteness of Stalinist-era crimes and the specific association of those crimes with transitional cleansing limited demands for retributive justice.

While the Stalinist period was marked by similarly high levels of violence as many regimes in Latin America, the post-1956 period was characterized by more subtle forms of repression. This essay does not ignore that brutal examples of grave and systematic rights abuses persisted in the post-Stalinist periods. For example, consider the extensive purges during Czechoslovakia’s post-Prague Spring ‘normalization’ policies (1968-1969), or the high internment rate under Poland’s martial law (1981).[xxi] However, these instances were largely the exception rather than the norm. Even the heavily repressive regimes in Romania and the GDR had shifted from direct forms of violence to a more institutionalized form of repression. Specifically, control was maintained through pervasive police presence and broad networks of collaboration to prevent and penalize dissidence. Along these lines, Brian Grodsky identifies that “the rights abuses regularly witnessed by the masses were more akin to corruption than to state

# Transitional Justice in Eastern Europe: Present Dilemmas of the Communist Past

Written by Brianna Brown

violence.”[xxii]

Tina Rosenberg usefully differentiates between “regimes of criminals” in the South, and “criminal regimes” in the East.[xxiii] This captures the idea that the post-Stalinist period in Eastern Europe was not necessarily less repressive than other regions, but that the specific form of repression was distinct. This goes back to the totalitarian nature of these communist regimes; because of a state monopoly on all areas of public life, there was little that could not be taken away. Luc Huyse identifies that the main instruments of control during this later period had “switched from terror and repression to economic control, control of the media, control of association and of rights.”[xxiv] Consequently, he claims, “violence was more psychological than physical.”[xxv]

Specific features of rule of law make it much more difficult to launch criminal charges against this type of ‘psychological’ repression. Rule of law proscribes retroactive justice, making it difficult for new regimes to prosecute individuals for acts that were not illegal at the time that they were committed.[xxvi] While this limits the extent to which countries can punish members of the prior regime, there are ways in which prosecutions may nevertheless occur. First, individuals may be tried for transgressions that were illegal both under the old and new regimes. Indeed, the Soviet legal systems included provisions that formally protected basic rights.[xxvii] However, even where commonalities existed, it remained problematic for these new democracies to interpret and apply the laws of an illiberal regime, especially given the lack citizen trust in the new, formally liberal court system. In this context, the new regimes were better off dismissing the argument of joint criminality and instead establishing discontinuity with the previous regimes.

A more credible channel of prosecution is through international law, as “responsibilities under it remain fixed even when domestic laws are in flux.”[xxviii] Indeed, in the history of transitional justice, international human rights standards have been critical in justifying prosecutions. For example, Kathryn Sikkink looks at the role of the Inter-American Commission on Human Rights (IACHR) in Argentina; international human rights law provided substantive “legal cover” for mounting societal demands for “*Juicio y Castigo a Todos los Culpables*.”[xxix] However, international criminal law is, by definition, limited to international crimes: genocide, war crimes, crimes against humanity, and the crime of aggression. Thus, while international criminal law may apply to certain crimes of the Stalinist period, Prague Spring, and crimes committed during Poland’s martial law, for the majority of communist-era crimes, the legal space for criminal prosecutions was limited. Although communist regimes were no less (or more) repressive than regimes in other regions, the specific qualities of their rights abuses – specifically mass collaboration – made it “much more difficult to envision trials” than it would “in the case of brutal regimes run by relatively small groups of *responsables*.”[xxx]

## *Transitional Factors and Balance of Power*

As illustrated by the Wilson excerpt earlier in this essay, the “parameters of justice” are not only a product of authoritarian legacies, but also of specific features of the transition process: the agreements reached between incumbent and oppositional parties and the resultant balance of power between these two groups.[xxxi] While the argument above focused on structural conditions, the essay now turns to the effects of the transitional moment itself. The most remarkable aspect of the communist regime collapses was their peaceful nature. With the exception of Romania, the revolutions of Eastern Europe occurred without the widespread violence typical in authoritarian regime collapse. While this can (and should) be seen as a positive factor, it is important to consider why this may have been the case. Monika Nalepa attributes this peaceful nature “to the promises exchanged at the roundtable negotiations between outgoing communists and the incoming oppositions,”[xxxii] an argument that fits in with a wide literature on the effects of transitional factors on transitional justice.

Samuel Huntington argues that a country’s prospects for transitional justice are “shaped almost exclusively by politics, by the nature of the democratization process, and by the distribution of political power during and after the transitions.”[xxxiii] Specifically, he divides third-wave transitions into ‘replacements,’ ‘transformations,’ and ‘transplacements’ and argues that countries will “prosecute and punish” if they fall into the former category, but will “forgive and forget” if they result from the latter processes.[xxxiv] In the context of Eastern Europe, this suggests that Romania and East Germany will pursue retributive justice while the remaining countries will do very little.

# Transitional Justice in Eastern Europe: Present Dilemmas of the Communist Past

Written by Brianna Brown

Writing in 1991, Huntington's predictions fail to explain the choices made by the Eastern European successor regimes. This is partly a result of his methodology; he reduces his selection of transitional justice outcomes to a dichotomy of trials and amnesties, which inaccurately describes the set of outcomes available to post-communist countries. Nevertheless, the logic behind his claim may still prove informative in explaining transitional decisions of these states. 'Transformations' or 'transplacements' suggest a central role for the leaders of existing authoritarian regimes, who acquiesce to the democratic opposition only if they can extract guarantees to protect their interests.[xxxv] Along these lines, Huntington argues, "virtually every authoritarian regime that initiated its transformation to democracy also decreed an amnesty as part of that process." [xxxvi]

However, arguments that focus on the presence of communist parties only at the initial "round-table" talks are vulnerable to another, more interesting, critique. While the role of authoritarian elites in negotiating transitions is common to other countries and regions (e.g. Greece, Argentina, Uruguay, Spain), the democratic regimes in Eastern Europe can be further characterized by their continued inclusion of the interests of communist successors in the institutions and structure of power of the democratic regime. Therefore, while the inclusion of communists at the negotiating table is a relevant argument, what is more important is their persistent entrenchment in the successor regimes. Not only were the communist parties able to extract amnesties and concessions in the transitional negotiations, but also they were also to legitimize themselves as spearheading democratic change, justifying their continued presence in the successor regime. With the sole exception of the Czech Republic, communist successor parties either came to power or were part of the governing coalition in every post-communist country. Barbara Geddes differentiates 'hegemonic party regimes' (such as communism), where former elites are "able to continue their political careers as democratic politicians," with military regimes (such as those in Latin America) where the tendency of former elites is to "return to the barracks." [xxxvii] While the military in these regimes can no doubt continue to influence the new political order, their influence is not as directly entrenched as in regimes where the former elite maintains its political role.

There are several channels through which the personnel continuity between communist and post-communist periods may limit the pursuit of transitional justice, particularly in its robust forms. Most straightforward, the presence of post-communist elites in governance will reduce elite-level political will for comprehensive justice programs. This effect was particularly dominant in Bulgaria and Romania, who each had parliamentary majorities led by communist successor parties in the early years of their transformation. Lavinia Stan remarks how the Romanian Communist Party was the only party to remain "strong and united" during the transition, giving it the organizational capacity to successfully "oppos[e] each and every transitional justice attempt." [xxxviii] Similarly, in Bulgaria, the electoral strength of the Communist (renamed "Socialist") Party led Hristov and Kashumov's to conclude: "there is not sufficient political will to achieve an acceptable degree of justice and accountability for the past." [xxxix]

Furthermore, as coalitions were often dependent on the support of post-communist elites, even anti-communist parties may temper their demands for justice, as the "political necessity of maintaining unity" may take precedence over addressing past injustices. [xl] Transitions in Eastern Europe included not only a political transformation, but also a difficult economic transition from a state to market economy. As the transition was quickly taken over by economic crisis, material needs were often seen as more important than addressing the (highly contested) injustices of the past. [xli] While this consideration is common to other regimes, Eastern Europe was additionally plagued by the fact that the stability of governments, extremely important to monitor the economic transition, was often conditional on acquiescing to the interests of post-communist elites.

In addition to conditioning political will for transitional justice, the presence of communist successor parties indicated that societal demands for justice would also be limited. The very election of such parties to power indicates that there were not substantial demands for criminal justice against communist officials. Indeed, contrary to expectations that former communists would be shunned, voters were instead "sweeping former communists into office." [xlii] Nedelsky provides a plausible explanation for this counterintuitive result: "the more a regime participates willingly in the democratization process, [...] the less likely it is that its former officials will be held accountable for their previous actions in a new democracy." [xliii] By participating peacefully in the round-table negotiations, the former communists bolstered their legitimacy in the new regime; in so doing, they also suppressed popular calls for justice. In this way, the post-communist parties had strategically acted to allay fears that they would be a threat to the new democracies.

# Transitional Justice in Eastern Europe: Present Dilemmas of the Communist Past

Written by Brianna Brown

Instead, they presented themselves as invaluable actors in the new regime.

Finally, even if there were strong popular demands for transitional justice, the presence of post-communist elites in governing positions reduced expectations that any transitional justice program would be meaningful. As Holmes argued, “the way ‘justice’ is defined depends wholly on who holds effective political power.”[xliv] Although popular conceptions of justice may advocate prosecution of certain individuals, when these same individuals hold political power, it is thus unlikely that the ‘official’ definition of justice will align with the popular conception of what justice ‘should’ entail. As such, even when citizens desired robust forms of transitional justice, the presence of former communists (i.e. former perpetrators) in power reduced expectations that any such desires could be reasonably fulfilled.

## *Discussion of cross-regional implications for Transitional Justice*

Without diving too deep into regional absolutism, this section has shown several dimensions along which the communist regimes of Eastern Europe generally differed from other regions that have plausible implications for the pursuit of post-communist transitional justice. They were long, deeply institutionalized, and totalitarian. This increased the proportion of individuals who could be conceivably presented as ‘complicit’ in the communist regime, at the same time as it decreased the strength of civil society. Moreover, while these regimes were victim to many serious rights abuses, there was a post-1956 shift in the type of repression that most consistently characterized the regimes from clearly identifiable crimes against humanity to more subtle forms of co-option, surveillance, and pervasive societal control. In addition, while there was some variance in the forms of transition pursued by Eastern European states, the results of these transitions were similar; the communist party was not generally discredited as a legitimate political actor but rather maintained an institutionalized presence in governance. This gave them greater influence over transitional justice trajectories than in regimes where the transition away from authoritarian rule was seen to demand significant personnel discontinuities between the former and successor regimes.

While some of these characteristics were shared by other transitional societies, the essay argues that the cumulative effect presents a plausible explanation as to why the Eastern European countries opted for a distinct form of transitional justice, arising from barriers against the two main categories of transitional justice – prosecutions and truth-telling. As suggested by much of the discussion above, prospects for retributive justice were substantially limited. Calls for truth-telling were also limited. While truth commissions are generally celebrated as being a victim-centred form of justice, the pervasive nature of the communist regimes, and the degree to which so many people could be implicated in its widespread networks of complicity, effectively blurred distinctions between victimhood and responsibility. Rather than leading to societal reconciliation, many citizens feared that truth revelation “had the potential to cause explosive conflict within the new states.”[xlv] In this way, while prosecutions and truth-telling are often seen as opposite ends of the transitional justice spectrum, the totalitarian pervasiveness of the communist regimes served to limit both forms of justice.

Nevertheless, the fact that these societies were limited in their quest for justice did not make transitional justice irrelevant. As O'Donnell and Schmitter assert:

“It is difficult to imagine how a society can return to some degree of functioning which would provide social and ideological support for democracy without somehow coming to terms with the most painful elements of its own past.”[xlvi]

However, the particularities of the communist period meant that, in order to ‘come to terms’ with their past, these societies would have to innovate a form of transitional justice that was politically feasible within the constraints of their particular experience. “The apparently obvious answer,” according to Grodsky, “was lustration.”[xlvii]

Whereas trials may be seen as appropriate for gross human rights abuses, they are ill suited for the relatively low-level abuses that tended to categorize the bulk of communist crimes. Lustration – as a “lesser form of retribution” – might satisfy this dilemma.[xlviii] As lustration falls under civil law, there is a “lower threshold of procedural protections” than mechanisms using criminal law.[xlix] Compared to extravagant truth commissions, on the other

# Transitional Justice in Eastern Europe: Present Dilemmas of the Communist Past

Written by Brianna Brown

hand, it was more digestible to the public, as it would target only those who wished to participate in politics or other public life, rather than threatening to expose the behaviour of everyone who in some way was associated with illicit acts. In this way, lustration can be seen as a middle-ground policy between the extremes of criminal prosecutions and truth commissions, both of which were limited by the totalitarian nature of the previous regimes. Nevertheless, advocates of lustration still had to confront the established presence of communist successor parties in public life, a topic that I will address in the following section.

## Transitional Justice in Eastern Europe

While the previous section aimed at identifying the dimensions along which Eastern Europe as a whole was distinct from other contemporary trajectories of transitional justice, the experience of this region (like any region) was not uniform. These states shared important similarities – such as the long duration and institutionalized nature of the previous regime, which constrained the democratic trajectories of these states in a similar manner. However, the communist regimes of Eastern Europe were by no means identical. Broad inter-regional comparison should not obscure important features of internal variation between these states. Specifically, although human rights abuses were generally of a different character in Eastern Europe than they were in Latin America, there were important differences in terms of the intensity and timing of human rights abuses within this region. If these factors had an effect on differentiating the region as a whole from other regions, it is reasonable to assume that within-region variation along this dimension may also contribute to within-region differences of transitional justice outcomes. Similarly, if the inclusion of prior regime elites in the new structures of power differentiates post-communist regimes from post-military regimes, it is also reasonable to expect that differences in the level of personnel continuity between these regimes should lead to different outcomes.

In this section, the essay shifts focus from a cross-regional perspective to a within-region perspective, to determine the reasons for internal variation in post-communist experiences with transitional justice. After a brief survey of the mechanisms pursued in various countries, it considers both the nature of human rights abuses and the salience of communist successor interests in the newly democratic regimes. In this sense, the essay compares the relative weight of the political past and the political present. Broadly, it finds that while the characteristics of the previous regime were most determinative in constraining the set of transitional justice options available to post-communist societies, it was the role of communist successor parties that had the greatest effect on the internal diversity within the aforementioned broad regional trend toward lustration.

### *Survey of Transitional Justice Mechanisms*

It is appropriate at this point to present a brief survey of the transitional justice mechanisms that were pursued in various countries in Eastern Europe. The essay briefly considers the record of prosecutions and truth commissions, to show that while they were not absent from the Eastern European context, they were not widespread. It then presents the timing and intensity of various lustration laws in this region. There was significant heterogeneity within the region, and this survey provides a basis for further analysis.

Across the board, the transitions from communist rule were quickly followed by several, largely symbolic, acts of transitional justice. Every regime officially denounced the past regime, through legislative acts declaring, posthumously, its illegality and every regime declared official state apologies.<sup>[i]</sup> In addition, several countries offered legal rehabilitation for political criminals of the prior regime. Notable among these was the rehabilitation of Imre Nagy in Hungary, Alexander Dubcek in Czechoslovakia, and Stanislaw Stomma in Poland.<sup>[ii]</sup> Seemingly inconsequential, these acts nevertheless “correct a public record, afford public acknowledgment of a violation, assign responsibility, and reassert the moral baseline to define violations of basic norms.”<sup>[iii]</sup> Moreover, official denunciation opens the door for more robust forms of transitional justice, by declaring discontinuity with the previous regime. The region-wide adoption of this mechanism demonstrates that the post-communist regimes were not uniformly opposed to transitional justice per se. The pursuit of other forms proved more difficult.

Indeed, the only country that was able to successfully pursue both prosecutions and truth commissions was (East) Germany. Following its reunification, Germany pursued trials of both high-ranking officials (e.g. Erich Mielke, Egon



# Transitional Justice in Eastern Europe: Present Dilemmas of the Communist Past

Written by Brianna Brown

Krenz) and lesser officials responsible for the execution of egregious rights abuses, particularly the prosecution of the border guards implicated in shooting to death regime escapees.[liii] Germany established its truth commission in 1992, to become the first of only two post-communist states to engage in this form of justice.[4] The comparative success of Germany is widely understood to result from the incorporation of East Germany into a pre-established consolidated liberal democracy – a substantial difference in post-communist experience which restricts the comparability of this case with its neighbours.[liv] Germany is thus often excluded from regional comparisons. The essay considers this case instructive as an approximate counterfactual for what transitional justice might look like in this region in ideal circumstances; reunification mitigated constraints arising both from the weight of the past and also from the continued role of communists in government. Nevertheless, detailed comparison remains problematic, and from this point on the essay largely limits consideration of this case from its within-region analysis.

Apart from Germany, trials were quite limited as a transitional justice mechanism, as attempts to establish prosecutions were met with moral and legal resistance. The most significant efforts were pursued in the Czech Republic who prosecuted a former Prime Minister, Lubomir Strougal, for abuse of power; he was acquitted for lack of evidence.[lv] Several investigations were also held in Hungary, though the statute of limitations precluded the investigation of any communist crimes except those “related to the 1956 events, [and] classified as ‘crimes against humanity’ or ‘war crimes.’”[lvi] In Poland, a 1991 law allowed for investigations of “Crimes against the Polish Nation.”[lvii] However, most cases “were quietly dropped for lack of evidence, while others went on for years only to end (repeatedly) without convictions.”[lviii] In Romania, apart from the appalling show-trials of Nicolae and Elena Ceaucescu, trials focused on the violence surrounding the 1989 transition rather than crimes under communism.[lix] In Bulgaria, the few prosecutions focused on economic crimes rather than human rights violations.[lx] Finally, the only example of criminal prosecution in Slovakia was the 2001 conviction of abuse of office against Alojz Lorenc, who had previously been deemed guilty in the former Czechoslovakia.[lxi] This survey is brief, but demonstrates that the prosecutorial path was indeed limited in Eastern Europe with only Germany, and to a certain extent the Czech Republic, launching serious efforts at criminal accountability.

Lustration laws were a more salient form of transitional justice, both in parliamentary debate and in law. At present, every country in question has adopted some sort of screening process for political office. However, there was substantial variance in the timing of these laws. In 1991, Czechoslovakia was the first country to adopt a lustration law, which was upheld only by the Czech Republic after the country’s division in 1993; Slovakia did not adopt credible legislation until 2003.[lxii] Hungary and Poland both considered adopting lustration early on, but the process was stalled by political problems. Both countries ultimately adopted lustration in the mid-1990s – Hungary in 1994 and Poland in 1997.[lxiii] Bulgaria and Romania entered the lustration game quite late, with Bulgaria adopting its law in 2001, and Romania only in 2012.[lxiv]

In addition to variance in the timing of lustration laws, these laws differed greatly in their scope and intensity. As Monika Nalepa identifies:

“In general, lustration laws can be described by three parameters: All persons in set *X* are screened for committing action *y* in the past, and if the screening procedure finds a person in *X* responsible for engaging in action *y*, he or she faces sanction *z*.”[lxv]

Along the *X* parameter, the Czech lustration law, which applies to all citizens who “[receive] compensation out of the state budget and [hold] a managerial position,” can be seen as ‘stronger’ than laws that only screen for legislative and other top official functions, such as in Poland.[lxvi] The Czech law was also strongest along the *y* dimension, as it applied to all secret police officers, informers, Party officials, and members of the People’s Militia; in contrast, the Hungarian law was limited to informers of a single division of the secret police.[lxvii] Finally, along the *z* dimension, the Czech law resulted in a permanent ban from public life, whereas the Polish law only resulted in a ban “in the event of a false declaration.”[lxviii] This is stronger still than the Hungarian law, which had no official sanction beyond “revealing the fact of collaboration to voters.”[lxix]

*Explaining the Variance: Weight of the Past vs. Politics of the Present*

# Transitional Justice in Eastern Europe: Present Dilemmas of the Communist Past

Written by Brianna Brown

This preliminary survey demonstrates that, while other transitional justice mechanisms were often (nominally) present, the countries of Eastern Europe did indeed move towards lustration. While the transitional justice methods used in the region as a whole can be seen as distinct from other regions, this survey also shows important and relevant internal variation within these countries. The essay now compares these results with two prevalent explanations: the 'weight of the past' and the 'politics of the present.'

As elaborated above, some authors have argued that the severity and timing of rights abuses determine the extent of transitional justice. It is plausible that variation along this dimension could equally explain variation in the extent of lustration laws. However, with consideration of three countries – Poland, Hungary, and the Czech Republic – Monika Nalepa determines this not to be the case. If the timing of lustration were to be determined by the timing of abuses, the comparatively recent experience under martial law in Poland (1981-1983) would provide the strongest case for lustration. Conversely, if the severity of abuses were responsible, we would expect lustration to be most severe in Hungary, which experienced the most extreme singular case of communist-era rights abuses during the Hungarian Uprising, with over 4000 dead, 35 000 detained, and 22 000 given criminal sentences in 1956 alone.[lxx] Contrary to both these predictions, the strongest and most immediate lustration law was passed in the Czech Republic, which had neither recent nor comparatively severe rights abuses. This country had an intermediate status in terms of both timing and severity; the aftermath of Prague Spring (August 1968 – mid-1970s) resulted in 90 deaths and a complete administrative purge.[lxxi] These results call into question the explanatory power of 'politics of the past.'

In contrast, 'politics of the present' arguments focus on the political realities in the new regimes, particularly the electoral strength of former communists. As preliminary support for this theory, consider that the strictest forms of transitional justice were pursued in the Czech Republic and Germany, precisely the two countries in which communist successor parties did not come to power. The Czech Republic is additionally interesting as its trajectory differed significantly from that of Slovakia, with whom it shared the same communist past, the same transitional moment, and the same initial lustration law in 1991 – which was strongly enforced in the Czech Republic but ignored in Slovakia. In Slovakia, the post-Divorce balance of power had shifted from anti-communist dissidents to 'reformed communists.'[lxxii] In particular Slovakia's first Prime Minister, Vladimir Meciar, was strongly associated with the communist-era secret police apparatus.[lxxiii] As other differences between these two countries were controlled by their shared Czechoslovak past, it is reasonable to conclude that the electoral strength of communist successor parties is responsible for the delayed adoption of lustration in Slovakia, and the weakness of the law once it came to place.

The case study of Romania is also instructive. Romania was considered one of the most repressive regimes in communist Europe, and was the only regime to have a violent transition. Consequently, 'politics of the past' arguments would predict this country to engage in robust forms of transitional justice with a strong lustration law. Moreover, Huntington specifically predicts Romania to punish the old regime, as it followed a 'replacement' style transition.[lxxiv] However, though draft laws were proposed in 1996, 2002, and 2010, Romania did not pass its lustration law until 2012.[lxxv] Huntington's theory fails in this case; the replacement effect was undermined by the fact that the Ceaucescu regime was 'replaced' by a second-rank communist, Ion Iliescu, rather than a full democratic regime. More generally, although a country may have good reason to pursue a strong lustration law, this episode demonstrates that, no matter the moral prerogative, transitional justice requires sufficient political will.

While the arguments for (and against) lustration were similar across the various Eastern European regimes, the experience of these countries differed substantially in their application of lustration laws. One may predict differences to coalesce around structural arguments, such as the nature of rights abuses or the timing of these abuses. This does not explain what happened in Eastern Europe. With attention to the more proximate past, Huntington argues that the form of a country's transition may explain these differences, highlighting the balance of power between old and new elites. Although it also fails to explain transitional patterns in Eastern Europe, his balance-of-power argument remains intriguing. The essay ultimately finds that the balance-of-power during the transition matters less than the balance-of-power in the succeeding government structures. Former communists were able to maintain political legitimacy in the new democracies, and were thus able to play an active role in shaping the debates on transitional justice.

# Transitional Justice in Eastern Europe: Present Dilemmas of the Communist Past

Written by Brianna Brown

## *Implications for 'Transitional Justice'*

Because lustration was specifically aimed at limiting the inclusion of communist successor parties in current governing structures, the extent to which these parties were present in government tempered the ability of these states to engage in lustration. Interestingly, the presence of these parties did not mean that lustration laws would be limited to periods in which 'anti-communist' parties had majorities; in Hungary, Poland, and Romania, it was the communist successor parties themselves who passed legislation. Monika Nalepa provides insight to this counter-intuitive phenomenon:

"If the Polish and Hungarian ex-communists anticipated losing power to anticommunist forces [...] the post-communists could shield themselves from excessively harsh legislation by preemptively passing a less punitive version of lustration than the anticommunists would have." [lxxvi]

While the essay does not examine her argument in full, this short excerpt highlights a key insight: successor parties could not only block liberal attempts at legislation, but could further determine the specific content of lustration laws. In this way, lustration laws had a similar function to amnesties passed by an outgoing authoritarian regime; they were pursued not as a concrete way to deal with the past, but rather to protect the interests of elites of the former regime. Perceived in this way, lustration laws have worrisome implications for the execution of 'justice' in Eastern Europe. When they were passed by liberal democratic parties (such as in the Czech Republic) they may promote justice; however, when they are passed by successor parties, their effect is more likely to be the opposite.

This exemplifies a widespread critique to lustration: its susceptibility to politicization. As lustration laws have the ability to systematically exclude large numbers of actors from the political stage, they are inherently vulnerable to political manipulation. Indeed, rather than satisfying legitimate moral aims, these laws have been manipulated in almost every country to delegitimize the political opposition. Csilla Kiss argues that Hungary's first lustration law, adopted near the end of the conservative government's first term, was "clearly intended to pose a significant threat to the post-communist Socialist Party that by then scored very high in the polls." [lxxvii] In Poland, revelations that lustration laws would harm the current government as much as the post-communist party caused the initially supportive country to drop proposed laws. [lxxviii] Even the relatively 'clean' lustration law in the Czech Republic was instrumentalized by the center-right "to discredit political rivals." [lxxix] Such widespread manipulation has led Brian Grodsky to conclude: "Politicization of lustration has been almost commonplace." [lxxx]

The implications of politicizing lustration call into question its classification as a mechanism of transitional justice; perhaps it would be more appropriate, as Roman David quips, to classify lustration as "Transitional Injustice." [lxxxi] Beyond specific cases of deliberate manipulation, the very fact that lustration policies are effectively designed to exclude numerous actors from the political process could easily be interpreted as "encouraging anti-democratic trends." [lxxxii] Along these lines, it is widely contested to what degree lustration policies conform to democratic standards and the rule of law. Rule of law guarantees that each individual be "judged individually, treated equally, and extended the full protection of due process." [lxxxiii] In stark contrast, lustration encourages collective punishment based purely on an individual's previous political association. While derogations from rule of law may be permissible, if they are justified by other democratic concerns, it is not clear that the supposed benefits of lustration outweigh such concerns. Indeed, in the face of political manipulation, arguments that lustration "morally cleanse[s] the state" or "reduce[s] corruption and abuse of power" fall flat. [lxxxiv] While the specific circumstances of Eastern Europe have limited the extent to which other mechanisms could be pursued, it is doubtful that lustration has been able to successfully satisfy societal needs for transitional justice in the post-communist world.

## **Conclusion**

This essay examined the pursuit of transitional justice in Eastern Europe, with attention to both broad trends and internal variance. Emerging from a long period of authoritarian repression, these countries faced similar challenges to other third-wave democratizers in confronting the legacy of the prior regime. However, as Czarnota astutely remarks, "while dealing with the past sounds like a universal problem, behind it are always particularities – local settings, relations, and structures." [lxxxv] The essay thus considered particular characteristics of Eastern European regimes,

# Transitional Justice in Eastern Europe: Present Dilemmas of the Communist Past

Written by Brianna Brown

both before and after their transitions: the duration of the regimes, the timing and scope of rights abuses, the transitional moment, and the post-transition balance of power between communist and oppositional forces. It determined that these general differences between Eastern Europe and other regions were highly relevant in constraining the transitional justice options that were available to post-communist actors. Regime characteristics limited both the legal capacity to engage in prosecutions, and popular pressures to engage in truth revelations due to vast networks of popular participation in the communist regimes. Developments during and following the transition consolidated these trends, as the inclusion of former communists in the new regimes further suppressed both supply and demand for justice.

With other mechanisms severely limited by prior structural conditions, policies of lustration were highly attractive. Specifically, lustration had the potential to curtail personnel continuities that might otherwise compromise the liberal characters of these regimes. This value was emphasized in the inaugural speech of the 1991 Czech lustration law: "The only way to prevent blackmail [and] the continued activity of StB [secret police] collaborators, [...] is to clear the government and legislative bodies of these collaborators." [lxxxvi] However, as the essay demonstrated in the second section, lustration was not always pursued for such noble reasons; more often lustration became "a stick with which one group of would-be leaders was attempting to beat another." [lxxxvii] While consideration of prior regime characteristics was well suited to define which transitional justice mechanisms were available to Eastern Europe, the specific articulation of lustration policies was determined by current political incentives. As such, the pursuit of justice was frequently manipulated to fulfill political ends.

This has important implications for the study of transitional justice. De Brito and Whitehead critique the scholarly tendency to perceive transitional justice "as 'a good thing' tout court," and claim, instead, that "not all transitional justice policies serve to improve human rights and democratic conditions." [lxxxviii] While all societies emerging from authoritarian rule may have a right to justice, context-specific variables limit the extent to which justice may be served. In the Eastern European context, there was a clear tendency towards lustration: a transitional justice mechanism that is particularly susceptible to politicization. Consequently, the acquisition of justice in post-communist Europe has been minimal. While this conclusion may seem bleak, the essay does not claim that the lack of comprehensive justice is in any way fatal to democracy in the region. However, it maintains that there is a region-wide deficit in transitional justice, and there remains considerable cause to address more completely the authoritarian legacies of post-communist Eastern Europe.

[1] This paper defines "Eastern Europe" to include the Soviet satellite states of Poland, East Germany, Czechoslovakia, Hungary, Romania, and Bulgaria. It thus excludes the successor states to the former Yugoslavia as well as the former Soviet republics such as the Baltic States. This helps control for within-region variation as these excluded states had substantial differences in both their experience under the communist period and also in their transitions to democracy.

[2] 'Lustration' refers to the exclusion of members or collaborators of the previous regime to positions of public office in the new regime.

[3] While Stalin died in 1953, the 'Stalinist period' continued to 1956, when Khrushchev announced thorough policy changes, including relative liberalization and de-Stalinization.

[4] The other country to establish a truth commission was Romania, in 2006.

[i] "What Is Transitional Justice?" International Center for Transitional Justice. 2014.

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Written by Brianna Brown

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