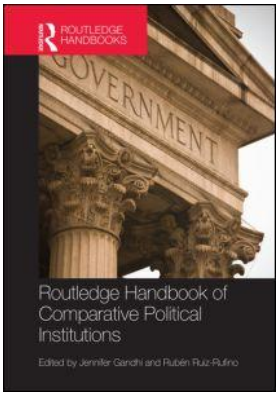

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The institutional context of transitional justice

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THE INSTITUTIONAL CONTEXT OF TRANSITIONAL JUSTICE

Monika Nalepa

Introduction

Transitional justice (TJ) has typically been characterized as the large body of literature that discusses ways in which new democracies and states recovering from domestic conflict deal with their authoritarian and violent legacies. Transitional justice mechanisms fall into one of the following categories: (1) trials of former perpetrators for human rights violations, (2) reparations to victims, (3) legislative acts condemning the former regime, and (4) truth revelation procedures (Elster 2004).

The first category includes trials and lifting statutes of limitation, enabling courts to prosecute crimes for which statutes of limitation have expired. Examples of trials of former perpetrators include the Nuremberg Trials and the Tokyo Trials following World War II. Compensation ranges from official apologies through monetary compensation to the restitution of rights to property that was confiscated by the ancien régime. As an example of an apology, consider the apology Willy Brandt issued to Jews for the Holocaust. An example of reparations to former victims includes the Argentinean law of 2004 compensating children born in captivity during the period of the military dictatorship between 1976 and 1983. The third category covers acts proclaiming the criminality of the ancien régime and legislation expropriating former authoritarian parties of illegitimately acquired assets. An example of the former is legislation passed in the early nineties in Czechoslovakia condemning the Communist Party as a criminal organization. And examples of the latter include legislation confiscating all assets of the Polish United Workers' Party, the communist authoritarian party in Poland. Truth revelation procedures comprise truth commissions and lustration. The most famous truth commission is, by far, the Truth and Reconciliation Commission of South Africa, created following the negotiated transition from the Apartheid regime. "Lustration" describes the broad set of personnel policies that disqualify or restrict access to public office of members or collaborators of the former authoritarian regime (Appel 2005).

Since lustration is the procedure that this chapter focuses on to make a general argument about transitional justice institutions, I illustrate it with a couple of more detailed examples. The first is de-ba'athification, a 2006 policy of purging the state administration of former members of Saddam Hussein's authoritarian party. The second example, from post-World War II France is the policy of "épuration,"—banning from office former Vichy collaborators. Both these policies were intended to free the new state of vestiges of the authoritarian regime and to bring

about reconciliation between its former supporters and resisters. Yet when de-ba'athification disbarred 185 former Ba'athists—mostly Sunnis—running for seats to the new legislature, it disenfranchised an important ethnic group for its alleged relationship to the Ba'athists and prolonged the civil unrest in the region. France's "épuration" was similarly exploited in the strife for power between the Communists and Gaullists (Kritz 1995).[1]

Transitional justice scholars have discussed a variety of mechanisms that are adopted for dealing with victims of authoritarian abuse, as well as members and collaborators of authoritarian enforcement apparatuses, including perpetrators of political violence (Huntington 1991; Huyse 1995; Linz and Stepan 1996). This scholarship has also explored which mechanisms are most conducive to peace and/or reconciliation (Laplante and Theidon 2007; Leebaw 2008; Lundy and McGovern 2008; Aolain and Campbell 2005; Rolston 2006), which are most agreeable with principles of rule of law (Allen 2001; Cassel 1998; Kaminski and Nalepa 2006; Krygier and Czarnota 2006; McEvoy 2007; Posner and Vermeule 2004; Sikkink and Walling 2007) and/or long term democratic stability (David 2003; Gibson 2007; King 2000; Sa'Adah 2006).

Most of the literature on transitional justice falls into one of the following two categories: it either addresses the normative question of how transitional justice mechanisms ought to be designed or explains how those that were adopted came about. Transitional justice research in the spirit of institutionalism is rare and critics have pointed out that this framework is inadequate for the study of transitional justice, because its adoption is more often the product of raw emotions (as diverse as revenge to forgiveness) rather than rational calculations (Elster 2004, Petersen 2002).

Yet contrary to these criticisms a rational choice perspective "does not require us to assume that institutions are chosen rationally." Instead, according to Avner Greif and Christopher Kingston, it "enables us to generate a theory with empirical refutable predictions about the institutions that prevail in a given situation." Contemporary rational choice scholars aspire to answer two kinds of questions: First, how are institutions selected (what Greif and Kingston refer to as the "institutions-as-rules" approach); and second, how institutions motivate people to behave in ways institutional designers would like them to (the "institutions-as-equilibria approach") (Greif and Kingston 2011, 13).[2] Hence, the "institutions-as-rules" approach focuses on explanations for who, when, and why adopted the institution in question is adopted, whereas "institutions-as-equilibria" focuses on the normative question of how institutions ought to be designed so that people are motivated to comply.

The absence of transitional justice research in the spirit of institutionalism is unfortunate, because institutionalist approaches to transitional justice could enhance this scholarship in at least three ways. First, explaining *who, when*, and *why* implements transitional justice institutions, irrespective of their desirability, would help us understand when transitional justice institutions are strategically viable. Second, examining the structure of incentives behind transitional justice mechanisms would allow designers to start verifying if normatively desirable mechanisms are feasible before they are put in place. Finally, combining the two approaches could indicate when transitional justice mechanisms that are likely to produce the normatively desirable outcomes are strategically attractive options for the actors who are empowered to introduce them. This third contribution is also consistent with Greif and Kingston's observation: "Despite their difference, the institutions-as-rules and institutions-as-equilibria approaches have much in common and are best viewed as complements rather than substitutes" (Greif and Kingston 2011: 15).

In short, TJ institutions are usually adopted in new democratic contexts after intensive bargaining between the executive and legislative branches of government and after they have been upheld by courts. Scholars focus on institutions-as-rules when they try to understand the adoption of transitional justice institutions, because institutions of separation of powers, rules organizing the work of legislatures, and executive-legislative relations and others are responsible for

conditioning the behavior of actors as they adopt a new institution. But when we are also interested in the extent that TJ institutions provide actors with incentives to comply with their intended normative goals (whether these be peace, reconciliation, rule of law, or democratic stability), this is also an account about institutions-as-equilibria. Scholars may combine the institutions-as-rules with the institutions-as-equilibria approach when they are explaining the durability of transitional justice institutions—the fact, that once adopted, actors do not have an incentive to change TJ institutions unless other institutional rules (or exogenous factors) change.

The remainder of this paper is organized as follows. In the next section, I explain how TJ institutions can be studied as rules of the game, focusing on when incentives push political actors to adopt them. In particular, I discuss how transitional justice institutions can be used strategically and/or preemptively and develop six hypotheses based on this theory. In the third section, I use an example from Poland to illustrate the transitional justice institutions-as-rules approach. In the "Transitional justice institutions as game equilibria" section, I explain how one can design, somewhat more lenient, institutions that will incentivize their targets to reveal information (incentive-compatible transitional justice) about the nature of past human rights violations that are no longer documented. I continue with the Polish example by showing how TJ institutions can motivate people to comply with normatively desirable institutions. The "Conclusion" summarizes how combining the two institutional approaches can be a fruitful exercise and concludes.

Transitional justice institutions-as-rules of the game

Lustration can affect public employees in any capacity, but as the Iraqi and French examples from the introduction illustrate, it has a potential for profoundly affecting electoral outcomes. Thus, electoral contenders can strategically exploit it.

Further investigations reveal that transitional justice continues to be used strategically in new democracies, even those that have successfully consolidated. In Romania just a few months prior to national elections, the Council for the Study of Securitate (CNSAS) started revealing names of politicians it suspected of collaboration with Romania's communist secret police (Securitate). CNSAS's work was curbed by a constitutional court decision. Within days of the decision, the government hastily passed a resolution empowering the CNSAS to continue working with the files even though it could no longer pass judgments on politicians in office (Bucharest News Agency 2008). CNSAS's findings leaked to the media and destroyed the reputation of many politicians and candidates running for office. Similar anecdotal evidence can be cited from most post-communist countries (Nalepa 2010).[3]

These example show that lustration can affect electoral outcomes by explicitly banning candidates from running for office or tarnishing their reputation to the point that they cannot effectively compete in elections. Thus, strategic politicians will exploit democratic institutions to their advantage and pursue the type of lustration that best serves their interests. If one believes that politicians act strategically to win and maintain office, one has to take into account the potential effects of lustration policies.

At the level of parties, politicians' preferences regarding lustration are shaped by their beliefs about the extent to which their parties contain members and collaborators of the ancien régime. This is what I refer to as parties' beliefs about their infiltration. Parties with many collaborators are hurt by lustration; parties with few collaborators or none stand to benefit from it. While some forms of collaboration are clandestine—such as being a secret informer of the authoritarian police—others—such as being a member of the authoritarian party—are open. Thus, in the case of some transitional justice procedures—for instance, decommunization—parties know how

lustration will affect them, but in the case of others, such as screening procedures revealing the identity of secret informers, political actors are initially uncertain as to how they will be affected by them. Because of such uncertainty, lustration laws are more likely to be adopted when parties that are not infiltrated by members and collaborators of the ancien régime (and know this to be the case) hold a majority in the legislature. In the case of post-communist Europe, where collaboration with the ancien régime tended to be clandestine, this means that contrary to both conventional wisdom and theories expressed in the transitional justice literature (Elster 1998; Halmai and Scheppele 1997; Holmes 1994; Huntington 1991; Huyse 1995), lustration laws are more likely to be adopted not in the immediate aftermath of the transition to democracy, but later—once successor-communist parties with high membership of open collaborators (former members of the authoritarian Communist Party and opposition parties infiltrated with clandestine collaborators)—have been replaced by new political parties that are less likely to harbor former collaborators in their ranks (Nalepa 2010). This consideration leads to the broadest strategic transitional justice hypothesis of this theory:

1 Lustration is likely to be adopted when either new political parties or parties who are not infiltrated with former collaborators win or are about to win significant representation in legislatures.

I define new parties as those that either have members who are too young to have been collaborators in the past or parties that have been recently formed by leaders after they have screened their membership for likely collaborators. Hypothesis 1 stipulates that parties who know they are not infiltrated with collaborators of the ancien régime have established a presence. In the case of new parties or lustration that screens out open collaborators (such as de-ba'athification, decommunization, or denazification) this is plausible. However, in the case of lustration that screens for secret informers, parties may be uncertain as to how lustration will affect them relative to parties they are competing against in elections. Thus, lustration that aims at uncovering clandestine collaborators may be delayed even if parties that are not infiltrated dominate the legislature. These parties will first have to learn that they are less infiltrated than their electoral competition before they engage in lustration. Assuming that this learning process is time-consuming, we have:

2 All else equal, lustration that aims at revealing secret informers of the political police occurs later in the transition than lustration vetting public offices of open collaborators of the ancien régime.

Hypotheses 1 and 2 specify when lustration laws will be adopted, but neither says anything about *who* will be proposing lustration laws and *what* kind of laws will be adopted. Studying politicians' strategic use of lustration (Nalepa 2008; 2010; 2012), I found that the presence of parties with fewer collaborators than their political competition increases the probability of adopting lustration in the close proximity of elections. However, parties that expect lustration to contribute directly to their electoral success are not always the ones that actually propose to adopt lustration. Agenda setting (i.e., closed as opposed to open rules of parliamentary decision-making; see Romer and Rosenthal 1979, 1978) in combination with electoral turnover can modify parties' incentives. Specifically, closed rules provide agenda setters that are more infiltrated than their electoral competition with incentives to preemptively adopt mild forms of lustration if they anticipate losing power to less infiltrated parties.

The implementation of lustration, as that of any transitional justice procedure adopted in the aftermath of a transition to democracy, is subject to the constraints of democratic processes.

Ironically, it is precisely the democratic features of post-authoritarian regimes that allow transitional justice institutions to be used strategically. The uncertainty of remaining in office associated with elections provides incumbents with incentives to tailor lustration laws to their advantage. But lustration, as any other bill, must be proposed for consideration in the legislature by the relevant agenda setter—a committee chairman, cabinet minister, or other member of the executive. Next, it has to be passed in a series of votes, often accompanied by intensive bargaining. Once a bill has made it out of the legislature, it is still subject to presidential vetoes and to judicial review by constitutional courts. Transitional justice mechanisms are, in particular, frequently subjected to constitutional review because of their potential for violating the principle of non-retroactivity (no punishment without crime). Typically, it is easy to assemble a coalition of political actors entitled to send the bill for constitutional review questioning its compatibility with this principle.

Given these institutional hurdles of the implementation process, a theory explaining lustration must take into account all stages of the legislative process: the proposal stage, the bargaining in the legislature, the bill's passage, the potential for an executive veto (as well as the legislature's capacity for override), and the motions of constitutional courts.

To develop these more specific hypotheses, I use the literature on legislative organization (Baron and Ferejohn 1989; Baron 2000; Gilligan and Krehbiel 1987; Weingast 1989) to distinguish between two legislative paths for adopting bills: closed and open rules of parliamentary procedure. Under closed rules, the proposer is different than the median in the legislature. The proposal, which is drafted in the appropriate committee or ministerial department, once on the floor of the legislature cannot be modified. The median has to "take it or leave it." In contrast, under open rule procedures, whatever the agenda setter proposes, can be amended upon reaching the floor of the legislature. As a result, the bill favored by the median voter in parliament is ultimately the proposal that gets passed. The role of the agenda setter is insignificant.

Suppose that rules of parliamentary decision-making are closed and an infiltrated party has proposal power but anticipates losing elections to a non-infiltrated party. Suppose furthermore, that the median in the legislature is located between the infiltrated and non-infiltrated parties. If the infiltrated party does not adopt any bill, then, following the turnover in proposal power (resulting from elections), it will suffer from a very stringent bill, as the median of the legislature may be ready to accept any transitional justice bill rather than put up with no lustration at all. The infiltrated party can prevent this punishment by implementing a mild bill, at the ideal point of the legislative median. If this bill is sufficient to appease the parliamentary median, it will prevail when the infiltrated party loses agenda setting power. Figure 27.1 illustrates the game that underscores this logic.

This reasoning, assumes that both the infiltrated and non-infiltrated parties know the exact location of the median. Suppose however, as is typical in democratic electoral settings, there is uncertainty about the exact location of the median. This uncertainty complicates the infiltrated party's strategy of preemption. In previous work (Nalepa 2010), I formalized this argument into a game with incomplete information. A sketch of the changes made to the model and the main intuition behind the solution to it are described as follows.

Let us consider the more interesting case of closed rules of parliamentary decision-making. The players are: the successor-communists (infiltrated party), the anti-communists (non-infiltrated party)[4] and two possible post-electoral medians: a left-of-center median and a right-of-center median. In terms of the figure below, both medians have ideal points between the infiltrated party and the non-infiltrated party, but the left-of-center median is located closer to the infiltrated party, while the right-of-center median is located closer to the non-infiltrated party. As before, the infiltrated party knows that after the elections, the non-infiltrated party will

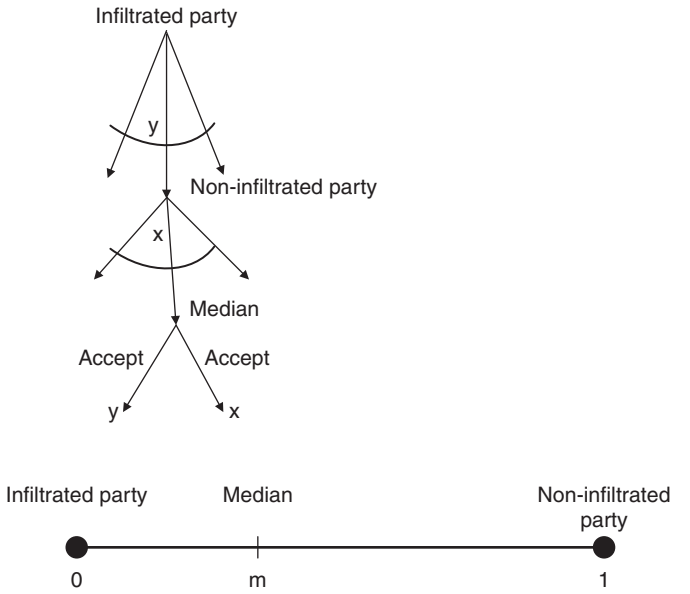

Figure 27.1 Strategic transitional justice under closed rules with certainty: the TJ space and game

have proposal power. They are uncertain however, whether the proposal must gain acceptance of the left-of center or right-of-center median. The first part of the game takes place before the elections. The infiltrated party must adopt a bill (let's call it *y*) from the transitional justice space. The next stage is the elections. The uncertainty of who will be median is represented, as is typical in game theory, by a "move of Nature," which determines whether the left-of center or right-of-center party will be median. In the third stage, the new proposer (the right-of-center party) proposes a new bill (let's call it *x*) from the transitional justice space. In the fourth and final stage of the game, the median chosen in stage two chooses between *x* and *y*. The equilibrium outcome is very intuitive:[5] if the infiltrated party believes the median is more likely to be left-of-center than right-of center, it will adopt a lustration bill at the ideal point of that party. If its beliefs are to the contrary, it will adopt a lustration bill at the ideal point of the left-of center party. In equilibrium, the original proposal prevails, that is, the non-infiltrated party cannot propose a competing bill that the median would prefer to the original proposal made by the infiltrated party. The intriguing empirical implication, expressed in hypothesis 3 below, is that sometimes it is rational for the infiltrated parties to propose and implement lustration:

3 Lustration bills are also likely to be proposed in legislatures with closed rules of procedure by agenda setters that are infiltrated with former collaborators, but who expect to lose proposal power to the parties that are not infiltrated with former collaborators; the lustration bills that are proposed under these circumstances are milder than the ideal points of the non-infiltrated parties.

In other words, if agenda setting power is about to be turned over to a political party with preferences on the opposite side of the legislative median as a result of the elections, the pre-electoral agenda setter is better off adopting a milder lustration bill (at the ideal point of the legislative median) than waiting for the extreme form of legislation to be adopted by the post-electoral agenda setter.

Note that if the roles of infiltrated and non-infiltrated parties are reversed, the symmetric result does not hold (i.e., parties that are not infiltrated with former collaborators, who expect to lose upcoming elections to infiltrated parties will not propose lustration that is to the left of their ideal point). The reason is that the more stringent lustration laws will lessen the electoral success of the infiltrated party by eliminating more of their candidates from the electoral competition. Hence we have the following hypothesis:

4 In legislatures dominated by parties that are not infiltrated with former collaborators stringent lustration laws will be proposed irrespective of the openness of rules of procedure and regardless of expectations about turnovers in power. However, in legislatures with open rules of procedure, the bills will be milder than in legislatures with closed rules of procedure.

The difference between the outcomes characterized in hypothesis 4 can be explained as follows. Open rules of procedure imply that the median's preferred policy prevails, thus the non-infiltrated parties cannot get the median to accept their preferred stringent bill in a "take-it-or-leave-it" fashion. However, under closed rules of procedure, the non-infiltrated party can force the median to make a choice between the no-lustration status quo and a stringent bill that is equidistant from the median with the status quo, but on the other side of the median's ideal point.

Note that hypotheses 1 through 4 specify predictions about when and what type of lustration is initiated for a no-lustration status quo. The final two hypotheses explore changes to lustration laws. Democratic elections entail uncertainty. Expectations of rational agenda setters may be intercepted by exogenous shocks, such as the flood in Poland in 1997 or the corruption scandal in Hungary in 1998 (Nalepa 2010). Rational expectations may lead to ex-post facto mistakes stemming from overly pessimistic or overly optimistic predictions. Consider first the pessimistic scenario: Suppose that the infiltrated party overestimates the median and adopts lustration at the right-of-center median's ideal point. Meantime, the median position goes to the right-of-center party. Since the infiltrated party implemented more stringent lustration than was necessary to appease the actual median, no amendments will take place. The non-infiltrated party will keep the gates on lustration closed, as nothing that it prefers to the original bill would be simultaneously acceptable to the median:

5 In legislatures with closed rules of procedure, where infiltrated parties adopted lustration prior to the elections, but the turnover in power was smaller than expected, the lustration law will not be amended.

Conversely, suppose that the infiltrated party underestimates the median and adopts lustration at the left-of-center party's ideal point, while the median position goes to the right-of-center party. The non-infiltrated party can now exploit the distance between the post-electoral lustration status quo and ideal point of the actual (right-of-center) median by proposing stringent lustration that is, approximately, as far from that median's ideal point as the left-of-center ideal point, but to the right of that median, as illustrated in Figure 27.2:

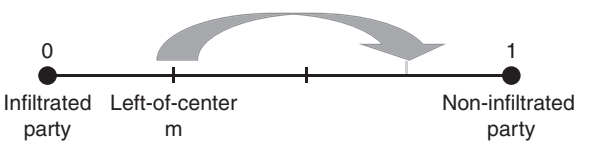

Figure 27.2 Equilibrium outcomes in the strategic transitional justice game

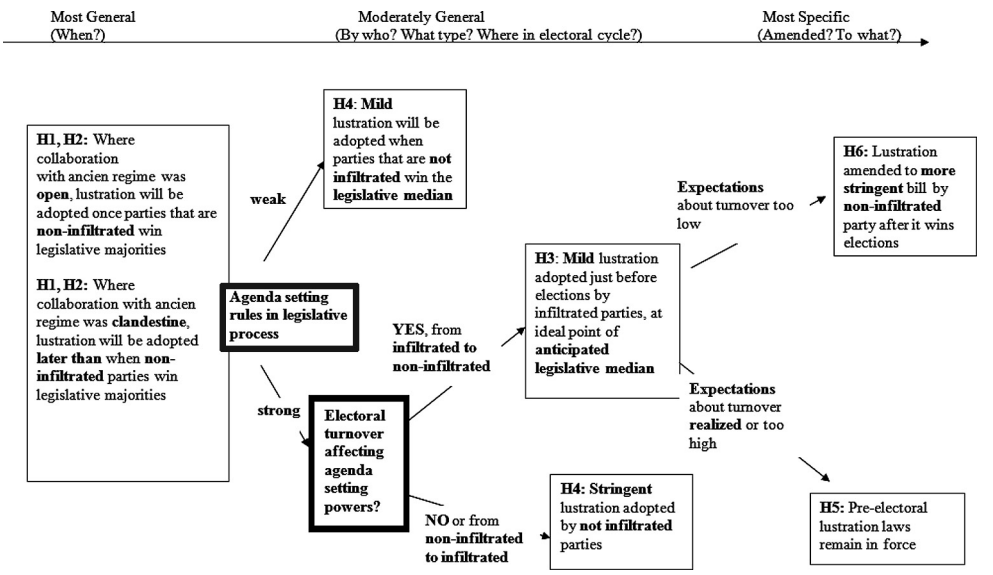

Figure 27.3 Hypotheses 1–6 from most general to most specific

Note: theoretical parameters requiring operationalization have been highlighted.

This strategic exploitation of the infiltrated parties' mistake by the party that is not infiltrated leads to the final hypothesis:

6 In legislatures with closed rules of procedure, where infiltrated parties adopted lustration prior to the elections, but the turnover in power was greater than expected, the lustration law will be amended.[6]

Figure 27.3 offers a graphic representation of all hypotheses and their relationship to one another.

Poland as a case study

In the previous section, the theory leading to hypothesis 3, stipulated that conditions of turnover in power may incentivize opponents of transitional justice to change the no-lustration status quo to a mild form of lustration in anticipation of losing power to elites preferring harsh lustration. This is exactly the background leading up to the passage of the Polish lustration law. By 1997, Poland, for reasons I explain elsewhere still had no lustration law in force (Nalepa 2010). The party holding a majority in the parliament at the time was the successor-communist Democratic Left Alliance (SLD), which was also doing very well at controlling the legislative agenda (Carroll and Nalepa forthcoming). Although formally, the rules of procedure were not amended to closed rule until late 1997, SLDs cohesive majority allowed it to act as a legislative cartel (Cox and McCubbins 2005). However, the next elections were scheduled for the fall of 1997 and the anti-communist right had for the first time succeeded at creating an electoral coalition (the Solidarity Election Action, AWS), with which it was expected to win in the upcoming elections, but not so overwhelmingly as to also capture the median. The median party in the legislature was expected to be either the slightly left-of-center Polish People's Party (PSL) or the slightly right-of-center Freedom Union (UW). In light of these circumstances, hypothesis 3 predicts that the

SLD, as the openly infiltrated (with communists) party would pass a mild lustration law in anticipation of power turning over to the non-infiltrated party (the AWS). This is indeed what happened in April of 1997. Supported with the votes of SLD and parties on the left, a mild and incentive-compatible form of lustration was passed in the Polish Sejm. For reasons outlined in hypothesis 6, the law was also amended, when instead of PSL, as the SLD had anticipated, the slightly more anti-communist UW became median.

Moreover, the Polish example suggests that conditions of turnover in power may incentivize transitional justice opponents to implement lenient (but possibly incentive-compatible) forms of these mechanisms in anticipation of losing power to elites preferring stringent forms of transitional justice. Somewhat surprisingly, we find that conditions characterizing transitional democracies, such as frequent turnovers in power, can actually facilitate the adoption of incentive-compatible (and normatively desirable) forms of transitional justice.

In the following section, I explain that the incentive-compatible mechanism of the Polish lustration law comes at a cost: the sanction for lying in an affidavit is a ban from office, but in equilibrium, the collaborator faces a milder sanction of only having his act of collaboration publicized.

Transitional justice institutions as game equilibria

After developing a theory in the spirit of institutions-as-rules of the game (Greif and Kingston 2011) and explaining who implements transitional justice, under what circumstances and of what kind, I devote this section to a discussion of transitional justice institutions-as-equilibria, with a particular focus on how to design incentive-compatible lustration mechanisms. The importance of aligning incentives in lustration mechanisms with the normative goals of transitional justice is particularly stark in light of three facts.

First, post-transitional states—which would have to serve as enforcers of rules—are notoriously weak and deficient of resources to ensure rule enforcement. Working for the police forces in former authoritarian states is neither a lucrative nor reputable job. Those with adequate training can obtain much more attractive positions working for private security agencies. Hence new democracies' enforcement apparatuses are notoriously weak. At the same time, organizing secret police archives so that they can serve the normative goals of lustration—that is removing from public office former spies and agents of the authoritarian regime—is an expensive process. Even if files had not been destroyed over the course of the transition, the authoritarian secret police would use and archive its evidence in a dramatically different way than is optimal from the point of view of a lustration process. For instance, Germany is one of the Central European countries that has been applauded for its implementation of lustration. But the BStU, commonly called the Gauck agency (after its first Federal Commissioner Joachim Gauck), spent a fortune on data recovery after in 1995 it began reassembling the shredded documents destroyed by the outgoing Stasi officers. By now archivists commissioned to the projects have reassembled 400 bags of shredded documents. Recently, the BStU has been developing a system for computer-assisted data recovery in order to convert the 15,000 bags of shredded documents into what is estimated to be 33 million pages.

Kilometers of files have been destroyed and this was even more true for regimes whose transition to democracy involved long and protracted negotiations, because those in their possession had the time, opportunity, and incentives to destroy as much as they could. This is the case because those in possession of compromising evidence that could be used in lustration proceedings are most likely the same people who helped collect it—they are the spies and officers of the secret police themselves who would also be implicated by a stringent lustration process. But even if the

lustration process were mild, why would the owners of materials compromising potential politicians want to just give up their evidence? Secret police files allegedly demonstrating that candidates for public office collaborated with the secret police can and have been used in new democracies to corrupt politicians with such "skeletons in their closet" (Stan 2008).

These facts have important consequences for lustration mechanisms that are expected to perform after being successfully implemented. A reliable mechanism must rely on minimal enforcement and in its design must correct for the scores of documents that were destroyed over the course of the transition.

The Polish lustration law of 2007, outlined next, satisfies these constraints by providing collaborators of the communist authoritarian regime with incentives to reveal information about their past, if they want to run for office.

The range of targets encompasses senior governmental officials chosen through national and local elections, members of the core executive, officials of the central judicial system, senior officials in the public healthcare and social welfare systems, editors-in-chief of the public media, administrators and faculty of public and private universities, high school headmasters, top personnel of the national postal service, and CEOs of companies where the state is the main shareholder. Targeted activities include officers and informers of the secret police, police units that were subject to the command of the secret police (such as riot police), faculty and administrators of police academies, members of the border guard patrol, officers working for military intelligence and counter intelligence, and employees of the communist Agency for Religious Beliefs and the Censorship Office (Dziennik Ustaw 2007). The sanction in the Polish lustration law is a combination of (i) a ban from holding office and/or (ii) exposing the truth about the past. All targeted persons must submit affidavits in which they have to attest to whether they engaged in the targeted activity. If the targeted person confirms collaboration, he is not banned from office, but the declaration is immediately published on the internet. As a result, voters or the appropriate nominating agency can withdraw support for the candidate if either believes the target's past disqualifies him from the office in question. If a target's affidavit denies collaboration, it is referred to a state prosecutor from the agency responsible for maintaining the archives of the former secret police in Poland. The prosecutor assesses the veracity of the target's affidavit. If the prosecutor finds evidence that the affidavit was incorrect or incomplete, the candidate is accused of a lustration lie and tried by a lustration division of a regional court (Dziennik Ustaw 2007). If the target is found guilty, not only is the information about his collaboration published, but he is also banned from holding any public office for a period of 10 years.

To see the incentive-compatibility of the lustration mechanism, consider the decision-making calculus from the point of view of the ex-collaborator who is running for office, without knowing if evidence against him was preserved in the secret police archives or not. He may reveal the truth himself and face the certain outcome of voters or nominating agencies learning of his past; or he may withhold it and face the risk of being banned from office for 10 years if evidence of his collaboration was in fact preserved. With some probability, however—and this probability depends on how much evidence exactly was destroyed—he may be able to keep his collaboration secret. Although in the aftermath of democratic transitions, little can be done to change the probability with which evidence was destroyed, by making the sanction for lustration lies sufficiently harsh, lustration designers can ensure that even where evidence destruction was common, former collaborators will continue to self-reveal. Also, because the verification of lustration declarations is limited only to the affidavits that have nothing to declare, the burden associated with enforcing the lustration rule is reduced relative to a regime that would verify the past of all candidates running for office. In addition, the incentive-compatible lustration mechanism comes with the added bonus of being a non-retroactive form of transitional justice. Note that the

lustration court becomes involved because the public official in question lied in his affidavit, not because he was in the past a secret police collaborator. It is the act of dishonesty of the declaration, rather than its contents per se that are the subject of sanction. It is also worth pointing out, that although, in line with hypothesis 6, the law was amended to a more stringent form, the incentive-compatible element of truth revelation in exchange for a milder sanction was preserved.

Yet, it would be unfair to maintain that the incentive-compatible design of lustration comes at no cost at all. As long as the equilibrium of self-revelation is maintained, the only sanction former collaborators face is having the truth about their past publicized. Whether or not this sanction turns into a real penalty of losing office depends on the voters and the nominating agency. Once their interest in sanctioning former collaborators is depleted, so is the force of the lustration law. That is why such incentive-compatible mechanisms ought to be considered as mild forms of transitional justice.

Incentive-compatible lustration mechanisms have also been adopted in Estonia and Latvia. However, incentive-compatible transitional justice mechanisms are not limited to Eastern Europe.[7] The South African Truth and Reconciliation Commission, which offered perpetrators amnesty in exchange for confessing their criminal acts, is an example of an incentive-compatible truth commission (Gibson 2004). Nor are they limited to truth revelation procedures, as indicated by the Colombian Justice and Peace Law of 2005, which offered former members of paramilitary groups participation in a reintegration program in exchange for surrendering their arms and providing testimony about the paramilitaries' chain of command (Daly 2012).

The purpose of the Polish example was to illustrate how combining the two approaches to institutional analysis—institutions-as-rules and institutions-as-equilibria—can be used in the context of understanding the adoption and operation of transitional justice mechanisms. The institutions-as-rules approach led us to conclude that moderate forms of transitional justice can be implemented by political elites who would prefer to avoid it altogether. The institutions-as-equilibria approach allowed us to characterize incentive-compatible forms of transitional justice using the example of lustration. At the same time, we explained that such incentive-compatible lustration laws are typically mild forms of transitional justice.

Conclusions

As I mentioned in the introduction, research on transitional justice lacks broad empirical tests. Among the few theories that have been tested to date are some of the specific hypotheses from the theory of strategic transitional justice outlined in section 2. These, however, have only been tested with data from a select group of countries in post-communist Europe.

Although there is no reason to believe that only East Europeans are capable of using lustration to promote their favorite political outcomes, no one to date has systematically investigated the strategic uses of transitional justice outside of Eastern Europe. But for all we know, strategic transitional justice could be a worldwide phenomenon. Since the nineteenth century, more than 150 authoritarian regimes have transitioned to democracy, 85 percent of which have transitioned after 1931. All these democratic regimes have been in a position to engage in the strategic use of transitional justice. However, as I explained, this strategic behavior has only been investigated for a select group of post-communist regimes.

Few scholars have even theorized about how former autocrats' anticipations of transitional justice may affect their behavior in nascent democracies. A few hypotheses about anticipating transitional justice have been formulated in the context of Latin American transitions (O'Donnell and Schmitter 1986; Geddes 1999), but their authors doubt that these explanations can be

extended to non-military regimes of the fourth wave of democratization, because single-party authoritarian regimes do not have access to the same coercive measures that outgoing military juntas do.

The lack of research on strategic uses of lustration cannot be attributed to the shortage of lustration procedures outside of post-communist Europe. Although they are not referred to as "lustration" (but "purge" or "vetting" or even "housecleaning") such procedures are just as popular in other regimes. In a study devoted to post-conflict justice and impunity, Nalepa (2009) catalogues 55 lustration processes that have taken place within the last 70 years and this is a mere sampling.

Understanding the conditions under which transitional justice policies are adopted strategically plays a critical role in policy-making. While practitioners may know which transitional justice mechanisms are normatively best, ultimately, the type of mechanism that gets adopted is rarely best in some normative sense and is frequently the outcome of the interaction between strategic politicians constrained by democratic institutions. Studying transitional justice institutions-as-rules of the game on the one hand, and equilibria on the other, will help us understand which of the mechanisms under consideration are politically feasible, given the political and institutional constraints present. Without knowing what determines the feasibility of transitional justice mechanisms, speculating which mechanisms are normatively best is but an academic exercise with little practical consequence.

One final benefit of studying transitional justice in an institutional context is that this kind of analysis allows us to cut through the thicket of normative considerations accompanying regime transitions and see the similarity between lustration mechanisms and other processes used by states and organizations to screen their members for undesirable characteristics. The most obvious similarities that come to mind are transparency laws (such as Freedom of Information Laws) as well as other anti-corruption measures (Ang 2014). The dilemmas faced by politicians involved in corruption scandals who are concerned that information of this involvement may be disclosed to the electorate are very similar to those facing former collaborators who are running for office in post-authoritarian settings. Understanding how lustration works can help scholars studying transparency laws in conducting institutional analysis.

Notes

1 "Épuration" affected tens of thousands of people. Nearly 1,000 politicians, 6,000 teachers and 500 diplomats were vetted for possible collaboration with the Vichy regime. Such measures were not limited to positions in government, but were extended to the private sector as well. Separate purge committees were set up for writers, composers, artists, and the press, among others. The subsequent (1953) amnesty did not give civil servants a right to return to posts that they had lost in the purge, but made that possible, and restored the right to a pension. For an overview see (Macridis 1982).

2 For a similar distinction between the two ways scholars use formal theory to address problems in political science see Svolik, this volume.

3 Two, among many, examples illustrating how lustration laws undermine cabinet stability include Hungary in 2002 and Poland in 2006. In 2002, Hungarian Prime Minister, Peter Medgyessy, narrowly avoided the collapse of his newly created cabinet after an article in a Budapest daily revealed that he had worked as an undercover agent for the military counterintelligence (BBC International Monitoring 2002). In 2006, Polish Deputy PM, Zyta Gilowska, had to resign from office after being accused of collaborating with the secret police. Her resignation eventually brought down the entire cabinet (Easton 2006).

4 In a non post-communist setting the interpretation of infiltrated and non-infiltrated parties would be modified depending on which parties had collaborated with the ancien régime or occupying force. For instance, in post World War II Belgium, an example of a non-infiltrated party would be the Belgian Socialist Party, while an example of an infiltrated party would be the Christian Flemish National Union.

5 For readers familiar with game-theoretic terminology, this is the Subgame Perfect Equilibrium, which is the most appropriate equilibrium concept for extensive form games of this type.

6 As a conjecture, one could consider what happens if the agenda setting rules were weak. In such cases, we know from the Downsian model, that the preferences of the legislative median prevail. As a result, we cannot empirically distinguish strategic from non-strategic behavior. For this reason I refrain from formulating hypotheses that hold uniquely for legislatures with weak agenda setting powers.

7 Although examples of incentive-compatible lustration laws abound in Eastern Europe. In Estonia, the parliament adopted a law in February 1996 that required anyone who served as an informer or employee of foreign (i.e., Soviet and German) security intelligence bodies submit statements describing their activity to the Estonian security police. The names and statements would remain confidential, but the names of those who failed to confess within a year would be made public in the official State Gazette (Baltic News Service). The Latvian Parliament began discussing the passage of a similar law to the one in Estonia in May of 1993 in the context of the upcoming elections to the Saeima. The law was to mandate that each candidate running in the Saeima elections submit a statement that he has not been an official of the USSR or LSSR Committee for State Security [the KGB], the USSR Ministry of Defense, the security services, the army intelligence service, or the counter-espionage staff of Russia. The law was passed on January 15, 1994, just before the elections. Later, it was extended to elections to city, regional and district councils.

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