

# TRANSITIONAL JUSTICE DYNAMICS IN SLOVAKIA: FROM SILENCE TO THE NATION'S MEMORY INSTITUTE

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## **Abstract**

*The purpose of this article is to identify and explain the dynamics of transitional justice in Slovakia. Furthermore, it focuses on the Nation's Memory Institute and its role in the process of dealing with the past. The dynamics are explained through the existence of constraints – the type of the regime change, the nature of the Communist regime and elite configuration. Transition process in Slovakia can be divided into three distinct phases, in which the interplay of the constraints allows for the application of various transitional justice mechanisms. The main finding of the article is that throughout the existence of the independent Slovakia, the elite configuration was the variable which affected the process the most. Favorable elite configuration allowed for the establishment of the institute in 2002, which can be considered a “breaking of the silence” when it comes to dealing with the past in Slovakia.*

**Keywords:** transitional justice, regime change, elite configuration, Slovakia.

## **1. Introduction**

Dealing with past crimes is a challenge faced by every new political regime being established in a country with a criminal past. There are two basic approaches to this challenge: either forgetting and forgiving or addressing the criminal past. Huntington argues that the decision to deal with the past has to be quick, because as time passes the discredited groups are able to regain influence.<sup>1</sup> The tendency to forget and forgive simply increases with the passage of time.

The post-communist transitions to democracy are all part of the third wave of democratization and they share some common characteristics that distinguish them from the previous cases of transition. Claus Offe labeled them as “triple transitions.” This triple transition encompassed the political regime change (introduction of democratic rules of the game, building up the new constitutional framework), economic transition (the introduction of the market economy) and transformation at the level of nationhood (redefinition of national identities).<sup>2</sup> All of these problems have to be addressed simultaneously.

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1 Samuel P. Huntington, *The third wave: democratization in the late twentieth century* (Norman: University of Oklahoma Press, 1991), 228.

2 Claus Offe, *Varieties of Transition. The East European and East German Experience* (Cambridge: M. I. T. Press, 1997).

Slovakia experienced the change from communist rule as a part of Czechoslovakia. Czechoslovak elites addressed the past through a series of measures, including a limited number of criminal prosecutions and a rather severe lustration. After the breakup of the federation, Slovakia adopted the “politics of silence”. However, in 2002 a law establishing the Nation’s Memory Institute and access to the secret police files was passed in the parliament. This development meant that the silence was broken after 13 years, which goes against Huntington’s expectation.

The purpose of this article is to provide some insights into the transitional justice developments in Slovakia. The main research question is: What were the dynamics of transitional justice in Slovakia and how they can be explained? The transitional justice theorists argue that it is the context, which imposes constraints and shapes the choice of transitional justice mechanisms. I am going to argue that the dynamics in Slovakia can be explained by the interplay of hard constraints on transitional justice: the nature of the nondemocratic regime, character of regime change and elite configuration.

The transitional justice literature on post-communist societies usually deals with Czechoslovakia as a unit of analysis, with focus on the Czech Republic after the federation dissolution (e.g. Welsh<sup>3</sup> or David<sup>4</sup>). The main exception is the work of Nedelsky<sup>5</sup>, who deals with the Slovak case separately but does not sufficiently account for all of the specifics of the Slovakian experience with democratization and the consolidation of democracy. Moreover, her work focuses mainly on secret file access and lustration, while this article demands a wider analysis.

Szomolanyi argues that Slovakia was the only country in the east European region, which experienced a quadruple transition. Except for the problems identified by Offe, Slovakia had to build its independent state shortly after the transition. The state-building, which already started in 1992, was a completely different challenge for the Czech Republic, which maintained most of the administrative and

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3 Helga A. Welsh, “Dealing with the Communist past: Central and East European Experiences after 1990,” *Europe-Asia Studies* 48 (May, 1996).

4 Roman David, “From Prague to Baghdad: Lustration Systems and Their Political Effects,” *Government and Opposition* 41 (No. 3, 2006).

5 Nadya Nedelsky, “Divergent Responses to a Common past: Transitional Justice in the Czech Republic and Slovakia,” *Theory and Society* 33 (February, 2004) and Nadya Nedelsky, “Czechoslovakia and the Czech and Slovak Republics,” in *Transitional Justice in Eastern Europe and the former Soviet Union: Reckoning with the communist past*, ed. Lavinia Stan (New York: Routledge, 2009).

institutional capacities of the old republic and for Slovakia, which had little experience of self-government.<sup>6</sup>

Erika Harris goes even further and suggests that the Slovak transition was so complex that it should be divided into three stages, which “affect one another, but nevertheless have distinct characteristics within the main post-communist transition.”<sup>7</sup> The first stage was a common experience in Czechoslovakia within the still existing federation. The second stage was the notorious period of Mečiarism between 1994 and 1998, which is associated with the independent state-building. The final phase was the period of 1998-2002, after the critical 1998 elections and the victory of pro-European democratic forces. This period is characterized by Europeanization, which later resulted in NATO and EU ascension.

In the first section, I will briefly define my stance towards transitional justice and discuss various constraints to its implementation. Then I will deal with the hard constraints in the Slovak case. The final section will provide an overview of transitional justice policies in the three transition phases, with an explanation of their adaptation based on the interplay of given hard constraints. In this article, I am only dealing with the transitional justice mechanisms aimed at mitigating grievances caused by the communist regime.

## 2. Transitional Justice and its Constraints

Transitional justice can be in its broadest sense understood as a “conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.”<sup>8</sup> Pursuing justice after the repressive regime removal is an important challenge for any new regime. According to Zalaquett, any transitional justice policy “should have two overarching objectives: to prevent recurrence of such abuses and to repair the damage they caused.”<sup>9</sup> He further emphasizes that in terms of aims a transitional justice policy should not only be in connection with the above mentioned universal objectives but

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6 Soňa Szomolányi, “Cesta Slovenska k demokracii: od „devianta“ k štandardnej novej demokracii.” in *Slovensko: Desať rokov samostatnosti a rok reforiem*, ed. Grigorij Mesežnikov and Oľga Gyárfášová (Bratislava: Inštitút pre verejné otázky, 2004). 11-12.

7 Erika Harris, “Slovakia since 1989,” in *Central and Southeast European Politics since 1989*, ed. Sabrina P. Ramet (Cambridge: Cambridge University Press, 2010). 186.

8 Ruti G. Teitel, “Transitional Justice Genealogy,” *Harvard Human Rights Journal* 16 (2003), 69.

9 Jose Zalaquett, “Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints,” in *Transitional Justice. Volume I: General Considerations*, ed. Neil J. Kritz, (Washington: US Institute of Peace, 1995). 5.

should also be able to contribute to the depolarization of the society, reconstruction of the core institutions and securing the economic resources for designated goals.<sup>10</sup> Méndez argues that pursuing transitional justice is necessary for the new political order and that granting impunity to the perpetrators can lead to the recurrence of the abuses in the future:

The pursuit of retrospective justice is an urgent task of democratization, as it highlights the fundamental character of the new order to be established, an order based on the rule of law and on respect for the dignity and worth of each human person.<sup>11</sup>

The new regime also holds responsibilities towards its victims. The most fundamental of the victim's rights, according to Méndez, is the right to know the truth about the past injustices, including details which were kept secret. This information should be provided to the whole society. Connected to this is the duty of the new regime is to grant reparations to the victims and to acknowledge them as valuable members of the new post-transitional society. Moreover, the members of armed and security forces, which carried out the past crimes, should be excluded from the post-transition enforcement and intelligence bodies.<sup>12</sup>

Transitional justice is a complex phenomenon which can be achieved through various mechanisms, which have significantly different legal implications. These include criminal justice, reparatory justice (which includes material reparations or moral acknowledgement), vetting of the candidates for various public positions (lustration) and truth-revelation (revelation of the criminal practices of the former regime to the public). In practice, transitional justice constitutes a mixture of given approaches and they differ from country to country, even within the same region. It is a result of various constraints on their selection.

After the removal of the old regime, the new elites usually function within a specific context and they face various challenges, which affect the possibilities of addressing the past crimes. These can be overall labeled as the transitional justice constraints. Jon Elster divides the constraints into two main categories: the hard constraints, which render some mechanisms absolutely unfeasible and soft constraints, which create trade-offs between justice and other goals (such as democracy or economic reconstruction).<sup>13</sup>

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10        *Ibid.*, 6.

11        Juan Méndez, "In Defense of Transitional Justice," in *Transitional Justice and the Rule of Law in New Democracies*, ed. A. J. McAdam (Notre Dame: University of Notre Dame Press, 1997). 1.

12        *Ibid.*, 12.

13        Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge, UK: Cambridge University Press, 2004), 188.

The most prominent of the hard constraints is the nature of the regime transition. The character of the regime change, actors who initiate the transition and the relative strength of the opposition and government are all factors, which influence subsequent possibilities of transitional justice pursuit. For a detailed discussion see Huntington's analysis of the "torturer problem."<sup>14</sup>

Another constraint, which can be classified as a hard constraint in Elster's terminology is the nature of the criminal regime and the type of crimes it committed. The reason for this is that different types of crimes call for different ways of their addressing.<sup>15</sup> An integral part of this problem is the legitimacy of the past regime. In such cases where the regime enjoyed relatively high legitimacy among its population, the choice of a severe mechanism is unlikely. Connected to both these constraints is the issue of balance of power between old and new elites within the new system. If the old elites are able to retain power, or enjoy electoral success in the forthcoming elections, then thorough pursuit of transitional justice remains unlikely.

The soft constraints include structural constraints such as the nature of the economy and the need of its transformation, availability of resources or the limited capacity of the legal system.<sup>16</sup> The complexity of the transition along with the scarcity of the resources creates a trade-off between the other goals of the transition (such as institutional changes or transformation of the economy) and transitional justice. Therefore soft constraints can also lead to the adoption of the "forget and forgive" approach.

### 3. Hard Constraints on Transitional Justice in Slovakia

The nature of the communist regime is the first variable, which influences the choice of transitional justice mechanisms after the fall of the regime. Nedelsky argues that it is the nature of the former regime – manifested in its level of legitimacy and opposition to the regime – which influenced the pursuit of transitional justice in Slovakia and eventually its divergence from the Czech case.<sup>17</sup> (Nedelsky 2004) The Czechoslovak post-Stalinist communist regime is characterized as rigid and unreformed system (e.g. Elster<sup>18</sup>; Judt<sup>19</sup>; Linz and Stepan<sup>20</sup>). Rather high level of

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14 Huntington, *The third wave*, 231.

15 Barahona A. De Brito, Carmen Gonzalez-Enriquez and Paloma Aguilar, "Introduction," in *The Politics of Memory. Transitional Justice in Democratizing Societies* (Oxford: Oxford University Press, 2001). 19.

16 Elster, *Closing the Books*, 208-213.

17 Nedelsky, "Divergent Responses," 82-88.

18 Jon Elster, Claus Offe and Ulrich K. Preuss, *Institutional Design in Post-communist Societies. Rebuilding the Ship at Sea* (Cambridge: Cambridge University Press, 1998). 39-46.

opposition persecution and lack of legitimacy during the normalization period (1969-1989) and rigid old elites suggest that post-communist elites would employ a rather strict transitional justice approach in both Czech Republic and Slovakia. However, the levels of regime legitimacy as well as the extent of opposition should be treated separately in the two parts of the federation.

The regime enjoyed higher levels of legitimacy in Slovakia and therefore the opposition was rather weak and very limited in numbers.<sup>21</sup> The first reason is the modernization of the society. Slovakia experienced a socialist industrialization. In 1948, when the communist regime was installed, there was a large difference between Slovakia and Czech lands. By 1989, the situation was more or less the same in both parts of the federation. Modernization of the society brought improvement in economic, as well as social opportunities for the majority of the society.<sup>22</sup>

Secondly, Nedelsky argues that during the Prague spring, "Slovak leaders were much more focused on enhancing Slovak national sovereignty ... [than] liberalization and democratization."<sup>23</sup> The existence of the wartime Slovak state proved that Slovak self-government was possible. The "Slovak question" was to some extent existent within the society since the beginning of the communist regime<sup>24</sup>. This ambition was partly fulfilled in 1968, when political system of Czechoslovakia was formally federalized and in this sense the legitimacy of the regime was strengthened.

Purges within the party and society after the Prague spring were not as harsh in Slovakia as in the rest of the country. Harris characterizes the situation:

[I]n Slovakia, when people lost their positions, usually they remained within the same enterprise, the collaborators were tolerated, people retreated to their country cottages and nurtured their networks and generally adapted well."<sup>25</sup>

People learned to accept the regime and therefore the normalization period in Slovakia was more lenient. This all contributed to the low levels of polarization

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19 Tony R. Judt, "Metamorphosis: The Democratic Revolution in Czechoslovakia" in *Eastern Europe in Revolution*, ed. Ivo Banac (Ithaca - London: Cornell University Press, 1992).

20 Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-communist Europe* (Baltimore: The John Hopkins University Press, 1996).

21 For a thorough analysis see Nedelsky, *Divergent Responses*, 82-88.

22 Jiri Musil, *The end of Czechoslovakia* (Budapest: CEU Press, 1995). 92.

23 Nedelsky, "Czechoslovakia," 42.

24 Even in the Stalinist times, this can be illustrated at the trials with so called "bourgeois nationalists" – which included the later normalization leader Husák.

25 Erika Harris, *Nationalism and Democratization: Politics of Slovakia and Slovenia* (Aldershot: Ashgate, 2002). 82.

within the society, the difference between the supporters and opponents of the regime was not so visible.

The second variable which imposes constraints on the possibility of transitional justice mechanisms choice is the nature of the regime change from nondemocratic regime. In case of Czechoslovakia it opened up possibilities to employ transitional justice. Kitschelt characterizes the Czechoslovak transition as a transition by "implosion of the old order."<sup>26</sup> In this case the old elites succumb to the mass protests of the civil society in a short period of time. This type of transition can also be labeled a "regime collapse."<sup>27</sup> Empirical evidence proves that swift changes occurred: the creation of the interim Government of National Understanding already in December 1989, the election of Havel as a president on December 29, with following constitutional changes and the scheduling of the free elections for June 1990. However part of the old elite was able to secure limited influence in the shaping of the new order.

Szomolanyi defines the Czechoslovak transition as a "negotiated collapse." The old rigid elites did not participate in the roundtable talks, the negotiations were held between the moderate communists, who however did not hold any significant power under the old regime, and the opposition representatives. Therefore the negotiations were not held between the old regime representatives and the opposition elites, but only among the new emerging elite.<sup>28</sup> In this sense the regime transition was a collapse, which afterwards included some negotiations that were not initiated while old elites were in power.

The elite configuration in the transition period is the final hard constraint I am going to discuss. Since it is the elite, who make decisions on the transitional justice legislation, it is important to examine whether the old elite was able to maintain their position in the new emerging political order. It is even more important in the case of Slovakia, which experienced long transition divided into three distinct phases. I am going to discuss elite transformation in each of these periods.

The first phase is to a large extent determined by the nature of regime transition and character of communist opposition. According to Elster, Offe and Preuss, the non-violent character of the regime change implies that the old elite are not completely discredited. Combined with the incoherent and fragmented opposition, which is brought together after the mass protests, they argue that old elite is

26 Herbert Kitschelt, Zdenka Mansfeldova, Radoslaw Markowski and Gábor Tóka, *Post-Communist Party Systems: Competition, Representation and Inter-Party Cooperation* (New York: Cambridge University Press, 1999).

27 Linz and Stepan, *Problems*, 316.

28 Soňa Szomolányi, *K'ukatá cesta Slovenska k demokracii. [Winding road to democracy]* (Bratislava: Stimul, 1999). 19-26.

needed in the subsequent transformation process.<sup>29</sup> This problem of “lack of transformative vanguard” occurred in the Czechoslovak case. The regime change was characterized by the creation of umbrella opposition organizations – in the Czech context, the Civic Forum (OF), in the Slovak, Public Against Violence (VPN), which consisted of individuals with divergent opinions – including the dissidents, grey zone and reform communists (from the period of Prague Spring). Both these movements were formed only after the mass protests had already started. Calda argues that old elites were able to secure representation and influence in the newly emerging regime due to the fact that personal questions were negotiated in the roundtable talks, in which OF and VPN made too much concession to the communists. This was a result of the fear of use of violence, as well as overestimation of the communist’s real power.<sup>30</sup> A coalition consisting of moderate representatives of both the old and new elite legitimizes both anticommunist opposition, as well as some old regime groups and therefore did not lead to widespread sanctions of individuals or whole groups.<sup>31</sup>

Another important factor affecting the elite configuration was the ability of the Communist party in Slovakia to undergo a successful transformation. It changed its name to the Communist Party of Slovakia – The Party of Democratic Left and the Communist reference was completely excluded in January 1991. This was associated with re-registration of all the members, which served as an alleged break with the past regime, adaptation to the conditions of pluralism and reorientation as a social democratic party.<sup>32</sup> However, it also led to a steep decline in membership.

Nevertheless, the first phase was dominated by the anticommunist elite, who had the highest electoral gains in the 1990 elections both in the Czech Republic and Slovakia. Civic forum was able to gain more than 50% of the vote, while the biggest representation from Slovakia was secured by VPN (32.5%) and Christian democrats (KDH – almost 19%). This suggests that the first phase delineated by the first two elections resulted in an elite configuration conducive to transitional justice pursuit. The second phase is characteristic by the dominance of HZDS (Movement for Democratic Slovakia) of Vladimír Mečiar. The party was seceded from VPN in 1991 and it was “dominated by former managers and communist party cadres.”<sup>33</sup> This was a result of the fact that HZDS was established by the former VPN members who did

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29 Elster, *Institutional Design*, 11-14.

30 Miloš Calda, “Czechoslovakia,” in *The Roundtable Talks and the Breakdown of Communism*, ed. Jon Elster (Chicago: University of Chicago Press, 1996). 162-163.

31 Vladimíra Dvořáková and Jiří Kunz, *O přechodech k demokracii. [On transitions to democracy]* (Praha: Slon, 1994). 61.

32 Marek Rybář, *Medzi štátom a spoločnosťou. Politické strany na Slovensku po roku 1989. [Between the state and society. Political parties in Slovakia after 1989]* (Bratislava: Univerzita Komenského, 2011). 82.

33 Nedelsky, “*Divergent Responses*,” 90.



not agree with the liberal orientation of the party, many of which were former communists.<sup>34</sup> Mečiar himself was a member of the party, who was purged after 1968, although he was able to maintain his job as a lawyer<sup>35</sup>.

HZDS became the most popular political party in Slovakia after the 1992 elections, securing 74 out of 150 mandates in the Slovak parliament. These elections brought strengthening of the personal continuity with the old regime representatives in Slovakia – 99 out of 150 members of parliament were former communists.<sup>36</sup> The dominance of HZDS was disrupted for a short period of time in 1994, after a larger number of parliamentary representatives left the party. In subsequent early elections, HZDS regained its dominance, securing 61 seats in the parliament. During this phase, SDL (in coalition with 3 smaller parties) became the second biggest party with electoral gain of slightly over 10%, but it did not become member of the ruling coalition.

The third period of transition brought a radical change in Slovak politics. HZDS, although winning the largest number of representatives in the parliament (with 27% of the votes), was not able to construct the ruling coalition. Instead, a broad anti Mečiar coalition of ideologically divergent parties was created. It included both center right parties united within electoral party SDK<sup>37</sup>, the transformed former communist SDL, which was able to secure almost 15% percent of votes, a coalition of Hungarian parties (SMK) and a small center left party SOP. This period was characterized by ever increasing fragmentation of the parliamentary parties – including the collapse of the SDK coalition, the creation of SDKU by Mikuláš Dzurinda in 2000 and the split of SDL which resulted in establishment of Smer by Róbert Fico. This fragmentation of the parliament in fact led to the creation of political groupings, which were more supportive of transitional justice.

The approach of the relevant political subjects towards transitional justice can be roughly identified in the research conducted by Benoit and Laver.<sup>38</sup> The research was based on expert surveys conducted between 2002 and 2003 (with members of academia, research institutes and to a lesser extent journalists and politicians) on

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34 Szomolányi, *Kľukatá cesta*, 46.

35 Mečiar was accused of being a secret police collaborator since 1976, although direct evidence was never provided. For a detailed discussion, see Nedelsky, *Czechoslovakia*, 89-90.

36 Szomolányi, *Kľukatá cesta*, 90.

37 Special electoral party SDK, consisting of 5 opposition center right parties was created due to the changes in electoral law (higher threshold for coalitions) passed by Mečiar before the elections.

38 Kenneth Benoit and Michael Laver, *Party Policy in Modern Democracies* (New York: Routledge, 2006).

various policy dimensions of political parties. One of the dimensions they were interested in was the treatment of former communists by the political parties. The scores by Slovak political parties were following:

**Table 1: Attitude towards Transitional Justice**

Party	SDL	HZDS	SDKU	KDH	SMK	Smer
Former communists	3.6	7.1	14	17.4	13.1	7.9

Source: The table is based on Benoit and Laver.<sup>39</sup>

The score indicates the party position on the continuous scale from 1 to 20, where 1 represents the approach that former communists should have “same rights and opportunities to participate in public life”, 20 is the opinion that “former communist should be kept out from public life as far as possible.”<sup>40</sup> This statistic is by no means an exhaustive indicator of attitudes of relevant political actors towards transitional justice, but it can serve as an indication of a direction certain party (or their coalition) adopts towards policies of dealing with the past. Moreover, it can be concluded that Christian democrats (KDH) were at the time the most interested in harsh transitional justice pursuit, followed by SDKU and SMK.

To summarize, it can be concluded that the old elites were able to preserve some influence in all of the transition stages in Slovakia. This influence however varied, and the third stage of transition can be expected to be the most conducive for transitional justice from the elite configuration point of view.

#### **4. Transitional Justice Dynamics in Slovakia**

As argued above, the Slovak transition can be characterized by the existence of three distinct phases. In each of the phases the hard constraints on transitional justice were interplaying with each other in different way and therefore the enactment of transitional justice legislature, as well as its implementation in practice was different. In this chapter, I am going to inspect the dynamics of transitional justice in detail.

##### *4.1 Slovakia within Czechoslovak Federation (1989-1993)*

This phase is characterized by the close proximity of the regime change. The period of December 1989 until February 1990 was characterized by resignation of communist deputies from the parliament, which were replaced by cooptation of mostly noncommunist representatives. Therefore the beginning of the first phase of transition was characterized by the adaptation of almost no transitional justice

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39      *ibid.*, 256.

40      *ibid.*, 173.

measures, explained by the retaining of power by the old elites in both executive and legislative bodies. The only exception were judicial rehabilitations, which occurred already in April 1990, before the first elections.

The major turning point was the 1990 June election when the elite configuration changed rapidly. The elections brought a major victory for the democratic forces and therefore the constraint of elite continuation was eliminated. The first set of mechanisms adopted fall under the reparatory justice category – judicial rehabilitation, extrajudicial rehabilitation and restitutions. As I already mentioned, the first transitional justice mechanism was the Act on judicial rehabilitation (nb. 119/1990). The purpose of this law was to

repeal the sentences based on acts that conflicted with the principles of democratic society respectful of political rights and civil liberties guaranteed by the Constitution and provided for in international documents [...]<sup>41</sup>

This was a symbolic act, a form of moral acknowledgement of the unlawful suffering, which did not bring any material compensation for the victims. It acknowledged that some activities of the victims, which were labeled criminal under the old regime, were morally right and in accordance with the values of any democratic society. Judicial rehabilitations were granted to more than 220 000 persons in Czechoslovakia.<sup>42</sup>

The Act on extrajudicial rehabilitation (nb. 87/1991) was passed in February 1991 and its aim was to “mitigate grievances, which arose through application of civil law, labor acts and various administrative acts ... [and] which were in conflict with the principles of a democratic society.”<sup>43</sup> The mitigation of grievance was to be carried out through revocation of some of the acts, return of the confiscated asset, and provision of financial compensation or adjustments in social security payments for the victims. Therefore this act did not only provide symbolic rehabilitation to the victims, but it resulted in limited material gains.

The idea behind property restitutions in Czechoslovakia was the alleviation of the injustices committed by the past regime. The nature of the grievances is the confiscation and nationalization of the property against the will of its rightful owner; moreover these requisitions were made without proper compensation or no compensation at all. Jablonovský argues that the state was aware of its lawful duty to compensate owners for the seized property (since the nationalization decrees

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41 Act on judicial rehabilitation, nb. 119/1990, §1.

42 Lubomír Morbacher, “Zločiny komunismu na Slovensku [Communist Crimes in Slovakia],” in *Zločiny komunistických režimů. Sborník z mezinárodní konference* (Praha: Ústav pro studium totalitních režimů, 2011). 147.

43 Act on extrajudicial rehabilitation, nb. 87/1991, §1.

include provisions for compensation for the expropriated property). Property was often nationalized without proper compensation and therefore the state violated its own legislature.<sup>44</sup>

A prelude to the actual restitutions of property was the November 1990 Act on the return of the assets of the Communist Party of Czechoslovakia to the people of the Czech and Slovak Federal Republic (nb. 496/1990). In practice, it meant nationalization of the properties owned by the communist party. This early initiative was followed by passing of various restitution laws – which can be divided into three broad categories – restitution of the agricultural property, restitution of estates and church property restitution.

Restitution of estates was already enacted in October 1990 with the Act on mitigation of certain property related injustices (nb. 403/1990). This law states explicitly that some cases of confiscation and nationalization between 1948 and 1989 were unjust. The mitigation of the injustices was to be carried out either by returning of the property, or financial compensation to the entitled person (owner or lawful heir). However, it did not allow for restitutions of other types of property.<sup>45</sup>

Therefore the law had to be amended several times and other restitution laws had to be prepared as well. Agricultural properties, as well as forests restitutions were regulated in the May 1991 Act on modification of the ownership of land and other agricultural property (nb. 229/1991). This law allowed for restitutions only to the citizens of the country with permanent residence. The church property restitutions were started by the July 1990 Act on the modification of some of the property relations of religious orders and congregations (nb. 298/1990). This provided for the return of the property to various church organizations, which were expropriated during the 1950s. At the same time, the Act on the settlement of property relations between the Greek Catholic and Orthodox Church (nb. 211/1990) was passed in the Slovak parliament. This was needed due to the fact that communist regime expropriated the Greek Catholic church and transferred its property to the Orthodox church.

Symbolic condemnation of the communist regime came with the November 1991 Act on the period of oppression (nb. 480/1991). This act explicitly labeled the past regime as the period of oppression and stated that “between 1948 and 1989 the communist regime violated human rights and its own laws.”<sup>46</sup> By passing this law,

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44 Roman Jablonovský, “Genéza právnej úpravy reštitúcií na území Slovenskej republiky [Genesis of restitution legislation in the territory of Slovak Republic],” in *Dny práva*, ed. Radovan Dávid, David Sehnálek and Jiří Valdhan (Brno: Masarykova Univerzita, 2010). 3-4.

45 *Ibid.*, 13.

46 Act on the period of oppression, nb. 480/1991, §1.

the new democratic regime delegitimized the old one and tried to differentiate itself from the period of oppression with a new period of freedom. However the law provides for the legal continuity of the legislation passed under the communist regime. "Legal acts adopted in the period [of oppression] ... shall be repealed only if so provided by specific laws."<sup>47</sup>

A specific post-communist transitional justice mechanism, which was first adopted in Czechoslovakia, was lustration. The so called "wild lustration" was already applied before the elections when some of the parties screened their candidates voluntarily before the 1990 elections (OF and VPN) and revelations of secret police collaboration was misused for political goals. This wild lustration is associated with information leaks from the Ministry of Interior and public accusation of collaboration directed towards some publicly active individuals. In this sense the lustration law can be seen as an attempt to govern the screenings and make the process transparent.<sup>48</sup> The lustration law (Act establishing certain additional conditions for the performance of certain functions in state bodies and organizations of the Czech and Slovak Federal Republic, the Czech Republic and Slovak Republic (nb. 451/1991)) institutionalized an exclusive lustration system, a system in which officials associated with the old regime were completely excluded from the public life.<sup>49</sup> The main idea behind the lustration law was to exclude old elites from the new emerging democratic order and in this sense facilitate discontinuity with the totalitarian regime and protect the nascent democratic order.

On the other hand, it was criticized on the basis of violation of legal certainty principle and institutionalization of collective guilt by both former communists and some of the dissidents.<sup>50</sup> Lustration legislature was valid for the whole federation; however it was never thoroughly applied in Slovakia.<sup>51</sup> This can be explained by the fact that the ruling Slovak elites (after the 1992 elections) were not in favor of punitive accountability mechanisms.

Criminal prosecution was a mechanism, which was used in a very limited manner during this period. Prosecutions were initiated against high-ranking communist officials for abuse of their power and the unlawful crackdown against the 1988 and 1989 demonstrations. The first ever trial was of the communist official and the initiator of brutal police interventions, Miroslav Štěpán, who was sentenced to 15

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47 Ibid., §2.

48 Nedelsky, "Czechoslovakia," 45.

49 David, "From Prague," 353.

50 For detailed evaluation of the lustration law from the normative point of view and criticism of its shortcomings see Tina Rosenberg, *The Haunted Land: Facing Europe's Ghosts After Communism* (New York: Vintage Books Edition, 1995), 67-121.

51 Monika Nalepa, *Skeletons in the Closet: Transitional Justice in Post-Communist Europe* (Cambridge: Cambridge University Press, 2010), 193.

years in jail. Criminal prosecutions concerned mostly Czech nationals, but one of the individuals held criminally responsible was also Slovak Alojz Lorenc, who was the deputy minister of interior and the former head of the state security. Lorenc was found guilty of preventive roundup of citizens in 1988-89. This activity was mainly aimed at dissidents, who were prevented from attending demonstrations. Lorenc was sentenced to 4 years in prison by the Czech court, but in the meantime the federation was dissolved and he avoided imprisonment by staying in the Slovak Republic and refusing to commence his sentence in the Czech Republic. As a result his trial had to be opened again in Slovakia.

Transitional justice in post-communist environment is closely connected to the secret police archives and in this sense access to these files can be considered as the most important truth-telling mechanism. Despite of the fact that Czechoslovak federal parliament adopted a strict lustration law; the secret files were not made accessible to the public, nor made available for research. Federal Prime Minister Čalfa argued that “the government is convinced that the publication, at a time when democratic institutions and habits are not yet consolidated, would expose these persons and their families to harassment, and would therefore be an ill-considered step.”<sup>52</sup>

#### *4.2 Slovakia under Mečiar (1993-1998)*

The second transition phase, which is a phase of the first years of existence of independent Slovakia, was characterized by the government of elites, who were not interested in thorough pursuit of transitional justice. The break-up of the federation, however, meant legal continuity of the existing federal legislation, which included the transitional justice measures discussed above.

It is important to emphasize that lustration law was not implemented in Slovakia even during the existence of the federation. After the breakup of the federation, Slovakia inherited the lustration legislation. There were attempts to repeal the lustration law. It was petitioned in the Slovak constitutional court arguing, that it is not consistent with the Charter of Rights and Freedoms included in the Slovak constitution. The court did not proceed with this application with the explanation, that the law was already petitioned in the federal Czechoslovak constitutional court, which decided that it does not violate rights and freedoms of the screened individuals.<sup>53</sup> Therefore formally, lustration legislation was in effect and required

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52 Marián Čalfa in Nedelsky, “Czechoslovakia,” 51.

53 Jana Kunicova and Monika Nalepa, *Coming To Terms With the Past: Strategic Institutional Choice in Post-Communist Europe* (April 2006 Version), [online] available at [http://citation.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/1/4/1/0/5/pages141057/p141057-1.php](http://citation.allacademic.com/meta/p_mla_apa_research_citation/1/4/1/0/5/pages141057/p141057-1.php) on 14.10.2012, 14.

the establishment of procedural rules. However, no lustration agency was established (the federal one was in Prague) and the lustrations were not carried out in practice. The lustration law, which was originally intended to be in effect for five years, simply expired at the beginning of 1996.

The main explanation of non-pursuit of lustration is the elite configuration constraint, which emerged as a consequence of 1992 elections, which brought electoral victory of HZDS. Kunicova and Nalepa argue that HZDS, although agreeing with some mild forms of transitional justice, did not agree with the harsh federal lustration law and “Mečiar’s gate keeping powers prevented the federal lustration law from being implemented [in Slovakia].”<sup>54</sup> Therefore the elite configuration in the newly established independent state can be considered the main reason for the turn to “politics of silence” in Slovakia.

The most important act passed during this period was the March 1996 Act on the immorality and illegality of the communist system (nb. 125/1996). Surprisingly this law came during this transition phase and it was supported by both coalition and opposition parties. The facts that HZDS was not interested in punitive measures and this law remained only at the symbolic level throughout the second transition phase can explain its support for it. Such a law was, according to the drafters, necessary to

give special reverence to the victims of the communist system, to acknowledge them significant share in the restoration of freedom and democracy, to keep in the nation’s memory suffering and sacrifices of thousands of its citizens, to avoid the recurrence of any attempts to restore the totalitarian system in any form and taking into account the necessity to deal with the communist system.<sup>55</sup>

The law identifies two goals of transitional justice – acknowledgement of the victims and deterrence of the recurrence of crimes. In accord with the first goal, the law officially thanks the victims of the communist repression for their struggle for freedom.

Another significant outcome of the law was the acceptance of the fact that various crimes were committed under the communist regime by state officials. Although the law did not state explicitly that the regime was criminal, it claims that the communist party “did not prevent its members and their accomplices from committing crimes and violations of basic human rights and freedoms.”<sup>56</sup> Moreover, the law lifted the statute of limitation for the crimes<sup>57</sup> committed between February

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54 *Ibid.*, 18-19.

55 Act on the immorality and illegality of the communist system, nb. 125/1996, Preamble.

56 *Ibid.*, §1.

57 These included, for example, crimes of terrorism, murder, bodily harm and other.

1948 and December 1989 if “for political reasons incompatible with the fundamental principles of the rule of law of a democratic state there was no final conviction or a waiver of the indictment.”<sup>58</sup> This was an important regulation for the possible criminal justice pursuit. However, no specific mechanisms were created for the pursuit of criminal justice and therefore the whole law remained only symbolic in practice. This can be explained by the fact, that the ruling parties were not really interested in opening any criminal cases, due to the circumstances already discussed.

#### *4.3 Slovakia after Mečiar (1998-2002)*

The last phase of the transition is characterized by the government of anti Mečiar coalition of liberal, socialist as well as conservative parties. As previously discussed, this was the phase which was most conducive to the pursuit of transitional justice due to the lowest extent of transitional justice constraints.

In connection to the judicial reparations act (already enacted in 1990), the July 2002 Act on one time financial premium provision for political prisoners (nb. 462/2002) provided financial compensation to one of the category of the communist regime victims. This law can also be seen as a partial fulfillment of the commitment given in the law on the immorality of the communist regime to compensate the victims. The financial allowance was provided to the victims or the family members of victims, who spent at least 3 years in jail and who were later rehabilitated.

At the end of 1999, minister of justice Ján Čarnogurský came up with the initiative to establish a body, which would be responsible for investigating communist crimes and initiating criminal prosecutions. It was to be based on the Czech model where the Office for the Documentation and Investigation of Communist Crimes functions under the Ministry of Interior and it is a police body. This was, however, rejected both by opposition, as well as some of the coalition parties – it was especially opposed by SDL.<sup>59</sup> (Kunicova and Nalepa 2006, 20)

The year 2002 also saw the conclusion of the Lorenc case, whose criminal trial was ongoing since the establishment of the independent Slovakia. He was sentenced to 15 months conditionally for the offense of abuse of authority. To this date, it is the only criminal case, which concluded with a conviction.

The unsuccessful plan of Čarnogurský resulted in the establishment of the Department for the documentation of the crimes of communism within the Ministry of Justice. Foundation of this small department did not require the support of

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58 Act on the immorality and illegality of the communist system, §4.

59 Kunicova and Nalepa, *Coming To Terms*, 20.



parliament and therefore its establishment was possible already at the beginning of the third phase. It consisted of only 2 persons and its responsibility was to collect documents concerning the period 1948-89, start with the documentation of the crimes committed during the communist period and to provide consultation services to the victims (concerning the restitutions and compensations).<sup>60</sup> It had access to a limited amount of archival material, because some of it was deposited within the Ministry of Interior.

The major turning point was the year 2002, when just a few months before the elections an Act on the declassification of the documents on the activities of state security authorities between 1939 - 1989 and the establishment of the Nation's Memory Institute (law on memory of the nation) nb. 553/2002 was passed in parliament. This brought "the breaking of the silence", which was a result of the developments after the break up of Czechoslovakia.

### 5. Nation's Memory Institute (NMI)

The establishment of the institute was accomplished in August 2002, after parliament had outvoted the presidential veto. The law establishing the institute was supported by a wide range of political parties and factions in the parliament. This was the result of the political developments after the 1998 elections. The main exceptions were SDL and to some extent HZDS.<sup>61</sup> In the first voting session in July 2002, 82 out of 93 present MPs voted for the law. Most of the SDL representatives were not present or abstained from the vote.<sup>62</sup> The second time the law was presented in the parliament after the presidential veto and it gained 82 votes out of 115 present in the assembly. This time more than half of the HZDS representatives were not present or abstained, although the rest voted for the law. None of the SDL representatives voted for the law. Political support for the law was therefore possible due to the favorable elite configuration which was a result of 1998 elections and subsequent fragmentation of political parties in the parliament. Moreover, the proximity to the elections (in September 2002) created an environment in which the supporters of the law from the ruling coalition were no longer constrained by their coalition partners, especially the SDL. The threat of a breakdown in the coalition was no longer relevant.<sup>63</sup>

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60 Marián Gula, *Vyrovňávanie sa s komunistickou minulosťou na Slovensku*. [Dealing with the Communist past in Slovakia] (Goethe Institut e.V., August 2010) [online] available at <http://www.goethe.de/ges/pok/prj/usv/svg/sk7612920.htm> on 13.10.2012.

61 At the time of the vote, the parliament was rather fragmented. At the time of the first vote, there were 7 parliamentary factions and one of the largest clubs was independents (30). During the second vote, the number of factions increased to 8 and there were 31 independent representatives.

62 But even 2 SDL MPs voted for the law.

63 Kunicova and Nalepa, *Coming To Terms*, 22.

NMI is supposed to examine not only the era of communist dictatorship, but also the era of Slovak state. This is a result of the fact that Slovakia was not able to address either its communist past, or the earlier nondemocratic past in an unbiased sense. Impartial study of the Slovak state was not possible during the existence of the Communist regime. Supporters of the law presented it as an attempt to overcome the “forgetting” of the past, by which the Slovak approach to transitional justice can be characterized. The preamble of the founding law states that it is important to bear in mind that

those who do not know their past, are condemned to repeat it, and that no unlawful act on behalf of the State against its citizens may be protected by secrecy or forgotten.<sup>64</sup>

Therefore the state has a duty to disclose the truth about its past, as well as duty to address the harm done to the victims is emphasized. There is “the duty of our state to rectify the wrongdoings to all those who suffered damage on behalf of a State, which violated human rights and its own laws.”<sup>65</sup>

One of the most important developments of the Act was the full disclosure of security police files, which were, until then, still inaccessible. The duties to administer and research the files were given to the newly established institution – NMI.

### *5.1 Functions of the Institute*

The newly established institute was provided with several mechanisms to address the past. In the following section, I will provide an overview of what the NMI actually does and how these functions can be organized from the analytical point of view.

The truth revelation function is primarily connected to the publication of information from the secret police files. In practice, it includes a wide range of activities. One of the functions of the institute is the provision of this information to the interested individuals. Upon request, any person has to be provided with information as to whether a file regarding him or her exists, whether there is a report containing the results of the intelligence, and be provided with the copies of

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64 On the declassification of the documents on the activities of state security authorities in 1939-1989 and the establishment of the Nation’s Memory Institute, 553/2002, Preamble.

65 Act on the declassification of the documents on the activities of state security authorities between 1939 - 1989 and the establishment of the Nation’s Memory Institute, 553/2002, Preamble.

these relevant documents. The first personal screenings began in 2003, after the establishment of the institute. This was a lengthy procedure, since the Institute had to make an inventory of and analyze all of the relevant documents.

Morbacher claims that the disclosure of information contained in the files helps citizens to uncover the full truth about their past and how it was affected by this repressive component. This function of the NMI enabled both those who knew that they were of interest to the secret police, as well as those who did not know that someone manipulated their lives, to learn what information was collected about them and how the state security influenced their lives.<sup>66</sup>

The goal of truth telling was not only aimed at provision of information to individual persons, but also to the whole society. Therefore after the information was processed, the lists of perpetrators, collaborators and victims were made available for the public. The Institute does not only work with the files deposited in its own archive, but also conducts research in other archives to fulfill its goals. One of the crucial functions of the Institute is to "to publish data on executors of the persecution and their activity."<sup>67</sup>

When it comes to collaborators, the Institute grants access to the registration protocols of the secret police, which include names of the secret collaborators. The files itself are held in the archive, which was made available for researchers in 2005. In 2007, it was made accessible for the general public as well. This led to an increased interest by the media in the issue of collaboration. Other truth telling activities of the institute include historical research. To fulfill the function to

conduct full and impartial evaluation of the period of oppression, particularly to analyze the causes and manner of loss of freedom, symptoms of fascist and Communist regimes and their ideologies, involvement of domestic and foreign persons ...<sup>68</sup>

the NMI has its own department of historical research. Since its establishment, the vision of the institute was to employ young historians unburdened by the past (meaning that they did not carry out their research during the communism). Therefore they would be able to provide unbiased evaluation of the period of

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66 Lubomír Morbacher, "*O našej minulosti, ŠtB, zmierení a odpúšťaní*. [On our past, state security, reconciliation and forgiving]," *Sme* (26. 09. 2006) [online] available at <http://komentare.sme.sk/c/2913140/o-nasej-minulosti-stb-zmiereni-a-odpustani.html> on 15.10.2012.

67 Act on the declassification of the documents on the activities of state security authorities between 1939 - 1989 and the establishment of the Nation's Memory Institute, 553/2002, §8.

68 *Ibid.*, §8.

oppression.<sup>69</sup> The results of this activity include publication of historical books, studies, and a professional journal, *Pamäť Národa* (Memory of the Nation).

The publication of the names of the secret police collaborators created various responses in the society. In a limited number of cases, the identification of collaboration of the persons holding public office led to their resignation.<sup>70</sup> In this sense, the impact of the institute's functioning resembles lustration. However, resignation from the post was a very rare response. The list of identified collaborators included politicians, prominent entrepreneurs, sportsmen and members of the clergy (including the catholic archbishop Ján Sokol). Nedelsky claims that this activity was able to capture public's interest and created a societal debate, which led to the stark condemnation of these individuals by the public.

On the other hand, a number of identified collaborators questioned the reliability of the information included in the files and several lawsuits were filed against the NMI. Until the end of 2010, 43 lawsuits were initiated on the basis of defamation. The plaintiffs claimed that the information in the file was inaccurate and demand a "verdict that they are wrongly registered in the state security protocols and they did not cooperate knowingly."<sup>71</sup> Twenty four lawsuits were lawfully decided, out of which 12 in favor of the NMI and 12 in favor of the plaintiff. These developments in the courts suggest that indeed the information in the files cannot be considered unconditionally accurate and therefore its publication can create moral problems, specifically incorrectly labeling as a collaborator an innocent person.

Since 2006, it is the institute's responsibility to accept and evaluate the applications for granting the status of the anticommunist resistance member based on the law on anticommunist resistance. This status is awarded to the persons who were either members of illegal anti-communist organizations, political prisoners, members of a foreign resistance movement or who carried out other anti-communist activities focused on the restoration of freedom and democracy.

Based on the law on memory of the nation, another of the tasks of the institute is to "make motions for criminal prosecution of crimes and criminal offenses [Nazi

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69 Matej Medvedický and Ondrej Podolec, "Sekcia vedeckého výskumu. [Department of scientific research]," *Pamäť Národa*, (vol. 2, 2007), 73.

70 The first was the case of state secretary Ján Hurný, who abdicated after his name appeared in the collaborators list, in spite of the fact that he denied the authenticity of the file. The latest was the case of Pavol Ňuňuk, who was a Military Counterintelligence functionary between 1980 and 1989. He was appointed a Head of the legislative section at the Ministry of Agriculture and decided to resign from his position in 2012.

71 Výročná správa ÚPN 2010 [Nation's Memory Institute Annual Report 2010], [online] available at <http://www.upn.gov.sk/data/upn-vyroczna-sprava-2010.pdf> on 15.10.2012, 11.

crimes, communist crimes and other crimes], in cooperation with the Attorney General's Office of the Slovak Republic."<sup>72</sup> Morbacher claims that Slovakia lags behind other states in the pursuit of criminal prosecutions due to the political developments after the split of Czechoslovakia and the reluctance of state organs to initiate prosecutions. The establishment of the NMI, its documentation of the crimes and identification of the perpetrators was a possibility to initiate criminal prosecutions.<sup>73</sup>

The first four submissions were presented in 2007, being three cases of murder and one case of torture. The first three cases are still open, while the latter was suspended due to the fact that the defendant "in neither of her testimonies, nor in the any written statements stated that the investigators used any kind of physical violence or forced her to confess."<sup>74</sup> In 2008, the cases of the 42 murders at the borders by the members of Border Patrol were submitted to the Attorney General's Office. The NMI tried to classify these cases as crimes against humanity, due to the fact that there is no statute of limitation for these crimes. The last two cases were submitted in 2009 and these were also documentations of murders.

The Attorney General's Office prepared a regulation for local attorney offices which states that the cases submitted by the NMI are not to be qualified as crimes against humanity. Although the law on immorality of the communist regime lifted the statute of limitation on crimes committed between 1948 and 1989, more than 20 years had passed and therefore most of the crimes were statute barred. It seems clear, then, that "despite of the commenced prosecutions in individual cases, [it is very likely that the crimes] will never be punished by the Slovak courts."<sup>75</sup>

## 6. Conclusion

The purpose of this article was to analyze the dynamics of transitional justice in Slovakia and to answer the question as to what was the reason for the "breaking of the silence" in 2002. The analysis of the dynamics showed that it is crucial to divide the Slovak transition into three distinct phases, under which the interplay of the analyzed constraints is different and therefore the approach towards dealing with

72 Act on the declassification of the documents on the activities of state security authorities between 1939 - 1989 and the establishment of the Nation's Memory Institute, 553/2002, Preamble, §8

73 Ľubomír Morbacher, "Trestnoprávne vyrovnávanie sa s komunistickou minulosťou na Slovensku a úloha ÚPN v tomto procese. [Criminal dealing with the Communist past in Slovakia and the role of NMI in this process]," *Pamäť Národa* (Vol. 3 2008), 77-78

74 Reasoning of the attorney's office in Výročná správa ÚPN 2008 [Nation's Memory Institute Annual Report 2008], [online] available at <http://www.upn.gov.sk/data/upn-vyrocnna-sprava-2008.pdf> on 15.10.2012, 20.

75 Morbacher, *Zločiny komunizmu*, 149.

the past varies as well. The first phase was still confined within the common federation framework and it was affected by both the type of regime change and the ability of the new elites to dominate politics. Therefore a wide range of transitional justice mechanisms – including lustration, reparatory justice and very limited criminal justice – were adopted. These mechanisms were valid for the whole federation and the legislation passed in this period established the basis for Slovak transitional justice.

The second phase, characterized by the domination of Vladimír Mečiar over Slovak political life, brought the birth of independence for Slovak Republic and the “beginning of silence” when it comes to dealing with the past. The existing legislation was not repealed, but the exclusive measures – such as lustration – were not applied at all. The only exception was the law on immorality of the communist regime, which remained, however, only in the symbolic realm. The reason for this was the fact that elite configuration in the main legislative body changed dramatically. The continual presence of the old elites in Slovak politics was to some extent determined by the lack of political opposition under the communist regime, which resulted in the need for them to participate in the political life.

The third phase brought a rapid change, which was primarily a result of a complete elite turnover. The conditions for transitional justice pursuit were made even more favorable with the growing fragmentation of the parliamentary forces. These developments led to the breaking of silence in 2002, which resulted in the establishment of the Nation’s Memory Institute. Therefore it can be concluded that elite configuration was the key variable, which affected the pursuit of transitional justice in the independent Slovakia.

The Slovak case shows that although all of the constraints are in play when deciding about which transitional justice mechanisms to adopt, it is the elites who play the most important role. They can, on the one hand, halt transitional justice even when all other constraints are conducive to its pursuit. On the other hand, it is the elites who can decide to pursue transitional justice even though several years have passed since the regime change occurred.

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