

Determinants of Post-Communist Transitional Justice: An Overview

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Abstract: Twenty-five years after the collapse of the communist regimes, there is a wide diversity among countries in Eastern Europe and the former Soviet Union when it comes to the methods they have adopted to confront their communist past, the timing of their transitional justice policies, as well as the progress they have registered to date. Some countries have adopted radical lustration programs banning numerous communist officials and secret agents from post-communist politics, while others have failed to publicly identify former secret informers from among post-communist politicians. Some countries have opened a wide range of secret archival collections, while others have kept most of the files hidden from the public eye. Some countries have convicted communist-era decision-makers and their willing executioners, while others brought very few communist-era human rights abusers to trial. This presentation discusses the main determinants proposed to date in an effort to explain the differences among transitional justice programs enacted in post-communist countries.

During the first 25 years after the collapse of European communist systems, a number of authors have tried to explain why different post-communist countries responded to their pasts in widely different ways at widely different speeds. Countries in Eastern Europe and the former Soviet Union were considered ideal from a comparative point of view because, with the notable exceptions of Belarus and some Central Asian republics that reverted to some form of dictatorship, they all experienced similar repressive communist regimes roughly at the same time, effected regime change in the relatively short period of time between 1989 and 1991, and chose to implement roughly similar political, social and economic transition programs afterwards. Post-communist countries in Eurasia have thus provided researchers with quasi-experimental conditions ideal for undertaking comparisons and establishing correlations. It is therefore not surprising that to date the vast majority of studies seeking to identify the determinants (predictors) of transitional justice employ countries located in that region as their empirical cases. The manifold similarities shared by these countries mean that, for comparative purposes, at least some factors can be assumed to behave as control variables with no (or little) explanatory value. For example, the presence of a communist regime in these countries cannot by itself represent a plausible predictor for the significantly different transitional justice programs they have implemented since 1989, since constants cannot predict variation. For “political regime” to predict differences in transitional justice programs, there should be some variation among countries with respect to the regimes they experienced before 1989.

The explanatory theories proposed to date by various authors have gone a long way in helping us to understand the conditions that facilitate or block the process of coming to terms with the human rights violations perpetrated by the communist regimes (sometimes referred in the region as “de-communization”). At the same time, however, they also suffer from a number

of serious shortcomings. Let me mention here what I consider to be the seven most important such shortcomings. First, the vast majority of these theories contrast the performance of only a handful of post-communist countries, sometimes selected because of reasons having to do with the researcher's familiarity with some local languages or personal interest in specific countries more than with a specific concern to maximize methodological rigor or to increase theoretical mileage. Second, most of these theories focus primarily on the 1990s, that is, the first decade of transformative policies designed to move Eastern Europe and the former Soviet Union away from communism and closer to democracy, and therefore are unable to speak about transitional justice policies adopted at a later date, the so-called "late" reckoning programs. Third, many of these theories reduce transitional justice to court trials against former communist decision-makers, lustration (a governmental policy that bans former communist officials and secret agents from occupying public office in post-communist times), or a combination of the two. These theories, therefore, ignore a host of other important reckoning practices and processes such as access to secret files, property restitution, public identification of former secret agents, rehabilitation and compensation of former victims, rewriting history textbooks, reconciliation programs, and memorialization.

Fourth, very few of these theories consider non-cases, that is, countries that have systematically avoided the need to confront their (communist) past, although non-cases can confirm, as well as supplement, the list of factors that impede reckoning identified by examinations of cases. Because of this blindness toward non-cases, countries like Albania, Ukraine, Moldova, and the republics in the Caucasus and Central Asia remain understudied by transitional justice specialists. Fifth, none of the theoretical explanations proposed to date fully ascertains the differential input of domestic and international factors, of state versus non-state

actors, of multiple repressive pasts characterized by varying degrees of oppression, or of cross-country diffusion -- topics that only recently have come to the attention of transitional justice scholars. Sixth, all these theories examine efforts to reckon with the legacy of one single type of dictatorial regime that evolved as a result of particular historical circumstances – more specifically, European communist regimes generally characterized by “deep repression” during their first decades of existence and by “wide repression” during their late phases, to use Rosenberg’s (1995) terms. These studies, therefore, might not be directly applicable to cases drawn from other regions of the world, where the political regime that must be reckoned with exhibited different features. Last, none of these theories is able to comment on the interaction between various determinants and its significance to explanatory models, since interaction per se has not yet figured on the research agenda of transitional justice scholars.

Explanatory Theories

Explanatory theories have been grouped together according to two broad typologies. Some authors, including myself, suggested that these theories tend to underscore the importance of either the “politics of the past” or the “politics of the present,” with only the most recent theoretical frameworks examining the simultaneous impact of both the past and the present on the pace and scope of post-communist transitional justice (Jaskovska and Moran 2006; Nedelsky 2004; Stan 2009). Other scholars distinguished four main categories, which divide among “theories of relative elite power, theories of state structure, social structure theories, and elite strategy theories” (Loyle 2013, vol. 1, p. 153), each characterized by different assumptions, commissions and omissions. While relatively intuitive, these two typologies tend to group explanatory theories according to a specified main determinant, but in order to do that they

ignore the effect played by the time when different theories have been proposed. Time seems important, nevertheless, both because it forced theorists to look only at the transitional justice programs implemented before they developed the explanation, and because different theorists did not work in isolation from each other, but rather painstakingly surveyed the literature published up to that moment, took issue with its limitations, and tried to address them. Let me therefore survey key contributions to this literature in the chronological order in which they were published, keeping in mind that this overview might not be comprehensive.

In 1991, Samuel Huntington claimed that three types of transition from authoritarian rule characterized the “third wave” of democratization, which included Eastern Europe, and that the outcome of the so-called “torturer problem” was predicted by the type of transition a society underwent toward democratization. In what he called the Hungarian and Bulgarian “transformations,” Huntington argued, communist leaders took the lead and changed those regimes into democracies. In the East German and Romanian “replacements,” much more rigid communist governments lost strength until they collapsed or were overthrown by revolutionary forces. Finally, in the Polish and Czechoslovak “transplacements” democracy was brought about in roundtable negotiations between weak communist regimes and weak oppositional forces, because there neither the regime nor the opposition was powerful enough to enforce its vision alone. Huntington found that, in essence, “justice was a function of political power,” and that transitional justice was determined by type of transition (exit) from communism to democracy. While officials of regimes that transformed themselves were able to declare amnesties in view of protecting their position, and transplacements involved some kind of amnesty as part of the negotiated transition, officials in replaced regimes were not in a position to demand anything. Hence, of the three types of transition he identified in Eastern Europe Huntington singled out

replacements as most likely to result in the prosecution of authoritarian officials. Consistent with his prediction based on transition type, Huntington noted that, “in Eastern Europe, apart from Romania and East Germany, the initial overall tendency was to forgive and forget” (1991, p. 228). The weaker an authoritarian regime was at the time of the transfer of power to democratic forces, the more likely officials and collaborators would be held accountable for their acts of oppression.

As the first to explain why different Eastern European countries took different paths in reckoning with communist crimes, Huntington’s framework has continued to receive attention. Being the first, however, was its Achilles’ heel, since his predictions were based on the initial transitional justice practices alone and thus could not factor in later developments. While Huntington predicted swift reckoning in Romania, for example, the country remained a laggard in terms of transitional justice initiatives, including trials of former decision-makers, the method he looked closely at. There were also problems with the way in which he interpreted some data. For example, the trial of the Romanian communist dictator Nicolae Ceausescu, which Huntington discussed at some length as proof of that country’s resolute efforts to come to terms with communist human rights abuses, was subsequently criticized as a show-trial that served only poorly the Romanians’ need for justice, truth and reconciliation (Stan 2013).

In 1994, John Moran replied to Huntington by arguing that structural factors such as the extent to which a communist country tolerated dissent and emigration before 1989 determine the scope of post-communist transitional justice. Moran discussed the importance of the psychological variables of “voice” and “exit” in explaining the appetite for vengeance after 1989. He found that in Eastern Europe “the tendency to forgive and forget can be found in those countries – Poland, Hungary – where either exit and/or voice were allowed under the former

regime. In countries where neither exit nor voice was allowed – Bulgaria and Czechoslovakia – calls for punishment predominated” (Moran 1994, p. 101). The more liberal were the communist leaders before 1989, the more lenient was the citizenry, and the less willing were voters to exclude those leaders from post-communist politics through lustration and to bring them to justice after the regime change. By contrast, Moran suggested, the more a regime silenced dissent and kept its citizens captive in the country, the more inclined the population to seek retribution and hold former communist officials accountable.

Moran’s focus on the nature of the regime to be reckoned with was an intuitive corrective to Huntington’s exclusive emphasis on the type of transition (the “exit from communism” moment), since transitional justice has to be tailored at least in part to the crimes it seeks to redress. The absence of a specific past crime means there is no need for later reckoning programs geared on redressing such a crime. Where the state did not abusively confiscate property from private individuals or minority communities, for example, there is no need for property restitution. Similarly, where the state did not use secret political police forces to constantly monitor the activity of its citizens, and therefore did not amass secret archives, there is no need and no possibility for giving ordinary citizens access to the secret files. At the same time, more egregious crimes committed by more repressive regimes call for more sweeping reckoning programs that benefit a larger number of victims.

Subsequent analyses moved away from Huntington’s preoccupation with the transition type and Moran’s focus on the nature of the communist past to emphasize the impact of post-communist factors, including political competition and electoral calculations. In an effort to explain later reckoning with the communist past and to move away from static explanations unable to account for continued interest in coming to terms with communist crimes years after

the regime change, these analyses acknowledged the wide plethora of new transitional justice programs enacted across the former communist bloc, especially lustration and access for ordinary citizens to the secret files compiled on them by the communist secret services with the help of secret agents drawn from all walks of life. Several such explanations belong to the “politics of the present” category, which privileged the relative balance of power between incoming and exiting elites.

Helga Welsh was the first to consider the simultaneous impact of multiple determinants related to both the communist past and the post-communist present. In 1996, she proposed that the “politics of the present” played a greater role than Moran’s nature of the communist regime or Huntington’s exit from communism in determining a country’s choice for or against lustration, the transitional justice policy that turned into a litmus test for the region. After surveying a number of Eastern European countries, Welsh noted that the reasons for favoring lustration were related to the post-communist party struggle for political power, although calls for banning leaders and spies of the *ancien regime* almost always made reference to the communist past. For Welsh, “the weaker the electoral strength of the former communists, the easier it has been to move ahead with de-communization [that is, transitional justice] efforts” (Welsh 1996, p. 422). The trend resulted in significant country differences across the region. Czechoslovakia could adopt radical lustration early on because there the communist camp was weakened and de-legitimized. By contrast, in the Balkan countries of “Bulgaria and Romania, where former communists have continuously been able to garner substantial electoral support, issues of lustration and prosecution of crimes committed under communist rule have added to the already substantial political polarization” (Welsh 1996, p. 422). Welsh discounted the possibility of countries enacting lustration as long as former communists controlled Parliament, the body

called to vote the screening bills, but at the same time she believed that, instead of disappearing as time passed, lustration could become even more salient if used by different post-communist politicians against their rivals.

While not specifying in much detail the actual mechanism through which post-communist political calculations convinced various actors to advocate reckoning, and while completely ignoring non-judicial programs and focusing mostly on lustration and court trials, Welsh's model relied on an important observation. The more Eastern Europe moved away from the 1989 moment, and the more those countries dismantled repressive communist institutions and replaced them by liberal democratic ones, the weaker was the influence of the communist regime and of the 1989 moment on a country's transitional justice trajectory, and the stronger the impact of political calculations centered on post-communist electoral gain. In short, the passage of time had apparently allowed moral concerns for the welfare of the former victims and the need to right past communist wrongs to be displaced by what many saw as the immoral concerns of the anticommunist political formations to score short-term electoral gains and to outdo their political opponents in view of retaining political power and their influence in government.

Building on Welsh's theory, which suggested that a key factor explaining the progress of transitional justice was the electoral strength of the former communists, Kieran Williams, Aleks Szczerbiak and Brigid Fowler argued that the variables determining the adoption of lustration legislation in Central Europe were the differing access of former opposition groups to power and their ability to put together a coalition supportive of lustration. In 2003, the three researchers refined Welsh's theory by identifying the circumstances under which lustration can be instrumentalized as part of the political game, and specifying the motives animating advocates of screening procedures. They noted that the countries that pursued lustration more vigorously – the

Czech Republic, Hungary and Poland – differed in terms of their past communist experiences and transition type, but faced identical demands for lustration during the early 1990s. For them, “these demands were translated into legislation at different times, and varied considerably in the range of offices affected and the sanctions imposed” (Williams, Szczerbiak and Fowler 2003, p. 3). Because of the pervasive networks of secret informers and the continuous political prominence of unrepentant communist leaders, “many of the political divisions in the newly-democratizing East European societies were expressed by reference to the old regime,” and “attitudes to the past developed into an issue on which parties cooperate and compete” (Williams, Szczerbiak and Fowler 2003, p. 3). Therefore, the adoption of a lustration bill depended on the ability of its most ardent advocates to persuade a heterogeneous parliamentary plurality that the safeguarding of democracy required it. Whereas Huntington and Moran believed that the past decided the timing and strength of transitional justice, Williams and his colleagues noted that none of the five “sources of the demand for lustration” they identified “had much to do with the nature of the preceding regime or the exit from it” (Williams, Szczerbiak and Fowler 2003, p. 15). As they wrote, lustration could result from five different sources: 1) public scandals involving the security services, 2) disillusionment with post-communist outcomes among elites, 3) the political needs of the post-communist right, 4) the impact of earlier lustration efforts, or 5) a public demand for information.

This study represented a step toward further clarifying the predictive power of the “politics of the present” variable. However, because it understood transitional justice as lustration exclusively, it also erroneously suggested that the vetting of former communist decision-makers and secret agents from post-communist public office had remained the cornerstone of the post-communist transitional justice process a decade and a half after 1989,

although by the time this study was published a much wider variety of programs had been implemented by both state and non-state local actors. More importantly, whereas Welsh argued that support for lustration could mount primarily from within the ranks of the anti-communist opposition, Williams, Fowler and Szczerbiak (2003) recognized lustration as a policy palatable to both former communists and former dissidents. In all three countries, they pointed out, lustration bills were initiated by anti-communist opposition forces, but subsequently these bills had to be modified and mollified in order to become acceptable to a sufficiently large parliamentary majority. Nalepa developed this point further in 2005 (see below).

In 2004, Nadya Nedelsky was the first author to factor in the neglected implementation of lustration laws, recognizing that ex-communist countries face tremendous difficulties in enacting any kind of legislation, let alone laws that restrict the political rights of former communists. The comparison of the Czech Republic and Slovakia, two countries that shared a common communist past but had significantly different post-communist experiences after the breakup of the federation in early 1993, allowed Nedelsky to control for both the nature of the old regime and the type of exit from communism. Whereas Huntington and Moran considered the past, and Welsh, Williams, Szczerbiak and Fowler considered the present as primary determinants of lustration, Nedelsky drew a link between past and present by arguing that “a stronger influencing factor affecting lustration, responses to crimes committed under communism, and levels of access to secret police files is represented by the level of the preceding regime’s legitimacy, as indicated during the communist period by levels of societal cooptation, opposition or internal exile, and during the post-communist period by levels of elite re-legitimization and public interest in ‘de-communization’” (Nedelsky 2004, p. 65). She spelled out the mechanism translating regime legitimacy into lustration as follows:

The higher a society's view of the previous regime's legitimacy, the lower its motivation to pursue justice for its authorities and the higher the likelihood, in a democratic context, that it will allow elites associated with the former regime to return to the political stage. These elites, in turn, would not be particularly likely to support vigorous transitional justice. Therefore, the more quickly they regain power, the less likely a legal framework will be established to screen such elites out of the political sphere over time. Conversely, the lower the society's view of the previous regime's legitimacy, the more likely it is to have both an anti-communist counter-elite to offer an alternative to communist successor parties and to offer electoral support to this counter-elite. In turn, these elites would certainly be more likely than the communist successor elites to pursue 'de-communization' (Nedelsky 2004, p. 88).

To prove the validity of her theory outside the Czech and Slovak cases, Nedelsky applied it to Poland, Hungary and Romania, countries with different types of communist regimes that translated into different levels of regime legitimacy during late communism and early post-communism. She then concluded that legitimacy is a stronger predictor in countries that previously had bureaucratic-authoritarian (Czechoslovakia) or national-accommodative (Hungary, Poland and post-1968 Slovakia) communist regimes than in countries with patrimonial communism (Romania).

The following year, in her doctoral thesis defended at Columbia University Monika Nalepa (2005, republished in 2010) explained the puzzling behavior of Polish and Hungarian successors to the Communist Parties, which first insisted on immunity from transitional justice as the price of supporting liberalization and democratization, and then implemented the very screening policies they raised initially against, by proposing an argument drawing on rational choice and game theory. A decade earlier, Welsh (1996) had discarded the possibility that the former communists could ever support lustration or any type of policy that might affect their post-communist political fortunes. Continuing the work of Williams, Szczerbiak and Fowler (2003), Nalepa (2005) determined that when former communists anticipated losing power to anti-communist forces, as was the case in Hungary in 1994 and in Poland in 1997, they tried to

appease a pivotal median political party in order to prevent harsher legislation favored by hardline anticommunists. Thus, she concluded, the former communists behaved rationally by initiating less punitive versions of transitional justice than their anti-communist rivals would. For the former communists, support for lustration was not the result of the desire for an honest reexamination of the communist past, but a pre-emptive strategy designed to protect their post-communist political careers from more radical policies.

Also in 2005, John Moran returned to identifying predictors and together with Eva Jaskovska re-examined explanatory theories of transitional justice, concluding that available theoretical frameworks were inconclusive because they both relied on a limited subset of post-communist cases and focused on only two dimensions of transitional justice: lustration and prosecutions of former communist leaders. To correct for these oversights, Jaskovska and Moran examined a previously ignored set of countries, the three Baltic republics that had been part of the Soviet Union until 1991, and expanded the definition of transitional justice to include not only court trials against communist officials involved in human rights violations (what they termed “criminal adjudication”) and lustration (their “political adjudication”), but also court proceedings ruling on the rehabilitation of those unjustly accused of crimes in communist times (which they considered to be part of “criminal adjudication”) and restitution of abusively confiscated property (for them, related to “civil adjudication”). After applying this framework to Estonia, Latvia and Lithuania, the two authors argued that Moran’s “pressure cooker” analogy, first proposed in his 1994 article, provided the best point of departure for identifying the determinants of post-communist transitional justice. They went further by suggesting not only that communist-era exit and/or voice provide release valves in post-communism, but also that additional escape valves are represented by the high political legitimacy of the previous

communist regime, the replacement of communism with nationalism as the dominant form of political legitimacy (thus hinting to Nedelsky 2004), as well as the torturers' disappearance through death or exile. Unless one of these valves operates to relieve the pressure, the country will arrive at a point at which criminal, civil or political adjudications will be realized. Jaskovska and Moran further admitted that an "untainted, non-communist leadership plays an important role in this process," and "the presence of a large communist party" seem influential in "increasing the likelihood of post-communist retribution" (2006, p. 501).

Bringing new evidence collected from a new set of countries, this article brought further support to Moran's earlier insistence that the nature of the past (communist) regime in part determined the scope of present (post-communist) transitional justice, while at the same time acknowledging that the past was only one element in a broader equation in which present factors, not all of them related to the political game, played a major role. Jaskovska's and Moran's work (2006) reinforced Nedelsky's suggestion (2004) that both the past and the present should be factored in when trying to identify the determinants of transitional justice in Eastern Europe.

In 2006, another study examined the implementation of lustration in Germany, the only country where the lustration process was completely decentralized. After contrasting different sub-federal lustration programs directed against former communist-era police and secret Stasi agents, Katy Crossley-Frolick concluded that some *lander* were more unyielding (Saxony), others more lenient (Brandenburg), and still others pursued a middle-course strategy (Berlin). Crossley-Frolick (2006) explained these differences through a combination of geographical location of the *lander* (positioned in the former communist East Germany or the former democrat West Germany) and state-level political agendas. Her conclusion was that "the German federal system of government may have, *a priori*, established a structural dynamic that inadvertently

generated these varied outcomes. By decentralizing the process, the particular social and political contexts of implementation became paramount. The agents responsible for executing the policies acted on the basis of cues and support from state level political leaders and administrative authorities about how stringently or how leniently the measures should be drafted and implemented” (Crossley-Frolick 2006, p. 1).

The first intra-country study to contribute to this literature, Crossley-Frolick (2006) recognized the differences in the way an important transitional justice program like lustration had been implemented across intra-country regions for its first fifteen years. Whereas previous authors have focused on the input of national, central governments, this article underscored the significance of institutional and cultural factors, as well as history at the local/regional level. This is an important point even in countries where national institutions are exclusively charged with carrying out lustration, and other transitional justice programs, since these programs’ implementation often hinges on the participation of local citizens (whose levels of awareness of these programs and costs for participating in them might vary considerably across local communities).

In an edited volume published in 2009, I argued that the scope and pace of reckoning are strongly linked to the relationship between regime and opposition during communism and post-communism. After surveying all post-communist countries from 1989 to 2007 and the adoption and implementation of legislation in the areas of lustration, court proceedings and access to secret files, my collaborators and I concluded that, in a clear pattern throughout the region, former communists voted against reckoning, while their opposition provided the impetus for it. The outcome of this struggle was strongly influenced by the composition, orientation, and strength of the opposition, both before and after 1989; the communist regime’s dominant

methods of ensuring societal compliance with its rule (repression/cooptation); and the country's pre-communist level of experience with political pluralism. In countries with a pre-communist history of strong multi-party politics, where the communist-era opposition included dissidents, mass opposition movement members, and internally exiled technocrats (as in the Czech Republic, Poland, Hungary, and the Baltic states) one finds a well-organized, well-educated, potentially powerful alternative elite in post-communism. This elite's orientation toward communism's legitimacy was grounded in its experience under that regime. Transitional justice was far more stringent where communist rule was enforced primarily through repression and ideological rigidity (as in the Czech and Baltic republics, and East Germany) than in those where it relied more on cooptation and allowed some level of reform (as in Poland and Hungary). By contrast, where organized opposition toward communism was weak because of a combination of little pre-communist experience with political pluralism (Bulgaria, Romania, the Caucasus, as well as Central Asia) and, in the communist period, the regime's severe repression of any nascent counter-elite (Romania and Albania) and/or successful cooptation of many elites (Slovakia, Russia, Ukraine, Belarus, and Romania), one finds a much weaker push toward transitional justice from 1989 to 2007. In these latter cases the former regime's behavior shaped the opposition's post-communist orientation toward it, as transitional justice was pursued more vigorously and successfully where repression rather than cooptation was the primary method of ensuring societal compliance.

In this second set of countries, communist-successor parties retained power longer after the regime change (of 1989 in Eastern Europe and 1991 in the former Soviet Union) than in the first-set countries. In these countries it was later that opposition parties gained sufficient electoral strength to adopt transitional justice legislation (or only to propose it, as was the case in Ukraine,

Georgia, and Moldova). Among second-set countries that adopted such legislation, the categories of former communist officials and secret policemen banned from politics were fewer and the list of state offices closed to them was shorter than in countries with more powerful opposition forces. Moreover, the later a country launched lustration and file access, the more tampered were the secret archives, the harder was to identify the individuals involved in past human rights abuses, and the more disputed were the official findings of collaboration with the communist regime. Together, we argued, these three factors are stronger predictors of the year when lustration and file access laws gained parliamentary approval, of the comprehensiveness and stringency of the laws in terms of the social categories targeted and the implications for those who fall within them, and of the number of trials against former communist officials and secret agents, than transition type, exit/voice and the “politics of the present,” narrowly defined.

That same year, Jelena Subotic (2009) found support of the strategic calculus of elites in the former Yugoslav space in regards to European Union membership in a study focused on the Yugoslav wars of the 1990s. In Bosnia, Croatia and Serbia, elites used cooperation with the International Criminal Tribunal for the Former Yugoslavia and domestic transitional justice institutions to pacify domestic opposition and pursue EU membership and other strategic goals. The product of political will, implementation of transitional justice involved “normalizing the past” (2009, p. xi) to meet bureaucratic accession commitments, and did not signal true compliance with the spirit of these reckoning institutions. As perpetrator of war crimes, Serbia implemented transitional justice in response to international coercion. There, Subotic identified “domestic misuse” of transitional justice and “domestic political maneuvers by powerful norm resisters that circumvented transitional justice by complying with its institutional requirements” (2009, p. 11). In Croatia, which was both a victim and a perpetrator of war crimes, elites

instrumentally complied with the ICTY primarily to obtain EU membership, while “keeping domestic norm resisters marginalized and too weak to successfully mobilize against adoption of transitional justice” (Subotic 2009, p. 12). In Bosnia, where the state effectively does not exist, “transitional justice has been used to strengthen state institutions, but also to weaken and delegitimize the non-cooperative Bosnian Serb entity” (Subotic 2009, p. 12).

Subotic’s work focused on rectifying the wrongs of the post-communist civil wars that torn the Yugoslav federation apart, not on the previous multi-decade communist regime whose collapse exacerbated the nationalist feelings and hatreds that led to those wars. Nevertheless, her study is important because it highlights the key impact of international pressure on the nature and scope of transitional justice programs adopted by domestic actors. Whereas the Western European governments, the United States, and the European Union have insisted on the prosecution of perpetrators of Yugoslav war crimes, for various reasons they failed to apply equal pressure on Eastern European new democracies to redress communist wrongs. Most of their calls related to the restitution of property to minority religious and ethnic communities, which accounted for just a fraction of all communist human rights trespasses. Foreign pressure on redressing other communist crimes was rendered null by the end of the Cold War and the desire to allow for future cooperation with formerly communist countries perceived to have lost that War; the reluctance to impose Western practices on Eastern countries; the recognition that Western European countries did not embrace one single model of reckoning with the legacy of World War II; the continued strong influence of the political left in Western countries, which argued against a ‘trial of communism’ akin to the Nuremberg Trials; and the strong rejection of lustration on grounds that it infringed the basic political rights of former communist decision-

makers and secret agents (although Western European countries themselves had used *epurations* to marginalize Nazi members and sympathizers after 1945).

The role of political leadership, international pressure, and public perceptions was central to Brian Grodsky's explanatory framework (proposed in 2010 and revisited in 2014). Based on the examination of four countries (Poland, Croatia, Serbia, and Uzbekistan) and seven transitional justice programs (including cessation of abuses, apologies and condemnations, rehabilitation and compensation of former political prisoners, truth commissions administrative cleansings, as well as criminal prosecutions of lower level functionaries and those with command authority) until 2005, Grodsky argued that political elites pursue transitional justice strategically, implementing popular programs only to the extent they do not interfere with the provision of other expected goods and services, and pursuing even unpopular programs when they are perceived to facilitate the delivery of these expected goods. For him, expected goods and services include "everything from order, security and civil liberties to anti-inflationary or pro-employment economic policies and international memberships (with their respective security or economic dividends)" (Grodsky 2014, p. 24). Leaders seeking political survival must ensure that transitional justice policies are perceived by their constituents to further, or at least not interfere with, the provision of the goods they can influence. "Primary actors" (the prime minister) suffer when constituent expectations and policy outcome are out of sync more than ceremonial "secondary leaders" (the monarch or a weak president). Transitional justice is eschewed when seen as impeding the delivery of goods, and pursued when seen as beneficial. Public attitudes govern the relationship between political goods and transitional justice policies, the more so since the latter are seen as competing for critical resources that might otherwise be made available for the pursuit of other programs. Where the public is neutral or favorable to

retribution, primary actors must demonstrate that such measures do not interfere with the provision of expected goods. Where the public is opposed to reckoning, elites will pursue such policies only “if they can explicitly link them to their ability to better provide these goods – in essence, buying their constituents off” (Grotsky 2014, p. 7).

Grotsky responded to previous concerns that the explanatory theories were often based on weak empirical data by expanding the number of transitional justice programs and the time period selected for analysis. Contrary to other authors, Grotsky also insisted that his study recognizes the fact that transitional justice is always implemented alongside other policies adopted by governments in the new post-communist democratic states. It is precisely this interaction, he argued, which prioritizes the need to redress the past as always secondary to the need to secure the present, that determines when political actors will support and when they will reject transitional justice.

In a recent contribution to a volume marking the 25th anniversary of the collapse of the communist regime in Central and Eastern Europe, Szczerbiak (2014) surveyed the late lustration laws adopted (but not implemented) in Poland in 2007. According to him, explanatory theories treating post-communist transitional justice as stemming primarily from efforts to instrumentalize reckoning as “an element of the struggle or power tool in post-communist politics” need to be modified because they “fail to fully grasp the extent to which the motives of those pushing for lustration and transitional justice were, in part at least, programmatically and ideologically driven and not motivated purely and simply by partisan interests and instrumental imperatives to gain a strategic advantage over their political competitors” (Szczerbiak 2014, p. 22). For him, the Polish case suggests “the possibility that the driver for late lustration may have been the fact that political elites believed, or came to believe, that a more radical approach was

both necessary and desirable from a normative perspective; or that some elites who always believed that lustration was necessary later found themselves able to implement it” (Szczerbiak 2014, p. 22). He argued that, rather than electoral gain, the push for late, more radical transitional justice is linked either “to the anti-corruption fight and the public’s ‘right to know’ the background of its public officials and authority figures, including its political and cultural elites” or to a prolonged ‘politics of history’ debate aimed at “questioning the [historical] legitimacy of political opponents” more than their willingness to break with communist practices by supporting radical reckoning (Szczerbiak 2014, p. 23). Note that both processes, which are driven by broad normative and ideological concerns more than narrow strategic, electoral calculations, have characterized many of Poland’s regional neighbors. As such Szczerbiak’s explanatory framework might also explain developments in countries such as Romania and Bulgaria, where public calls for lustration have often referred to the fight against corruption.

Conclusion

In short, several different factors have been identified as determinants of post-communist transitional justice, including the pre-communist level of development, the repressive nature of the communist regime and the society’s response to it, the type of transition to democracy (exit from communism), the balance of power between former communist and anticommunist political actors during the early stages of democratization, the leadership provided by domestic political actors, concerns for limiting the damage inflicted on post-communist democracies by former communist-era networks, and pressure applied by foreign governments and international organizations on domestic political elites. While one study surveyed here provided an intra-country comparison (Crossley-Frolick 2006) and another examined only one country (Szczerbiak

2014), others contrasted a small number of countries (Jaskovska and Moran 2006; Nalepa 2005; Nedelsky 2004), still others considered a larger relevant subset (Huntington 1991; Welsh 1996; Williams, Fowler and Szczerbiak; Subotic 2009; Grodsky 2010 and 2014), and only one compared all post-communist countries in both Eastern Europe and the former Soviet Union, including those that did very little to reckon with their communist past (Stan 2009). Some authors understood transitional justice as court trials (Huntington 1991; Subotic 2009) or lustration only (Crossley-Frolick 2006; Williams, Fowler and Szczerbiak 2003; Moran 1994; Nalepa 2005; Welsh 1996; Szczerbiak 2014), while others expanded the definition to include criminal, civil and political adjudications (Jaskovska and Moran 2006) or court proceedings, lustration and file access (Nedelsky 2005; Stan 2009). The most ambitious study (Grodsky 2014) examined seven different transitional justice methods, both judicial and non-judicial, both backward-looking and forward-looking. Crossley-Frolick (2006), Huntington (1991), Moran (1994), Nalepa (2005) and Welsh (1996) considered only the early years of post-communism, Jaskovska and Moran (2006), and Williams, Fowler and Szczerbiak (2003) examined most of the 1990s, Nedelsky (2004) covered the 1990s and the early 2000s, whereas Stan (2009), Grodsky (2010 and 2014), and Szczerbiak (2014) investigated the entire 15 year-long period that preceded the European Union accession of Eastern European and Baltic countries.

This literature helps us to understand the different routes post-communist countries have pursued in order to redress their recent pasts. Still, the impact of important factors such as cross-country emulation (what Welsh 2014 called diffusion among countries and programs) would benefit from further rigorous, systematic study. Important transitional justice methods such as truth commissions, property restitution, official apologies and condemnations, and memorialization have been completely ignored. Equally ignored are reckoning processes

championed and implemented by civil society, non-state actors, which sometimes sought to complement official programs, other times sought to preempt them, and still other times sought to provide better alternatives to them.

References

- Crossley-Frolick, Katy. 2006. "The Devil Is in the Details: The Vetting of East German Police in Post-Unified Germany," Paper presented at the Midwest Political Science Association meeting. available at:
http://www.allacademic.com/meta/p_mla_apa_research_citation/1/4/0/0/p140000_index.html (accessed on 2 February 2009).
- Grodsky, Brian. 2014. "Transitional Justice and Political Goods," in *Post-Communist Transitional Justice: Lessons from 25 Years of Experience*, ed. Lavinia Stan and Nadya Nedelsky. New York: Cambridge University Press, 2014.
- , 2010. *The Costs of Justice: How New Leaders Respond to Previous Rights Abuses*. Notre Dame: University of Notre Dame Press.
- Huntington, Samuel. 1991. *The Third Wave: Democratization in the Late Twentieth Century*, London: University of Oklahoma Press.
- Jaskovska, Eva and John P. Moran. 2006. "Justice or Politics? Criminal, Civil and Political Adjudication in the Newly Independent Baltic States," *Journal of Communist Studies and Transition Politics* 22:485-506.
- Loyle, Cyanne. 2013. "Determinants of Transitional Justice," in *Encyclopedia of Transitional Justice*, ed. Lavinia Stan and Nadya Nedelsky. New York: Cambridge University Press, 152-158.

- Moran, John P. 1994. "The Communist Torturers of Eastern Europe: Prosecute and Punish or Forgive and Forget?," *Communist and Post-Communist Studies* 27:95-109.
- Nalepa, Monika. 2010. *Skeletons in the Closet: Transitional Justice in Post-Communist Europe*. New York: Cambridge University Press.
- . 2005. "The Power of Secret Information: Transitional Justice after Communism." PhD Thesis defended at Columbia University, Department of Political Science.
- Nedelsky, Nadya. 2004. "Divergent Responses to a Common Past: Transitional Justice in the Czech Republic and Slovakia," *Theory and Society* 33:65-115.
- Rosenberg, Tina. 1995. *The Haunted Land: Facing Europe's Ghosts after Communism*. London: Vintage.
- Stan, Lavinia. 2013. *Transitional Justice in Post-Communist Romania: The Politics of Memory*. New York: Cambridge University Press.
- . ed. 2009. *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the Communist Past*. London: Routledge.
- Subotic, Jelena. 2009. *Highjacked Justice: Dealing with the Past in the Balkans*. Ithaca: Cornell University Press.
- Szczerbiak, Aleks. 2014. "Explaining Late Lustration Programs: Lessons from the Polish Case," in Lavinia Stan and Nadya Nedelsky, eds., *Post-Communist Transitional Justice: Lessons from 25 Years of Experience*. New York: Cambridge University Press.
- Welsh, Helga. 2014. "Beyond the National: Pathways to Diffusion," in Lavinia Stan and Nadya Nedelsky, eds., *Post-Communist Transitional Justice: Lessons from 25 Years of Experience*. New York: Cambridge University Press.

-----, 1996. "Dealing with the Communist Past: Central and East European Experiences after 1990," *Europe-Asia Studies* 48:419-428.

Williams, Kieran, Brigit Fowler and Aleks Szczerbiak. 2003. "Explaining Lustration in Central Europe: A 'Post-Communist Politics' Approach." *SEI Working Paper* no. 62, available at <https://www.sussex.ac.uk/webteam/gateway/file.php?name=sei-working-paper-no-62.pdf&site=266> (accessed on 28 December 2013).