

Coming To Terms With the Past:
Strategic Institutional Choice in Post-Communist Europe¹

Jana Kunicová & Monika Nalepa

The World Bank *Rice University*

Current Version: December 17, 2006

Word count: 8,237 (10,442 incl. footnotes)

Abstract: Countries undergoing transitions from authoritarian rule to democracy often engage in measures restricting access of former authoritarian elites to political office. Despite scholarly consensus that these policies ought to be adopted in the early aftermath of transitions to democracy in order to stimulate democratic consolidation, little research has been done on the timing of transitional justice policies. Specifically, countries that have delayed dealing with the past, such as Slovakia, present a puzzle demanding explanation. We address this puzzle by shifting the focus of transitional justice analysis from normative considerations to interpreting procedures dealing with the authoritarian past as outcomes of strategic institutional choice. Using the example of Slovakia in the context of Post-Communist Europe we show how historical legacies of political players combined with the institutions they confront explain why Slovakia failed to deal with its Communist past until 2003, while the Czech Republic, similarly to other East Central European democracies, passed a wealth of transitional justice legislation well before 2002. We show how the Slovak agenda setter used gate-keeping powers to prevent transitional justice and also demonstrate how the close proximity of elections combined with expectations of coalition breakup eventually led to the adoption of transitional justice legislation.

¹ The authors thank Mikhail Filippov, Scott Gehlbach, Mary Alice Haddard, Saumitra Jha, Marek Kaminski, Roderick Kiewiet, Lanny Martin, Devra Moehler, Conor O'Dwyer, Philip Tetlock, Jocelyn Viterna, and anonymous reviewers for comments. Basia Kataneksza provided excellent research assistance.

1. Transitional Justice as a Strategic Institutional Choice

New democracies face the task of coming to terms with their authoritarian past. Democratization implies taking power away from the previous authoritarian regime, but many new democracies have gone further and examined human rights violations committed by the ancien régime and sanctioned past oppressors and their collaborators. Coming to terms with the past has taken many forms: from high-profile trials of the authoritarian henchmen, through “truth commissions” where victims can express their accounts of suffering under dictatorships and material restitutions to those dispossessed by the previous regime (“reprivatizations”), to administrative purges (“lustrations”) that attempt to free public life from those complicit with the authoritarian apparatus.²

This paper focuses on *lustrations*, or screening laws, the most prevalent form of transitional justice in Post-Communist Europe. Lustration denotes procedures that are set up to verify whether persons running for or currently holding public office had worked under the communist regime as secret collaborators of the political police.³ By 2003, most countries in the post-communist region had implemented institutions that verify the past of their public office holders. These include Bulgaria, Czech Republic, Estonia, Germany, Hungary, Lithuania, Latvia, Poland, Romania, and, eventually, Slovakia.

² See Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (New York, NY: Cambridge University Press, 2004); Jon Elster, ed., *Retribution and Reparation in the Transition to Democracy* (New York, NY: Columbia University Press, 2006); Neil J. Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes: General Considerations*. Vol. 1. (Washington, D.C.: United States Institute of Peace Press, 1995).

³ Lustration may, but need not involve forcing the proven collaborator to step down from office. Sometimes this information is merely revealed to the voters of the relevant nominating agency. In some lustration regimes, membership in the former Communist party, without demonstrated collaboration with the secret police apparatus, is considered a lustrable offense.

Slovakia, however, joined this group remarkably late. The aim of this article is to provide a theory of transitional justice that will explain why this happened.

There is a large and important literature dealing with questions of transitional justice, but most of it emphasizes the function of transitional justice for the consolidation of democracy. Besides describing different types of reconciliation procedures, the current transitional justice literature highlights why it is so important for post-authoritarian countries to implement these procedures.⁴ First, there is an argument of *fair representation*: the new democratic regime can only be entrusted with the mission of representing voters if its leaders and civil servants are not tied with the former regime. Broadly speaking, victims of the totalitarian regime should not feel resentment towards politicians in office; citizens who were politically prosecuted under authoritarian rule should not be rehabilitated in the new regime by the same judge who ruled against them previously. Similarly, the police officers responsible for law and order in the democratic state should not be the same as the ones who took part in suppression of anti-authoritarian demonstrations before. There is also a *corruptibility* argument: if their collaboration with the previous regime is kept secret, public officials become corruptible as they are vulnerable to blackmail by those who have access to such information and can reveal it to the public. In other words, there is an implicit electoral cost, or loss of popularity, associated with the official's collaboration being exposed. In such a case, elected

⁴ Neil Kritz, Ruti Teitel, *Transitional Justice* (New York, NY: Oxford University Press, 2000); A. James McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame: University of Notre Dame Press, 1997); A. James McAdams, ed., *Judging the Past in Unified Germany* (New York, NY: Cambridge University Press, 2001); Anne Sa'adah, *Germany's second chance: trust, justice, and democratization* (Cambridge, MA: Harvard University Press, 1998).

officials may be tempted to avoid such cost by corrupt means.⁵ Therefore, the normative theorists argue, the implementation of transitional justice is crucial for democratization.

The fact that an institution serves a desirable purpose cannot, however, explain its adoption and implementation. We start from the premise that institutions, including transitional justice, are established by political actors who pursue their own interests and face a multitude of incentives and constraints. Normatively desirable functions that transitional justice serves in promoting democratic consolidation are therefore insufficient to explain institutional choice. Hence, in this paper, we view transitional justice as a result of strategic interaction among political elites in new democracies.

Political economists consider institutions either the equilibria of strategic choice by political players, or shared beliefs enabling actors to engage in equilibrium behavior, or “rules of the game.”⁶ Comparative scholars of democratic transitions have successfully applied the idea of strategic institutional choice to the selection of electoral rules in new democracies⁷ and the adoption of constitutional arrangements, such as

⁵ For a related argument in the corruption literature, see Kunicová (2005).

⁶ Avner Grief, *Institutions and the Path to Modern Economy* (New York, NY: Cambridge University Press, 2006)

⁷ Marek M. Kaminski, “How communism could have been saved: Formal analysis of electoral bargaining in Poland in 1989,” *Public Choice*, 98 (January 1999), 83-109; Pauline Jones Luong, *Institutional change and political continuity in Post-Soviet Central Asia : power, perceptions, and pacts* (Cambridge, New York: Cambridge University Press, 2002); Olga Shvetsova, “Endogenous Selection of Institutions and Their Exogenous Effects,” *Constitutional Political Economy*, 14 (September 2003), 191-212; Steven S. Smith and Thomas F. Remington, *The politics of institutional choice : the formation of the Russian State Duma* (Princeton NY: Princeton University Press, 2001); Robert G. Moser, *Unexpected outcomes: electoral systems, political parties, and representation in Russia* (Pittsburgh: University of Pittsburgh Press, 2001), p. 183

presidentialism⁸ and federalism.⁹ However, until recently, little has been written about transitional justice institutions as consequences of strategic choice or as constraints that define the “rules of the game.”¹⁰ Our approach is to examine carefully how the set of preferences, expectations of electoral outcomes, and legislative rules affects the adoption and implementation of transitional justice institutions which normative theorists argue can be conducive to democratic consolidation. By concentrating on screening laws, this paper contributes to our understanding of how political institutions are adopted and implemented in new democracies.

Screening laws varied considerably across the Post-Communist region, but the most puzzling difference was that between the Czech Republic and Slovakia. The law designed to govern the lustration procedure in both countries was passed in the Federal Assembly of Czecho-Slovakia in 1991.¹¹ After the “velvet divorce” on 1 January 1993, all federal legislation was by default to be valid in each of the two successor states, unless overruled by their respective parliaments. Given that formally the law remained on the books in both republics, one would expect the same form and extent of transitional justice to be implemented in both the Czech Republic and Slovakia.

Just the opposite happened. The Czech Republic not only fully implemented lustration, but went above and beyond the federal Lustration Law, which was to be valid until 1996. The Czech Parliament passed amendments that continued lustrations past this

⁸ Timothy Frye, *Brokers and bureaucrats : building market institutions in Russia* (Ann Arbor: University of Michigan Press, 2000).

⁹ Mikhail Filippov, Peter C. Ordeshook and Olga Shvetsova, *Designing federalism : a theory of self-sustainable federal institutions* (New York: Cambridge University Press, 2003).

¹⁰ Exceptions include Monika Nalepa “The Power of Secret Information: Transitional Justice After Communism” (PhD diss., New York, NY: Columbia University, 2005) and Marek M. Kaminski and Monika Nalepa, “A Model of Strategic Preemption. Why Post-Communists Punish Themselves?” (paper presented at APSA annual meeting, Philadelphia, PA, August 21 - September 3, 2006).

¹¹ Federal Law 451 of 1991, is described in the Appendix 2, along with similar legislation from Poland and Hungary.

date and created a large and efficient implementing agency at the Czech Ministry of the Interior. In contrast, Slovakia did not implement the federal Lustration Law at all, refraining from transitional justice for over a dozen years, until a “Law on National Memory”¹² was passed in 2002. This law chartered an agency responsible for collecting and publishing information on collaborators with the secret police. While the scope of such lustrations is not limited to a particular type of public servants and applies virtually to everybody, the law does not stipulate any legal sanctions against the implicated persons nor does it bar them from running for or remaining in public office.

The case of delayed lustration in Slovakia presents an excellent opportunity to study the adoption and implementation of strategic institutions in new democracies. Lustration, adopted in a democratically elected parliament, was not implemented in Slovakia, in contrast to the Czech Republic and other Post-Communist countries in the region. What rendered the existing formal institution ineffective?

We first show that the Slovak “exception” cannot be explained alone by the communist legacies of politicians who were in power. Our approach leads us to consider reasons that involve both the legacies of politicians and the institutional constraints that they faced. This approach allows us also to explain the second part of the puzzle: that eventually Slovakia embraced transitional justice, even though this happened very late in the transitional period. The timing of Slovakia’s transitional justice regime presents a counter-example to popular theories in the transitional justice literature – namely, that procedures revealing the truth about past human rights violations and their perpetrators

¹² Law 553 of 2002, Law on National Memory.

have the greatest chance of passing in the immediate aftermath of transition to democracy¹³.

We show how an unusual status quo arrangement resulting from the federal breakup combined with agenda setting in the legislature led to stalling the transitional justice process. Next we argue that the prospect dissolving a coalition brought lustration back to the agenda. Additionally, we document that models incorporating expiring coalition commitments are capable of explaining the passage of bills other than transitional justice. Thus, this article illustrates how analyzing a case that cannot be reconciled with previous explanations allows us to advance new theory.

The rest of the paper proceeds as follows. In Section 2, we present our puzzle by placing the Slovak case in the context of lustration regimes in East Central Europe. Next, in Section 3, we examine the time period in Slovakia immediately following the “velvet divorce” (1992-1998). We show that both the agenda-setting executive and the median party in the legislature preferred that there be some lustration law rather than none, so preferences of the key political actors alone cannot explain why Slovakia refrained from lustration in this period. Instead, we argue that these actors faced powerful institutional constraints in the form of parliamentary rules that circumscribe agenda-setting and gate-keeping powers.¹⁴ These, together with the relevant preferences, prevented the implementation of the federal Lustration Law.

¹³ Jon Elster, “Coming to Terms with the Past,” *European Journal of Sociology*, 39 (1998), 7-48; Carlos Nino, *Radical Evil on Trial* (New Haven: Yale University Press, 1996).

¹⁴ Agenda setter models were originally developed by Romer and Rosenthal (Thomas Romer and Howard Rosenthal, “Political Resource Allocation, Controlled Agendas, and the Status Quo,” *Public Choice*, 33 (Winter 1978), 27-44; Thomas Romer and Howard Rosenthal, “Biurocrats vs. Voters: On the Political Economy of Resource Allocation by Direct Democracy,” *Quarterly Journal of Economics*, 93 (November 1979), 563-87) and used to explain budget allocations by school boards in the United States. Denzau and Mackay (Arthur Denzau and Robert Mackay, “Gatekeeping and Monopoly Power of Committees: An Analysis of Sincere and Sophisticated Behavior,” *American Journal of Political Science*, 27 (October

Section 4 tackles the remaining part of the puzzle: why Slovakia eventually embraced transitional justice, more than a decade after the transition. We analyze the period between 1998 and 2002, when although the median in the legislature remained the same, a more pro-lustration actor became the new agenda-setter. We argue that the agenda-setter failed to reap policy benefits from the setter's advantage because of the blocking power of coalition partners. Given that the government coalition comprised parties on opposite sides of the anti- to pro-lustration dimension, the left-leaning SĽS effectively blocked its right-wing coalition partner SDK's attempts to implement transitional justice. Only toward the end of the electoral term, when the demise of the governing coalition was anticipated, did the new law pass in the Slovak parliament. We also demonstrate that other contentious legislation was delayed until the end of the electoral term when coalition commitments were expiring, which further supports our claims that constraints on adoption of controversial institutions were relaxed toward the end of the term.

In Section 5 we consider an alternative explanation of Slovakia's late adoption of transitional justice: the commonly held belief that attributes the delay to voters' lack of interest in coming to terms with the past. Finally, in Section 6, we discuss the lessons learned from the Slovak experience with transitional justice. Most notably, the adoption

1983), pp. 740-761) extended these findings to explain gate-keeping powers of the congressional rules committee. Gilligan and Krehbiel (Thomas W. Gilligan and Keith Krehbiel, "Collective Decision-Making and Standing Committees: An Informational Rationale for restrictive Amendment Procedures," *Journal of Law, Economics and Organization*, 3 (January 1987), pp. 287-335) interpreted the emergence of congressional committees and the use of restrictive procedures in congressional decision-making as a way of using informational asymmetries between committee and floor members to overcome sub-optimal legislative outcomes. Huber (John D. Huber, *Rationalizing Parliament: Legislative Institutions and Party Politics in France* (New York: Cambridge University Press, 1996)) introduced findings from setter models to the study of parliaments outside of the United States. Most recently, Kaminski and Nalepa (Kaminski and Nalepa, "A Model of Strategic Preemption. Why Post-Communists Punish Themselves?") developed a setter model under incomplete information and illustrated its use in the context of transitional justice to explain the unusual behavior of post-communist parties in East and Central Europe.

of formal democratic institutions is meaningless when political actors lack the incentives and/or face constraints to implement them. If new institutions are not aligned with the preferences of those responsible for their implementation, then they are rendered vacuous and may even discredit the democratic process.

2. Transitional Justice in East-Central Europe

As noted previously, most countries in Post-Communist Europe adopted some form of transitional justice. Slovakia, while not the sole exception to this trend, is the most surprising one. Other countries that resisted lustration include Russia, Ukraine, Belarus, Moldova, the Central-Asian republics, as well as the post-Yugoslav countries. The case of the former Yugoslavia differs from the rest of the region due to the civil war and its aftermath, and therefore should be considered separately, with different issues and time frame in mind. Similarly, the resistance to transitional justice in some parts of the former Soviet Union is not very surprising, as the authoritarian regime there lasted much longer than anywhere else in the region, effectively turning most citizens into collaborators.

Among countries that did not implement lustration shortly after transition, Slovakia was truly the odd one out. Consider the following statement by František Mikloško, deputy of the Slovak parliament for the Christian Democratic Movement (KDH), delivered at one of the parliamentary debates over lustration: “It is remarkable that all post-communist states in Europe have institutions for dealing with the past. World-wide, only four countries lack such institutions: North Korea, China, Cuba, and Slovakia”¹⁵. As we noted above, there are, in fact, more such countries, yet Deputy

¹⁵ “Stenozaznam Narodnej Rady,” (Bratislava, Slovakia, 2002, ZO 61).

Mikloško's words are clearly an expression of his concern with Slovakia remaining an outlier among post-communist democracies governed by the rule of law.

Although their lustration strategies varied considerably, screening laws were adopted in all remaining East European that successfully transitioned to democracy, eventually becoming members of the EU or promising candidates for membership. The differences in the adopted lustration regimes can be characterized by three parameters: the set of targeted persons who are lustrated, the set of past activities for which targeted persons are screened, and the sanction that is handed down when participation in the targeted activity is uncovered. In the remainder of this section, we compare and contrast the existing lustration regimes in Post-Communist Europe along these three dimensions, as well as give a brief historical overview of the adoption and implementation of transition justice in the region.

The Czech law targeted more than 420,000 persons who had to apply for lustration certificates in order to hold on to nominated and elected managerial positions in the public service. These certificates constituted proof of not having worked for the secret police.¹⁶ The Hungarian law, initially, only targeted 600 legislators, although an amendment to the declassification law passed in December 2000, has affected careers of hundreds of public figures, writers, journalists and academics. A total of 7,872 persons had been vetted according to statistics provided by the Lustration Commission by

¹⁶ This number reflects the total number of lustration certificates (positive or negative) issued by the Federal Ministry of Interior (between October 1991 and December 1993) and Czech (between December 1993 and May 2004) Ministry of Interior. Therefore, it includes a small proportion of certificates issued to Slovaks prior to the velvet divorce in 1993 (interview with CO10, May 16, 2004 (Praha, Czech Republic, 2004)). From an interview with one of the authors (xxx), when asked why Slovakia may have failed to implement the lustration law. All interviews were conducted by xxx in the Spring and Summer of 2004 and are coded to preserve anonymity of interviewees.

December 2003.¹⁷ In Poland, by the end of 2003, over 21,000 persons, including legislators, were the targets of lustration, but an overwhelming majority of the targets were attorneys.

With respect to the activity that is targeted with lustration, in the Czech Republic, both collaboration with the secret police and membership in the high echelons of the Communist party present a hindrance to assuming public office. In Hungary, only those members of the former nomenclature who received reports from the secret police are targeted. The Polish bill does not target former apparatchiks in any direct way.

The sanction for proven collaboration varies from merely announcing that the person in question collaborated with the authoritarian regime (as in Hungary) to more serious repercussions, as in the case of the Czech Republic, where proven collaborators are banned from holding public office for a specified period of time. It can also combine these two sanctions. In Poland, if a target of lustration is willing to disclose the truth about the nature of his collaboration, he can run for office while his past is revealed to the voters; but if a former collaborator attempts to conceal his past and is proven guilty, he is banned from running for office.

The very first attempt to deal with former secret police informers, however, took place in Germany, where the “Federal Authority for the Records of the State Security” of the Former GDR, known as the Gauck-Behörde Agency, was appointed to collect and administer the files of the notorious STASI, the East German secret police. Public employers were obligated by law to request background checks of potential employees from the Gauck -Behörde Agency. Finally, private citizens could also access their own

¹⁷ Elizabeth Barrett, Peter Hack, and Agnes Munkacsy, “Vetting in Hungary,” in *An ICTJ Project: Vetting in Eastern Europe* (New York, NY: ICTJ Press, forthcoming).

files to find out who had been spying on them in the Communist era. More than 1.2 million persons consulted the agency prior to 2004.

In 1990, the Bulgarian constituent assembly appointed a special commission to produce a list of persons who had collaborated with the secret police prior to the transition. The final list included the names of eighty deputies, that is, one-fifth of all legislators and was eventually scrapped. However in February 2001 a new commission was appointed to publish over the course of five years names of secret service collaborators. In addition, a law was provided that all candidates for elected posts, from the president of the republic down to mayors and municipal councilors, would be screened for collaboration with former communist special services. Eligibility for holding elected office was made conditional upon clearance of former collaboration. Since the law did not extend to candidates running for office, in the Spring of 2005, prior to parliamentary elections, two of the largest legislative parties volunteered to submit their candidate lists for screening.

The Romanian legislature adopted lustration in December 1993. The law mandated the publication of the names of former agents and informers of Securitate, the Romanian secret police in 1945-1989. Proven informers were forbidden from holding public office. In 2000, a law relying on candidates declarations, similar the Polish mechanism was introduced (the Romanian Lustration Act).¹⁸

Lustration procedures relying on incentives of candidates for office to step down and reveal themselves if they had been secret police collaborators were also adopted throughout the Baltic states. The 1992 Lithuanian statute gave ex-informers of the KGB

¹⁸ Herman Schwartz, "Lustration in Eastern Europe," in Neil J. Kritz, ed., *Transitional Justice. How Emerging Democracies Reckon with Former Regimes. General Considerations* (Washington, D.C: United States Institute of Peace Press, 1995), pp. 461- 88.

six months to report their past. Failure to do so would result in a ban on running in elections and publication of the compromising information. As the lustration law covered the entire 50-year period of the Soviet rule in Lithuania, there could be even more than 10,000 KGB collaborators in the country.¹⁹ Estonia adopted a procedure akin to the Lithuanian one in February 1995. According to this law, informers and employees of foreign security and intelligence bodies had to make statements on their activity with the communist security police. The names and statements of those who confessed were to remain confidential, but those agents and informers known to the authorities who failed to register themselves with the authorities within a year were due to see their names published in the official State Gazette.²⁰ Furthermore, in April 2003, the Estonian parliament passed a law banning from running in parliamentary and local elections all former KGB employees.

Latvia banned former KGB intelligence collaborators from running in national elections in March 1993 and from running for office in local elections in January 1994. Similarly to the Polish, Lithuanian, Estonian and Romanian legislation, each candidate had to submit to the central electoral commission, a statement that he was not previously an official of the Soviet or Russian authorities (including the Defense Ministry, security services, army intelligence service or counterespionage) or a collaborator of the KGB. In June 1998 former KGB collaborators were banned from serving in diplomacy. In February 1999 they were banned from working in the police and in security services. In February 2000 Latvia published names of all former KGB and in November 2003, ran a

¹⁹ *The Baltic Times [Vilnius]*, Jun. 19, 2000.

²⁰ *Baltic News Service*, Feb. 6, 1995.

campaign to exclude KGB collaborators from running for seat in the European Parliament.²¹

In short, among the post-communist countries that successfully transitioned to democracy from Communist rule, Slovakia was the only one that delayed the adoption of lustration for more than ten years. In the next section, we explain how a unique constellation of institutional parameters can account for this delay. The most important institutional factor setting Slovakia aside from other countries in the region were that the status quo was given by the federal Czecho-Slovak Lustration Law, formally on the books in newly independent Slovakia. In this sense, the choice before Slovak politicians was not whether to adopt any transitional justice bill that would reflect their preferences; instead, it was whether to implement the existing bill or not.

3. Agenda-Setting, and Gate-Keeping in Slovakia (1992-1998)

The velvet divorce between the Czech Republic and Slovakia followed the failure of the constitution-making process. Although after the peaceful separation both new states adopted their own founding documents, the legislative institutions were designed in a very similar way.²² Following the Czecho-Slovak breakup, the Lustration Law remained valid in both successor states. While only the Czech Republic inherited the lustration agency for implementing the law, it was up to the Slovak executive to propose legislation that would charter an office responsible for issuing lustration certificates.

²¹ More examples of lustration laws and, similar transitional justice procedures, such as truth commissions are described in Marek M. Kaminski and Monika Nalepa, "Judging Transitional Justice," *Journal of Conflict Resolution*, 50 (June 2006), 383-408.

²² Petr Kopecký, *Parliaments in the Czech and Slovak Republics: Party Competition and Parliamentary Institutionalization* (Burlington, VT: Ashgate, 2001).

However, for almost six years following the velvet divorce, power was in the hands of Vladimír Mečiar, a former Communist. His party, the HZDS (Movement for a Democratic Slovakia), was to a large extent made up of former Communists. Scholars of democratic transition and consolidation have argued that the presence of former autocrats in positions of power following the transition presents an obstacle to their engagement in transitional justice.²³ However, the fact that ex-communists have ruled Slovakia in 1992 to 1998 alone is insufficient to account for this country's lack of lustration. Transitional justice procedures have been implemented in other countries of Post-Communist Europe, precisely when successor communist parties controlled the legislative process. Kaminski and Nalepa show that in four post-communist countries, Poland, Hungary, Bulgaria and Romania, the first lustration laws were passed precisely when communist successor parties were in power.²⁴

Although the Slovak executive tried to remove the federal Lustration Law by petitioning the Constitutional Court about its inconsistency with the Charter of Rights and Freedoms, the Slovak court refused to even consider the petition. The explanation the Court gave for this decision was that the federal court had already deliberated exactly the same question and reached the conclusion that the law is consistent with the charter.²⁵ Thus, the Slovaks were not politically in a position to abolish the federal Lustration Law after the breakup. It was, however, up to them to create a lustration agency. If such an

²³ Jon Elster, 7-48; Luc Huyse, "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past," *Law and Social Inquiry*, 20 (January 1995), 51; Guillermo A. O'Donnell and Philippe C. Schmitter, *Tentative Conclusions about Uncertain Democracies* (Baltimore: Johns Hopkins University Press, 1986).

²⁴ Kaminski and Nalepa "A Model of Strategic Preemption. Why Post-Communists Punish Themselves?," p.1-31

²⁵ National News Wire CTK, "Survey or Slovak Press," *CTK Czech News Agency* (Dec. 28, 1993).

agency was created, it would implement the federal law adopted in Czecho-Slovakia. In the absence of such an agency, no law would be enforced.

Suppose that all possible transitional justice bills are ordered on a single-dimensional issue space, from 0 (no transitional justice) to 1 (most stringent transitional justice). Let M_{SL} and M_{CZ} represent the ideal transitional justice policies of the median legislator in the Slovak parliament and the Federal Assembly, respectively. Let E_{SL} represents the ideal policy of the Slovak executive.²⁶ In the elite survey conducted by Peter Kopecky with Czech and Slovak parliamentary elites, 73.3% of interviewed parliamentarians regarded the relationship between the executive and legislature as “inter party mode” (in which the parliament is defined as an “arena for political struggles”).²⁷ This justifies placing the positions of the Slovak executive and legislative parties on the same issue dimension. The preferences of political players in Slovakia can be represented graphically as follows:

[Figure 1 about here]

In the Slovak parliament Mečiar and HZDS’s positions on transitional justice were to the left of the, executive and legislative median in Federal Assembly.²⁸

The institutional constraints were as follows. The bill passed by the Federal Assembly in 1991 would become operational if a law appointing a lustration agency had been proposed by the Slovak executive and voted in by the Slovak legislature. In the

²⁶ We assume Euclidean preferences: actors prefer outcomes closer to their ideal points to policies farther from their ideal points.

²⁷ Kopecky, pp. 98-9.

²⁸ Scholars who discuss the processes leading up to the Czecho-Slovak break-up list evaluations of the communist past and issues of dealing with this past among the critical differences between the two members of the federation. See, for instance, Kopecký 2001, Peter Kopecky and Cass Mudde; “What has Eastern Europe Taught us about Democratization? (and vice versa),” *European Journal of Political Research*, 37 (2000), 517-539; Michael Kraus and Allison Stanger, *Irreconcilable differences?: explaining Czechoslovakia's dissolution*, (Lanham, MD: Rowman & Littlefield, 2000).

absence of a lustration agency, the situation of “no transitional justice” would prevail. As discussed above, repealing the Lustration Law altogether was an arduous task.²⁹ Note the interesting asymmetry: it would have been much easier to make the Lustration Law harsher, if the actors so desired, but very difficult to amend it “down” or repeal it altogether. Thus, the federal law, identical with the federal legislative median’s ideal point, set the agenda.³⁰ Until 1996, when the federal bill was set to expire, there was a very limited set of viable lustration alternatives for Slovakia: the harsh federal bill, M_{CZ} , an even harsher bill in $(M_{CZ}, 1)$ or no transitional justice at all, 0.

Although the 1991 Federal Assembly was the agenda setter, the Slovak executive (E_{SL}) had gate-keeping powers: it was up to this executive to determine whether a lustration agency would ever be proposed. Provided that the Slovak executive preferred

²⁹ Softening lustration laws is difficult, because a politician arguing that a lustration law should be abolished is under suspicion of being a collaborator himself. The literature describes debates following lustration proposals in the early nineties in post-communist countries where such proposals, unlike in Slovakia, were discussed in parliament. In Czecho-Slovakia, Poland and Hungary, all amendments proposed to a lustration bill submitted for debate were in one direction only – towards making the law more stringent, either by adding new categories of collaboration to be targeted, by adding new positions to be screened or by introducing harsher sanctions for proven collaborators. In Hungary, the bill submitted to the floor by the government coalition became so harsh as a result of successive amendments that in the end it was repealed by the Constitutional Court.; In East Germany, the federal bill on dealing with secret police files (*Stasi – Unterlagen-Gesetz*) of December 1991 left it up to individual *Länder* to determine how the files are to be used. Although the Unification Treaty stipulated that “evidence of secret police activity could constitute an important ground for disqualification” virtually all Eastern *Länder* interpreted this legislation as an effective lustration bill (see McAdams). Transcripts from parliamentary debates in Poland indicate that only two MPs resisted the lustration bill (Stenogramy Posiedzen Sejmowych, I kad., pos. 19). Transcripts from the 1992 debates in the Czecho-Slovakia indicate that only members of the Communist Party protested against the law (Federal Assembly of ČSFR, 1991, 17th session). See Roman David, “Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland (1989-2001)” *Law and Social Inquiry*, 28 (Spring 2003); interviews: PL4, PA4 and PA6March, 2004 (Krakow, Poland, 2004).; Gabor Halmai and Kim Lane Scheppele, “Living Well is the best Revenge: The Hungarian Approach to Judging the Past,” in A. James McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame: University of Notre Dame Press, 1997).

³⁰ The federal bill is assumed to be identical with the federal median in the legislature, because evidence from literature as well as elite interviews, indicate that the final version of the 1991 Lustration Law was to a large extent determined by amendments from the floor. See Roman David, *Ibid.* Bills adopted in this way exemplify open rules of procedure in parliamentary decision making. See Thomas W. Gilligan and Keith Krehbiel, “Collective Decision-making and Standing Committees: An Informational Rationale for restrictive Amendment Procedures,” *Journal of Law, Economics and Organization*, 3 (Autumn 1987), 287-335.

the policy of “no transitional justice” to the federal median’s ideal point ($\epsilon > 0$ in figure 1) the Slovak executive would keep the gates closed. As long as the Slovak median shared the preferences of the executive, opening the gates would not result in legislation implementing the federal law. However, if the Slovak median, preferred the federal bill to no transitional justice (if $M_{CZ} - M_{SL} \leq M_{SL}$ in figure 1), the Slovak executive could still avoid transitional justice by “keeping the gates closed.”

The theoretical insight of our model is that keeping the gates closed, resulting in the outcome of “no transitional justice” (0) is not inconsistent with the Slovak executive’s preferring the Slovak median’s ideal lustration bill (M_{SL}) to no transitional justice (0) and that not implementing transitional justice is consistent with having a legislative median would rather take harsh federal lustration bill no bill implemented at all. The obstacle to implementation was that the Slovak median’s ideal policy (M_{SL}) was not a feasible choice. Also notice that if the Slovak executive could freely propose any legislation to the Slovak median, he could even propose his ideal policy, E_{SL} , which would be accepted by the Slovak median. What explains the lustration impasse is the non-zero status quo inherited from Slovakia’s federal predecessor, the harsh Federal Lustration Law.

Our theoretical model of Slovak legislative politics finds empirical support in data from Slovakia. Figure 2 illustrates Slovakia’s legislative parties’ relative seat shares as well as their positions on a pro- to anti-communist dimension, which can serve as an approximation of the transitional justice issue space. These positions were estimated on the basis of answers to questions asking members of political parties about their positions with respect to former communists’ access to public office in the *Party Policy in Modern*

Democracies (PPMD) survey.³¹ *PPMD* answers were measured on a 1-20 scale. We have normalized the scores to [0,1] by forcing the most lenient position to 0 and the harshest position to 1.

[Figure 2 about here]

The median in both terms was Mečiar's HZDS with a position of .32, which is to the right of at least one other major legislative party (SDL). Using the *PPMD* data, we can see that during this time both the median in the Slovak legislature and the Slovak executive preferred some form of lustration to a situation of "no transitional justice," but the preferences of both were far from the federal bill. Note that our model predicts the strategy of keeping the gates closed on lustration, irrespectively of how close the Slovak median is to the federal bill. Therefore, even if one is unclear about how cohesive HZDS was under Mečiar, the prediction still holds.

Indeed, Benoit and Laver's data suggest considerable variance in attitudes to dealing with former communists among members of the HZDS.³² It is controversial, however, whether these differences had the potential to translate into voting behavior. Petr Kopecký in his work on Czech and Slovak republics noted that in open ended questions about "the most important tasks of an MP" 41% of parliamentarians in Slovakia indicated loyalty to one's party ("to fulfill the party's program") as the most important task.³³ Irrespective of how we resolve the issue of HZDS cohesiveness, for our model to work, it is not necessary that the median be located *precisely* at .32 of the normalized transitional justice scale. We can even use one of the findings from our theory

³¹ Kenneth Benoit and Michael Laver, *Party Policy in Modern Democracies* (London: Routledge, Forthcoming 2005).

³² The standard error for HZDS's answers, at 3.7 is larger than for any of the remaining parties, save for SDL

³³ Kopecky, pp. 68-9.

as a test of the HZDS's cohesiveness. In our model, as long as the distance between the Slovak median (M_{SL}) and "no transitional justice" (0) is smaller than the distance between M_{SL} and the Federal law (M_{CZ}), the median will not adopt TJ legislation even when the gates are open. Indeed, prior to 1994, Mečiar's cabinet worked on empowering the Slovak Information Agency (SIS) to deal with the secret police files, but these efforts came to a standstill when it turned out that the SIS would have to implement the federal law. Apparently, the split within the HZDS was not wide enough to make the median embrace lustration in its harsh, federal form.

In 1994, Mečiar's cabinet lost a vote of confidence after a series of defections from HZDS, and until the early September 1994 elections, Jozef Moravčík, leader of the Democratic Union (DÚ), served as caretaker Prime Minister. HZDS's electoral success brought Mečiar back into power in October 1994. He remained Prime Minister until the elections in 1998.

To summarize, we have shown how Mečiar's gate keeping powers prevented the federal lustration law from being implemented. In our argument, however, the "Mečiar factor" alone is not sufficient as an explanation. It only has explanatory power only when considered together with the relevant institutional constraints. The most important of these constraints was a non-zero status quo in the transitional justice issue dimension. Instead of starting with a situation of "no transitional justice" at the outset, Slovakia inherited the extremely stringent Czech lustration law that would be implemented if a law empowering a lustration agency were adopted. If Mečiar's influence alone were responsible for the lack of lustration in Slovakia, one would expect a lustration law to be implemented shortly after his cabinet fell – if anything, as a measure preventing his

comeback. As we show in the next section, events unfolded rather differently. The Slovak case undermines the claim made frequently in the literature that transitional justice is adopted in the early aftermath of transition or not at all.³⁴ Slovakia transitioned from the group of countries that resisted lustration to the group that embraced it when the “Law on National Memory” was passed in August 2002, but this was more than four years after Mečiar was ousted out of power.

4. Legislation Delayed: An Expiration Date on a Disconnected Coalition (1998-2002)

The idea of a lustration law resurfaced after the 1998 elections, when the coalition of four parties headed by Mikuláš Dzurinda formed a new cabinet. Although Prime Minister Dzurinda was a lustration skeptic, the appointment of Ján Čarnogurský, a member of the SDK (Slovak Democratic Coalition) and Mečiar’s staunch opponent, to the post of the Minister of Justice brought lustration back to the political agenda. At this point, the federal law had expired and the executive was free to propose any law from the transitional justice issue space. However, Ján Čarnogurský needed the support of all coalition partners to floor a lustration proposal. Two of the coalition partners – SDL (Slovak Party of the Democratic Left) and SOP (Slovak Party of Civic Understanding) – were categorically opposed to any form of dealing with the past, including opening files of the former secret police or lustration. Approximate positions of all legislative parties in the Slovak parliament in the transitional justice issue space along with their seat shares are illustrated in Figure 3a, while positions of parties in the cabinet coalition are in Figure 3b.

³⁴ Jon Elster, 7-48; Carlos Nino, 13-41.

[Figure 3]

The pro-lustration coalition necessary for bringing the bill to the floor could not be formed within the cabinet without antagonizing SOP and SDL. Both parties, especially SDL, had former Communists in their ranks. SDL would not tolerate a harsh cabinet-sponsored bill. In order to prevent lustration, it threatened to withdraw from the coalition altogether. SDL's and SOP's criticism of Čarnogurský's anti-communist positions caused panic within the ruling coalition. This is well captured in Dzurinda's critical remarks about lustration made to the Czech Press Agency: "We either dedicate ourselves to the level of unemployment and the [EU] integration process, or we contribute to the further polarization of our society."³⁵

Čarnogurský became isolated in his pursuit of strict dealing with former collaborators, because preserving the coalition with SDL was a priority. When his proposal failed to gain approval of the coalition, Čarnogurský created, by executive order, a Department for Documentation of the Crimes of Communism (ODKZ) within the Justice Ministry. With only two employees, including Marián Gula, former head of the Czech office for documenting communist crimes, the department collected documents and could launch a complaint with the prosecutor's office in cases where crime was suspected. The special department was by no means equipped to carry out lustration. The two-person agency set up by Čarnogurský was in effect much closer to SDL's and SOP's ideal lustration policies than SDK's. Before setting up the ODKZ in November 1999, Čarnogurský told the Slovak daily SME: "When I was submitting the draft of the bill, I didn't meet an outright rejection. However, from the SOP side there were reservations

³⁵ National News Wire CTK, "Lustration Processes Over in Slovakia," (*ČTK Czech News Agency*, Sept. 29, 2000).

about the title of the bill – they thought it was too harsh.”³⁶ Effectively, the two coalition partners, SOP and SDL, acted as veto players. As is clear from Figure 3b, the SDL-SOP-SMK-SDK coalition was not connected on the “Pro- to Anti-Communist” dimension.

In 2000, Premier Dzurinda told news reporters that “Slovakia has overcome the problem of lustration.”³⁷ He could hardly have been more mistaken. In August 2002, Slovakia passed the Law on National Memory that created the Institute for National Memory (ÚPN), an institution resembling the Polish Institute for National Remembrance as well as the Czech Institute for Investigating Crimes of Communism. Crucially, the electoral term was drawing to an end. This significantly reduced the costs of SDK’s forcing through a pro-lustration policy. The threat that the coalition with SDL and SOP would break down as a result of a lustration proposal authorized by the cabinet was not important at that time.

The only real obstacle to the SDK proposal came not from the parliamentary floor, but from President Rudolf Schuster of SOP. Schuster vetoed the bill in its entirety and sent it back to parliament for consideration. The Slovak constitution does not require a supermajority to overturn a presidential veto.³⁸ However, in practice, more votes may be needed than for the initial passage of the bill, because of a change in the quorum requirement. This could become a challenge especially in case of the original ÚPN bill, as attendance tends to decrease in parliamentary sessions in the close proximity to elections. The vote to overturn the veto was cast on 19 August 2002 – literally in the last session of parliament in that term, merely a month prior to parliamentary elections. This

³⁶ <http://www.geocities.com/Area51/6199/OKNO-HOTNEWS.html>

³⁷ CTK Czech News Agency, Sept. 29, 2000.

³⁸ Constitution is available at http://www.government.gov.sk/VLADA/USTAVA/en_vlada_ustava.shtml

fact suggests an explanation to the otherwise puzzling distribution of votes over the two bills.

In the original vote on the ÚPN passage, four out of eight SOP deputies supported the cabinet bill and only one out of 18 SDL' deputies cast a vote against. This is puzzling, because since 1993 SDL' deputies had been consistently criticizing the idea of lustration.³⁹ However, by 1998, leaders of SDL' and SOP knew their parties did not stand a chance for re-election.⁴⁰ It was easy to predict that the median in the next parliamentary term would be more anti-communist than HZDS. In throwing their support behind a bill which was still moderated by the presence of the HZDS median, SDL' and SOP deputies were rationally preventing a much more stringent bill after the election. Indeed, a median with more anti-communist preferences than HZDS could cause the final lustration outcome to be even farther away from the SDL's and SOP's ideal points.⁴¹

The Slovak Institute for National Memory created as a result of overturning the presidential veto is not exactly a lustration institution in the sense that it does not verify the past of persons running for public office, but reveals information about all instances of collaboration. However, its consequences are very similar to those of lustration laws. It began its operation with an open call for the return of ŠtB documentation in Slovakia and abroad. The collection of documentation was followed by opening criminal investigations against perpetrators of communist crimes for which statutes of limitation had been extended or lifted.

³⁹ See *ČTK*, May 11, 1994; *ČTK*, Dec. 28, 1993; *Financial Times Information*, August 15, 1999 and <http://www.geocities.com/Area51/6199/OKNO-HOTNEWS.html>

⁴⁰ In the 2002 elections, SDL' came in last among all parties winning seats with only 1.4% of seats, whereas SOP did not even cross the threshold necessary for securing seats.

⁴¹ For a similar argument see Kaminski and Nalepa, "A Model of Strategic Preemption. Why Post-Communists Punish Themselves?", pp. 1-27

Finally, in May 2005, the ÚPN published a list of all ŠtB collaborators and their victims on its website. In doing so, it toppled political careers of several members of parliament,⁴² cabinet ministers,⁴³ bishops and archbishops,⁴⁴ and even Parliament Speaker, Pavol Hrušovský.⁴⁵ Slovakia was the third country, after East Germany and the Czech Republic, to make publicly available its entire list of collaborators. Soon afterwards, Poland and Hungary were to publish their own lists. Thus, Slovakia joined the group of countries that dealt with the problem of former secret police files relatively late, but caught up with the states that had begun dealing with the past in the immediate aftermath of transition.

Our argument implies that the proximity of elections affects coalition politics. In particular, towards the end of a coalition's tenure, legislation that was threatening sustaining that coalition's may be adopted. If this is true, other contentious bills, besides transitional justice, should have also been passed in the close proximity of elections. We use the *PPMD* data and roll call votes from the Slovak Parliament to examine this hypothesis. The relevant information is summarized in Table 1.

[Table 1 about here]

Within three months of the 2002 election, eighteen bills were passed in the Slovak parliament. We assigned a dimension to each bill from the *PPMD* data using the portfolio of the bill's sponsor. In ambiguous cases or with issues for which the *PPMD* survey did not report positions, we used the general Left-Right dimension. We report the distance between the most extreme of the three coalition members (positions are normalized to the

⁴² Jozef Banáš, Dušan Munko, Karol Fajnor, Arpád Duka Zolyomi

⁴³ Ján Hurný, Emil Chuchut, and Pavol Nunut

⁴⁴ Július Filo, Ján Sokol

⁴⁵ CTK Czech News Agency, Sept. 29, 2000.

[0, 1] interval with respect to all legislative parties).⁴⁶ Presidential veto activity supports the argument that contentious legislation was saved for the last quarter of parliamentary tenure.⁴⁷ Out of 18 bills passed, 17 were overturns of President Schuster's veto. In addition, in 16 out of 18 bills, the distance between coalition partners was more than .62. This suggests that expiring coalition commitments can explain delays in legislative activity beyond transitional justice. One should expect this to happen frequently in legislatures with high party turnover, where incumbents lose office to the opposition in almost every election, as is the case of Post-Communist politics in general and Slovakia in particular.

5. Alternative Explanations

Before we conclude, it is worthwhile considering one of the alternative explanations for Slovakia's restraint from lustration. Conventional wisdom suggests that the adoption of transitional justice is related to voters' desires for punishing perpetrators and collaborators of the *ancien régime*.⁴⁸ If one believes that politicians respond to voters' preferences and voters choose representatives according to their advocated transitional justice positions, we should only observe transitional justice in those countries where voters regard transitional justice as important. Thus, perhaps Slovakia had delayed transitional justice because Slovak voters did not consider lustration as important? Such a conviction was expressed by Aleš Šulc, chair of the

⁴⁶ As before, we normalized the position scores of each party, constraining the minimum position to be 0 and the maximum to be 1.

⁴⁷ Unfortunately, data on SOP's positions was not collected at all. This missing information would have posed a serious challenge to our analysis, save for the fact that the President in office at the time was Rudolf Schuster, a politician around whom SOP was created in the first place. Schuster's veto activity can be considered as a good proxy for SOP's stance on the bills in question.

⁴⁸ This is an argument widespread in journalistic and policy-makers' accounts, although we are not aware of any scholarly work that attributes the adoption of transitional justice to voters' preferences.

Security Department in the Czech Ministry of Internal Affairs, the institution that has issued lustration certificates to hundreds of thousands of citizens applying for clearance to maintain their managerial positions for reasons why there had been no lustration in Slovakia:

The Slovaks don't need that [lustration]! It would tear their families apart, families made up of Communists, Fascists, Catholics and Protestants, all in one home. Clans rule in Slovakia and their members choose political and ideological affiliations according to the metaphor: when you're in a boat, you can't have everyone on the same side, or the boat will capsize and everyone will fall into the water!⁴⁹

Such elite beliefs about the electorate's attitudes to transitional justice, however, are not supported by actual attitudes expressed in public opinion polls. In the immediate aftermath of the breakup more than half of the Slovaks polled by MVK agreed that the federal Lustration Law should be enforced in Slovakia, but politicians refusing to comply with this wish were re-elected. When in March 2005 the Slovak Institute for National Memory released the names of former secret police collaborators, a public opinion poll survey found that 82% of respondents believed that those listed as collaborators should give up their public posts⁵⁰. This clear preference for harsher lustration sanctions than the mere revelation of a politician's past did not have any legislative consequences.

The argument of politicians' compliance with the electorate's transitional justice preferences is difficult to defend in a broader context than Slovakia. In a 1994-1995 survey, William Miller polled MPs and the general public in five East European

⁴⁹ Interview, CO10

⁵⁰ MVK Opinion Poll, *ISI Emerging Markets*, (March. 29, 2005).

countries. One of the questions in this survey, “[Do you agree that] more should be done to punish people who were responsible for the injustices of the communist regime?” captures preferences regarding transitional justice. Preferences regarding punishing former autocrats can serve as a proxy for positions on screening public officers who in the prior regime had engaged in collaboration with the secret police. As the questionnaire contained questions about the respondents’ ideological distance from different political parties, the design allows us to compare match voters with their preferred parties and compare to what extent voter demand for transitional justice diverges from the preferences of their most favored politicians.

We observe that in the Czech Republic, Hungary, and even in Ukraine, political elites are systematically more keen on lustration than their respective voters. Only in Russia, is this trend reversed, with MPs preferring less transitional than their constituents. Unfortunately, there is no data on MPs in Slovakia, but the public’s preferences (at 2.46 on a scale from 1-high to 5-low) are exactly between those in the Czech Republic (2.24) and Hungary (2.56).⁵¹ There is little reason to believe that in Slovakia, the way in which voters attitudes to transitional justice translate into politicians’ actions is significantly different from the three East European countries where both surveys were carried out.

Further survey evidence is available from the Legal Values and Transitional Justice Surveys conducted in 1995 and 2005 in Poland, Hungary and the Czech Republic (n=3076) where respondents were asked about important characteristic for reelecting politicians. In 2004, at the same time when the Slovak poll was conducted, on average,

⁵¹ In Ukraine and Russia the public’s preferences are 2.78 and 2.87, respectively. See William Miller “Values and Political Change in Post-Communist Europe,” study number 4129, available at <http://www.data-archive.ac.uk/findingData/snDescription.asp?sn=4129>. See Appendix 2 for detailed comparison of MPs and the general public by country and political affiliation, available at www.xxx.yyy.edu/~zzz

only 22% respondents believed that former membership in the Communist Party was important in determining one's eligibility for legislative office. Other factors, such as "talents and abilities," "representing voter interests," and "being backed by powerful organizations" received 84%, 84%, and 59% support, respectively.⁵² Interestingly, in these countries, where support for transitional justice is miniscule, lustration laws have been in place for years, and are rather restrictive.⁵³ Hence, the conventional wisdom commonly voiced by elites, that voters' preferences are driving lustration policies receives poor empirical backing.

6. Conclusion: Implications for Democratization

Although we are far from dismissing the normative function of transitional justice, normative implications cannot pass for reasons for which lustration and other laws dealing with the past are adopted. Institutional constraints created by the breakup of a federal structure and limitations of coalition politics can prevent lustration institutions from being embraced. As we have demonstrated in the case of Slovakia, after lifting some of these constraints, far-reaching transitional justice laws can be passed and implemented.

⁵² The Legal Values Survey (LVS) carried out by James Gibson in 1995-98 in six countries to assess political tolerance, the legitimacy of existing institutions and attitudes to the rule of law in established as well as new democracies. The survey included questions about threat perceptions of Communists and questions on demand for transitional. Among the six countries it covered were Poland and Hungary, but not the Czech Republic. The Transitional Justice Survey (TJS) was written and administered by one of the authors. It was based on 3057 in-home face-to-face interviews and conducted in December 2004 by Pentor, Survey Research Company in Poland, Hoffman Research International in Hungary, and Opinion Window Research International in the Czech Republic. The combined results from both surveys, broken down by country and year are presented in Appendix 3, available at www.xxx.yyy.edu/~zzz

⁵³ A complete description of 3 lustration laws is provide in Appendix 4, available at www.xxx.yyy.edu/~zzz

In comparison to other legislative dimensions, lustration bills have a very important advantage for the student of politics: they allow for a relatively pure approximation of politicians' policy preferences. This is crucial because rational choice models take preferences of political actors as primitive. Yet the literature on politicians' behavior has shown that these agents are guided by at least three objectives: policy, winning office, and rents.⁵⁴ This presents an ultimate problem for the political scientist who has to decide which type preferences to exclude. Transitional justice legislation, however, eliminates this problem. First, with the exception of monetary compensation for authoritarian crimes, lustration cannot be a substantial source of rents. Second, policy preferences of political elites are not conflated with behavior directed at catering to voters' preferences. Although lustration is a poor tool for winning votes, the transitional justice dimension can certainly be used as an important strategic weapon in political competition. An effective lustration bill can deprive a former secret police collaborator of political office and can make office more accessible to non-collaborators by banning former agents of the *ancien régime* from running. Hence, politicians' preferences on the transitional justice dimension can serve as true proxies of preferences that guide their actions in the political arena. In short, if politicians care about lustration while appealing to voters on other dimensions, we can plausibly use politicians' policy preferences with regard to lustration to explain their strategic behavior.

Finally, our view of transitional justice procedures as strategic institutional choice allows us to bridge the gap between two broad sets of arguments in comparative

⁵⁴ Persson, Torsten, and Guido Enrico Tabellini, *Political economics : explaining economic policy*, *Zeuthen lecture book series* (Cambridge, MA.: MIT Press, 2000); Kathleen Bawn "Money and Majorities in the Federal Republic of Germany: Evidence for a Veto Players Model of Government Spending," *American Journal of Political Science*, 43 (July 1999), pp. 707-36.

literature on democratic transitions: one that ascribes democratization outcomes to the underlying preferences and cleavages,⁵⁵ and another that emphasizes the importance of adopting formal democratic institutions.⁵⁶

Slovakia's experience with transitional justice institutions shows why we need to consider both institutions and elite preferences together. We recognize that the electorate's demand matters when the relevant policy dimension is salient with voters, but transitional justice has consistently been shown not to be an issue on which elections are fought and won in the post-communist Europe. On the other hand, the preferences of the relevant political actors matter for the outcomes when they are considered together with the institutional constraints.

Specifically, we have argued that a formal institution mandating transitional justice, the federal Lustration Law, was not implemented in Slovakia precisely because of the constellation of political players' preferences and institutional constraints. Formal institutions that are adopted but not implemented are not only meaningless, but, perhaps more gravely, undermine the legitimacy of the democratic process. As Ján Langoš, Director of the Institute of National Memory, remarked:

Although the Slovak Constitution states that Slovakia is a state governed by the rule of law, the period [when the federal Lustration Law was not implemented] was not a period of the rule of law... Similar to the former communist regime that

⁵⁵ Samuel P. Huntington, *The third wave : democratization in the late twentieth century* (Norman: University of Oklahoma Press, 1991).

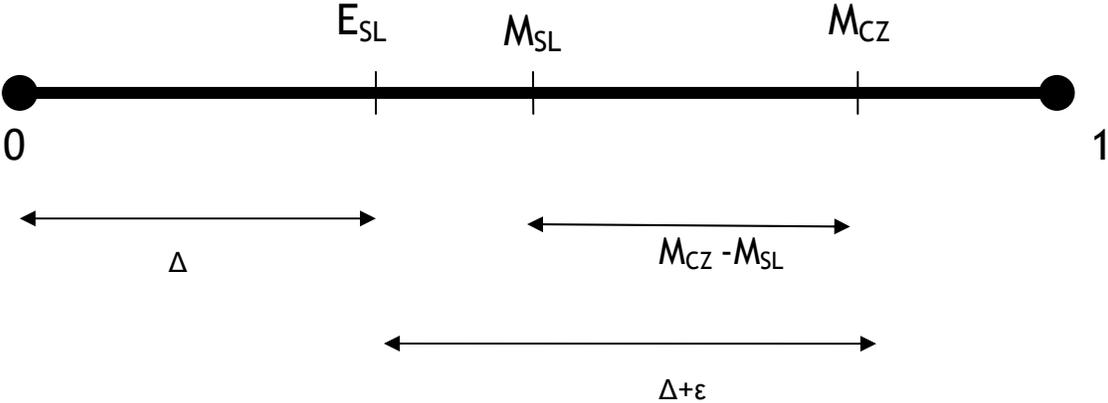
⁵⁶ Mark P. Jones, *Electoral laws and the survival of presidential democracies* (Notre Dame: University of Notre Dame Press, 1995); John Benedict Londregan, *Legislative institutions and ideology in Chile* (Cambridge, UK New York, NY: Cambridge University Press, 2000); Josep M. Colomer, *Strategic Transitions. Game Theory and Democratization* (Baltimore: The Johns Hopkins University Press, 2000);

was abusing human rights and its own laws, the government elected in 1992 was abusing its own laws [by not implementing them].⁵⁷

The lesson here is that the adoption of democratic institutions alone does not make a regime democratic unless it is followed by implementation. However, implementation will only take place if doing so is worthwhile for politicians. As we argued in this paper, politicians' optimal behavior will be jointly determined by their preferences and the institutional constraints that they face. Thus, our understanding of the preferences and institutional incentives and constraints is imperative to our understanding of democratization outcomes.

⁵⁷ interview *Hospodárske noviny*, May 15, 2004.

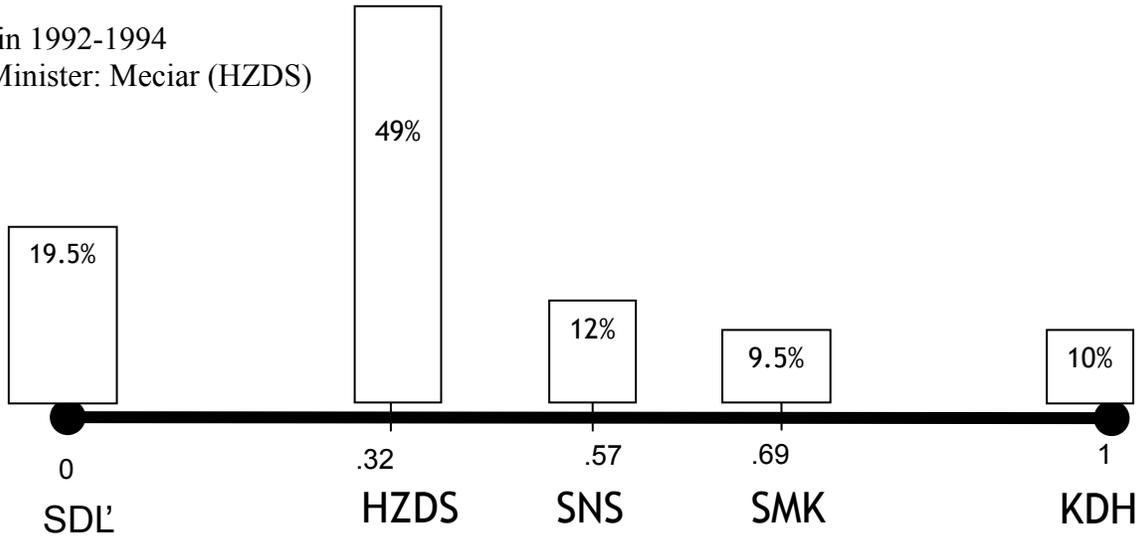
Figure 1. Transitional Justice Bill Issue Space with Relevant Actors' Ideal Points



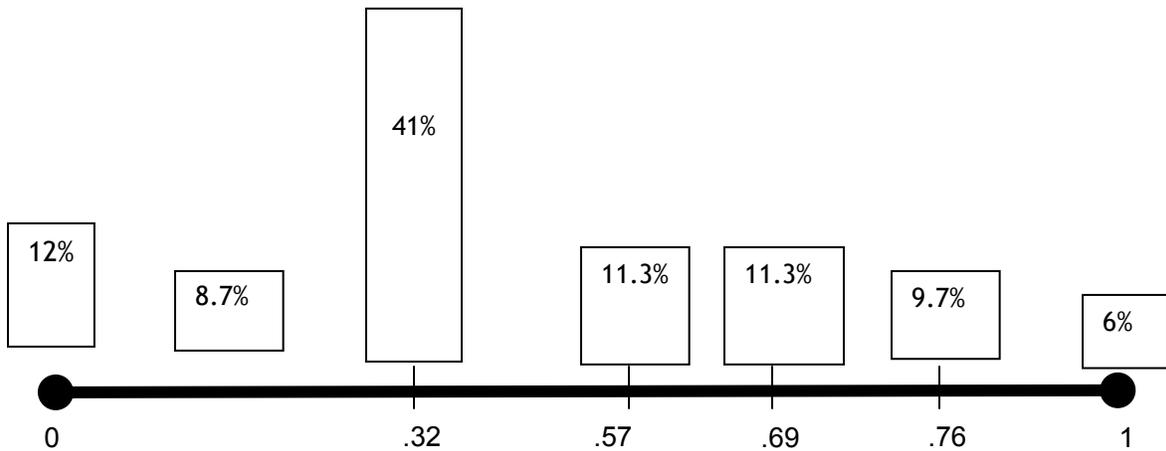
Notes:
 0 represents “no transitional justice”; E_{SL} represents the transitional justice ideal point of the Slovak Executive; M_{SL} represents the transitional justice ideal point of the Slovak Median; M_{CZ} represents the transitional justice ideal point of the Federal (Czecho-Slovak) Median identical with the federal bill; 1 represents “harshest possible” transitional justice bill; $\epsilon > 0$ and preferences of all actors are Euclidean.

Figure 2. Positions on Pro- to Anti-Communist Dimension of Legislative Parties in and Distribution of Seats (%) in Two Slovak Parliaments: Ordering on Pro- to Anti-Communist Dimension

a) in 1992-1994
Prime Minister: Mečiar (HZDS)



b) in 1994 -1998
Prime Minister: Mečiar (HZDS)
Except for Moravčík (DU): 3/94 -12/94



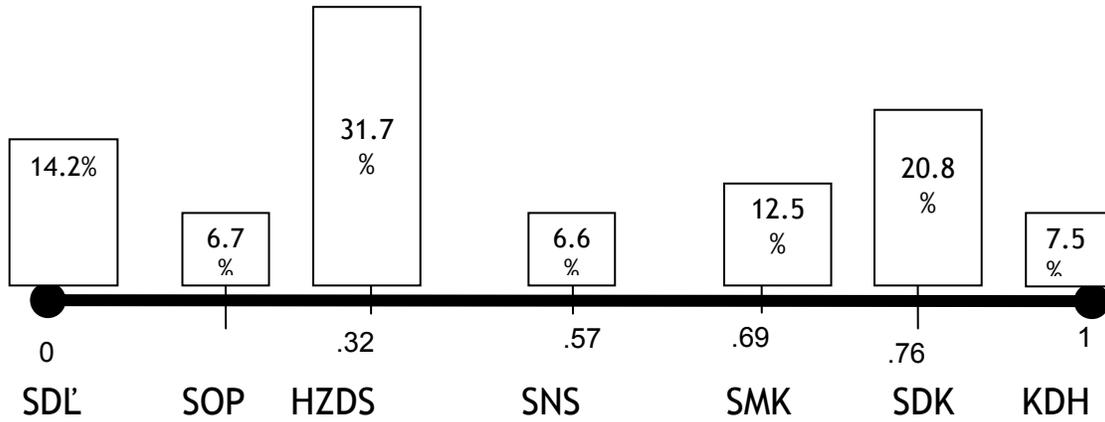
Common
Choice

ZRS HZDS SNS SMK DÚ KDH

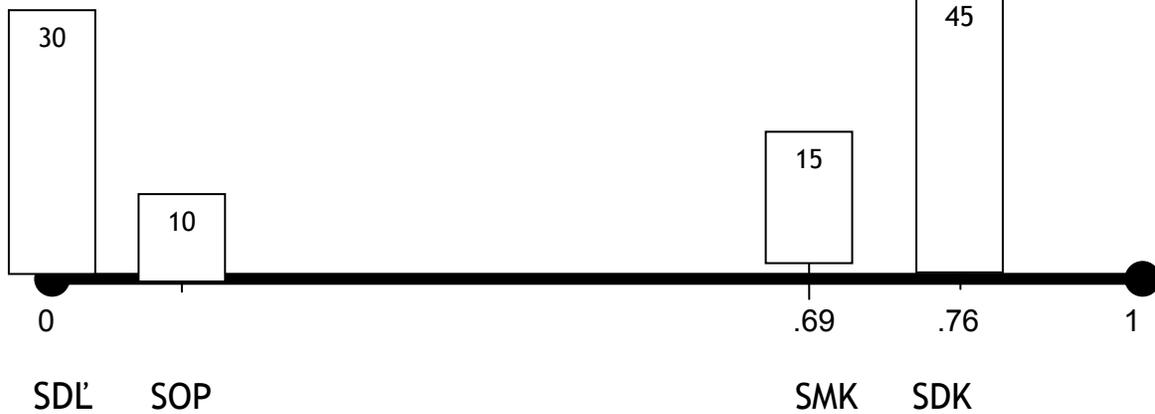
Notes: Party positions were approximated with 2002 post-elections data and were rescaled to place the left-most and right-most parties at 0 and 1, respectively; “Common Choice” was a coalition created prior to the 1994 elections comprising of SDL and minor leftist parties – its position is approximated by with SDL’s 2002 position; DÚ (Democratic Union) merged in 2000 with KDH to create the SDKÚ (Slovak Democratic and Christian Union) – its position is approximated by SDKÚ’s 2002 position. ZRS (Revolutionary Socialist League) entered the parliament only in the 1994-98 term. Its exact position on how to deal with former Communists could not be estimated, but it is plausible to assume that it was somewhere between SDL and “Common Choice” (Benoit and Laver 2006).

Fig 3. Positions on Pro- to Anti-Communist Dimension and Distribution of Seats (%) Ordering on Pro- to Anti-Communist Dimension (1998-2002)

a) Slovak Parliament
 Prime Minister: Dzurinda (SDK)
 Minister of Justice: Jan Čarnogurský (SDK)



b) Dzurinda's cabinet
 Prime Minister: Dzurinda (SDK)
 Minister of Justice: Jan Čarnogurský (SDK)



Notes: SDK (Slovak Democratic Coalition) has been approximated by SDKÚ's (Slovak Democratic Christian Union) 2002 position, because SDKÚ was the predecessor of the SDK coalition (Benoit and Laver 2005). SOP's (Party of Civic Understanding) position could not be estimated precisely, because the party did not cross the electoral threshold and no MPs from SOP joined a party which did cross that threshold. We located the party's position to the left of HZDS, based on the party leader's (Rudolf Schuster's) very critical remarks about lustration and decommunization (*ČTK*, Nov. 16, 1999), as well as his veto in 2002.

Tab 1. Bills Passed in the Slovak Parliament within Three Months of 2002 Election

Bill Name	Issue	Veto Overturn	Normalized distances between Cabinet Coalition Members		
			Max	Min	Δ
On state treasury	Taxes and Spending	Yes	.758	.136	.621
On military pensions	Taxes and Spending	Yes	.758	.136	.621
On use of DNA for identification purposes	Left-Right	Yes	.906	.202	.704
On state of emergency and state of war	Left-Right	Yes	.906	.202	.704
On personal data protection	Decentralization/ Nationalism	Yes	.599/ .493	.209/ .296	.389/ .197
On labor relations	Taxes and Spending	Yes	.758	.136	.621
On the civil code	Left-Right	Yes	.906	.202	.704
On dog ownership	Environmental	Yes	.761	.083	.678
On waste disposal	Environmental	Yes	.761	.083	.678
On UPN	Former Communists	Yes	.760	.136	.625
On small business (crafts)	Taxes and Spending/ Privatization	Yes	.758 .972	.137 .335	.622/ .637
On social welfare	Taxes and Spending	Yes	.758	.136	.622
On railway law enforcement	Left-Right	Yes	.906	.202	.704
On inheritance	Left-Right	No	.906	.202	.704
On Military service	Nationalism	Yes	.493	.296	.197
On SOE's	Privatization/ Taxes and Spending	Yes	.972/ .758	.335/ .136	.637/ .622
On Healthcare	Privatization/ Taxes and Spending	Yes	.972/ .758	.335/ .136	.637/ .622
On Health workers	Taxes and Spending	Yes	.758	.136	.622

Notes: Bills are assigned to issue spaces based on the past and present portfolios of their sponsors. Where issue portfolio was not represented in the PPMD data, the Left- Right dimension was used (for instance, data on positions with respect to civil liberties was not collected by Benoit and Laver for Slovakia). Only positions of SDL', SDK and SMK have been used for calculating the maximum, minimum positions and the distance, Δ . SOP's position was not provided in the PPMD data, but President Schuster, who vetoed 17 out of 18 bills, was SOP's leader.