Chapter 10

Transitional Justice Research in Post-Totalitarian Societies in the OSCE Region

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10.1 Background

Since the mid-1990s, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) in Warsaw has supported Transitional Justice (TJ) processes in Central and South-East Europe under the Rule of Law and Human Rights Programmes.¹ This has become visible through the Office's engagement in former Yugoslavia and the work of the International Criminal Tribunal for former Yugoslavia (ICTY) through its plethora of Rule of Law and Institution Building Programmes in the Western Balkans. While the post-war societies of the Balkans are an obvious target for TJ initiatives, these programmes are predominantly financed by private donor organisations or the European Union (EU). TJ initiatives, programmes and policies also had a spill-over effect on other countries in the region which were not directly affected by the atrocious civil war in the former Yugoslavia. Albania, a former totalitarian socialist state and now a Council of Europe and an OSCE member state, was indirectly affected by the war. Albania had a short interval of TJ measures after the dictatorship ended in 1991 and then paused for over a decade—not unrelated to the war in the neighbouring country of Kosovo. Only a generation after the regime change in the 1990s, in 2018, the OSCE Mission in Tirana, together with political foundations and the University of Tirana, started conducting trainings and programmes to support young researchers and helped to fund a Centre for Justice and Transformation at the university to conduct TJ research in the country and region in their own language. Without proper language skills and access to the files of the totalitarian regime that lasted from 1944 to the 1990s, TJ research would be an impossible endeavour. Such initiatives can be an incentive and example for other post-totalitarian and authoritarian societies and

¹ODIHR Rule of Law and Human Rights Programs <https://www.osce.org/rule-of-law>.

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researchers in the OSCE region, such as in Central Asia, the Caucasus and Eastern Europe including Russia.

International organisations such as the OSCE/ODIHR, in that respect, can support these research initiatives by collaborating with local and other public institutions such as universities, research centres, think tanks, and civil society organisations. However, any proper TJ research needs a bottom-up approach by domestic actors such as survivors, former victims or simply by the new post-totalitarian generation which is slowly coming of age in most of the post-socialist-totalitarian societies and is starting to ask questions about what happened under the previous regimes. Moreover, this generation across the OSCE region has started to realise that many of the current political and societal problems,—including the economic crisis or Pandemics in 2019 and 2020—the high level of corruption, lack of transparency, weak rule of law and poor economic development due to lack of social mobility and foreign trust in investments, are connected to, first, the non-revealed legacies of the past and, secondly, to the fact that many of the old political and economic elite of the communist regimes have remained in power for over two decades. Most political new and old elites have carried on with business as usual, applying top-down socialist methods in dealing with problems, using autocratic modes of governance for example in the security and the public education sector, without undergoing proper and systematic vetting or lustration, that is to say scanning one's personal files and purging of governmental officials. But the interlinkage between the level of good governance performance and Transitional Justice is still under researched, not only in the OSCE region. Cynthia Horne is one of the researchers who has worked on this topic in Eastern and Central Europe and who has attempted to test the impact of lustration on trust in public institutions and national post-totalitarian governments. She runs numerous statistical models using the Transitional Justice Database, controlling for the timing of lustration, the degree of other TJ measures present, as well as additional political and economic factors.² Her findings indicate that 'countries with more extensive and severe lustration programs, and political and legal reforms connected to dealing with the past have higher levels of trust in public institutions'. But the impact of Transitional justice on trust in national government is widely under researched and mostly inconclusive. This brings us back to one of the main research questions in the field of TJ, namely how is the lack of and refusal to conduct a TJ process today linked with the democratic flaws, collapse of *Rechtsstaat* and the high level of corruption in many of the post-totalitarian and post-Soviet countries?

To begin with, there has not (yet) been overwhelming signs of a national catharsis in many of the post-Soviet and post-totalitarian countries and societies since 1991—that is to say an urge and desire expressed by citizens for coming to terms with the past—let alone to connect present democratic deficits and economic shortcomings with the fact that the communist past has never been dealt with properly. One of the

²Horne (2014).

causes of this present situation seems to be what Hannah Arendt had already described in her work in the 1950s and 1960s on the ‘Banality of Evil’³ in which she explained the root causes of totalitarianism, namely the willing support by citizens for such regimes and its long-lasting aftermath—until today. She explains that totalitarianism requires a mass that goes along with the system. These masses are intrigued by the positive aspects of a political regime that promises security, development and modernisation, as being superior to liberal norms. The sheer number of people who follow it, combined with indifference to liberal values and norms, continue to exist even if these countries have formally transformed to liberal democratic regimes and institutionally democratised. Many of the post-communist totalitarian countries (luckily) did not have to go through war to become independent, but they are by far not yet democracies. But what seemed a blessing at the time of regime change in the early 1990s is now a curse, namely the rather non-violent and peaceful transitio; for most of these countries, albeit not all; because in these societies, the past totalitarian regimes have never been completely delegitimised or demystified, and thus most of the old ways, methods and ideas how to govern continue. This includes human rights violations, censorship, levels of torture, nepotism, corruption and arbitrary justice.

10.2 Post-Totalitarian Particularities for Researchers

For research in post-totalitarian societies, researchers find the plethora of written documents and quantitative data in archives. It is the archival materials accumulated over decades by state institutions, secret services, police, prisons, courts, councils, governments and ministries that are the main sources that reveal the structure and the dimension of totalitarianism and its consequences. It is not as much the immediate victims of mass atrocities, killings, intimidation or violent crimes, but rather the institutions and systems that carry information on the decades of systematic manipulation, suppression and humiliation, including the security and education sectors. Most of the ‘victims’ and bystanders will not recognise themselves as such, because they had been politically indifferent people who never join a party and hardly ever go to the polls. The banality of evil, to speak with Arendt’s terminology, therefore also determines TJ research in the post-Soviet and post-socialist realm and—among many—there are three reasons that make that research a challenge:

First, the post-communist-socialist and totalitarian states were highly bureaucratic. The main instrument of suppression was the security apparatus, especially the infamous secret services such as the KGB or the different Securitate regimes and organisations in the Soviet satellite states. They stored and collected thousands of miles of (paper) documents in files and archives across the OSCE region. To scan, vet and investigate them all will take decades, hence there is—despite serious cleansing efforts—still a valuable amount of documents available for researchers. Of course,

³Arendt (2016).

there is little doubt, as Christian Nielsen⁴ and others have expressed that the key documents and files of that period have been destroyed right after the collapse of the Soviet Union and other post-communist regimes in 1990/1991 by those who potentially had to fear repercussions and trials, and who later became part of the new political elite in the country. Few civil society and victim organisations tried to save them, but not all have been successful, as was the case in East Germany after the fall of the Wall in 1989. The remaining documents still provide fascinating and investigative materials for researchers that allow us to reconstruct the past.

Second, the language disparity in the former communist countries and the Soviet empire. The number of satellite states range from East Germany, Slovenia, Estonia, Albania, Moldova and Azerbaijan, across Russia to Kazakhstan, Mongolia, in the Far East, and Kyrgyzstan and Turkmenistan into Central Asia. Key documents and files about the systematic violence and suppression during the 70 years of totalitarianism that would need to be investigated are written in many different languages—apart from Russian—mostly handwritten, and require thorough language knowledge not only in Russian, Polish, Albanian or Romanian, but also in the local languages of the former ‘empire’ such as Tajik or Kazakh.

Third, most former Soviet republics inherited their independence around the year 1991 and very few fought for it. There is a lack of national catharsis and a desire of bottom up approach to Transitional Justice these former Soviet republics became independent not because there was a long enduring civil society or civil war that fought for independence—other than in Central Europe or the Western Balkans—but because states in Central Asia, Caucasus or the Ukraine inherited independence and with it the bureaucracy from the collapsing Soviet regime without much bottom-up pressure to change the bureaucratic regime they inherited. One might wonder if these societies and their leaders ever had a choice whether or not they would have wanted that independence? Thus, in 1991, there was no organised civil society, nor an intellectual elite that was demanding a thorough dealing with the past in all aspects of historical, judicial, political or societal matters of the totalitarian regimes, and which remains weak until present days. The lack of this civil society, organized victims groups or (state) commissions of inquiry pose a challenge for researchers, because those organizations are in TJ research usually the first contact points from which to start research and investigation into the past of that country or society.

Vello Pettai and Eva-Clarita Pettai, in their studies on TJ, memory and post-communist societies, highlight more challenges. They point out that whereas in the case of Central and Eastern Europe, the totalitarian regimes lasted for some five decades, in Ukraine it lasted more than seven decades, and thus encompassed several generations of which the youngest never remembered nor experienced any democratic reforms or behavior. Oppression went through several generations and had clear variations from country to country.⁵ It encompassed not only restrictions on free speech, association and travel, but also more horrific human rights violations

⁴Nielsen, Christian Axboe (2014).

⁵Pettai and Pettai (2014).

such as widespread surveillance, indiscriminate arrest, mass deportation and summary killing. Moreover, much of what had happened was kept secret, known only through individual recollections and family stories. While liberation between 1989 and 1991 was an exhilarating event for all of these peoples, it also came with hard questions about how to deal with this past: Who should be held to account, if many of them transformed ‘overnight’ into full-fledged liberal democrats—on paper—but kept their old bureaucratic Soviet mentality intact, and in fact deep down in their hearts never truly wanted to depart from the communist regime.

Many Eastern and Central European countries, after becoming members of the Council of Europe in the 1990s, the European Court for Human Rights in Strasbourg, had soon set legal and political benchmarks and incentives for dealing with the past. The Court set benchmarks and criteria for commissions of inquiry, trials and vetting, and lustration and citizenship education. But new states in Central Asia and beyond are not members of the Council, and they also lack of a strong civil society that could push hard enough to make TJ an issue in science and more importantly in politics. In the post-Soviet region and former totalitarian regimes, that is to say Eurasia and the former Soviet republics of Central Asia, ODIHR has been less active in this aspect, too, because of the lack of interest by local civil society and governments in proceeding the avenue of TJ. But nevertheless, despite the fact that many of the former post-Soviet countries do not enjoy protection by the Council of Europe, the OSCE has adopted many of the Council’s legal norms and political measure to promote accountability and human rights compliance in the region, which serve as a benchmark for rule of law and democracy promotion by ODIHR.

10.3 Post-Communist and Totalitarian Research in OSCE Region

To foster TJ research in the post-totalitarian environment of the OSCE region, one has to see it as a long-term process and a concept that encompasses a number of different legal, political, judicial, historical and cultural instruments and mechanisms that can strengthen, weaken, enhance or accelerate processes of regime change and democratic consolidation. Today, Transitional Justice in this region is conducted by few younger scholars and growing number of internationally trained researchers who belong to the post-totalitarian generations and that is asking questions about the linkage between the lack of TJ processes, the high level of political corruption and the shortcomings of democracy at the same time. TJ measures such as truth commissions, trials, memorials, compensations or amnesties can foster or hamper successful transition or reconciliation processes, and there is no automatic guarantee for a certain political or societal outcome, because TJ measures can be politically instrumentalised, used or abused, and the process outcome depends on a variety of different actors involved, which has largely happened in these countries by old elites who remained in power and aimed at silencing the past forever. But we see now

that this process, as such, is inter-generational and it can not be silenced forever and the measures are multiple and can be applied at any time later in the transformation process.

Out of the plethora of truth finding methods, legal procedures, memorials, amnesties or vetting procedures and thee multiple ways of compensations, TJ measures apply in OSCE region and need to be researched. They are composed as a set of judicial and non-judicial instruments and mechanisms such as trials, truth commissions, vetting and lustration procedures, memorials, reparations, restitutions or compensations, and even amnesty and rehabilitation laws that redress the legacies of massive human rights abuses either during war, occupation, dictatorships or other violent and suppressive conflicts and situations. These measures include criminal and political procedures and actions as well as various kinds of institutional reforms such as security sector reforms or constitution building. These measure can be well researched with investigative methods, solid desk research and interviews, because they aim to facilitate civil or political initiatives during transition and transformation processes and hence their impact or non-impact can be seen at present times. In the hands of political and civil actors, such initiatives can lead to reparations and legal, security sector or institutional reforms. Whatever combination of measures is chosen by the government or by civil society actors during transition processes, they ought to be in conformity with international human rights standards and obligations in order to have any positive impact on democratic institution building.⁶ Moreover, for researchers TJ measures can be divided into different categories: procedural, interpersonal and informational justice measures, such as trials, truth commissions, reconciliation programmes, vetting, lustration, security sector reforms, apologies, reparations, compensations or memorials and many different types of dealing with the past. They aim to lead to distributive and restorative justice and are often referred to as establishing the rule of law.⁷ Justice is meant in an institutional sense to build up (democratic) institutions for the future, based on the (bad) experiences of the past, and less so in philosophical terms. Overall, TJ measures aspire to prevent society and their institutions, such as political regimes, to repeat the wrongdoings of the past that led to new forms of suppression and terror, war or personal loss and grievances. Consequently, the field of research of Transitional Justice is wide and large and often seems to never end—as seen in the post-WWII research endeavours in Europe up until today.

Hence, TJ is more forward than backward-looking, and its consequences can be seen in everyday's life, for example, by comparing current levels of political corruption with the failure to conduct thorough TJ processes in the past, and this has become a driver for political regime consolidation both in post-conflict and transition countries. The whole TJ process aims to demystify and delegitimise the past, and to legitimise and strengthen the future and present political or societal

⁶United Nations (2010)

⁷Hague Institute for the Internationalisation of Law (2010).

structures or regime.⁸ Against this backdrop, TJ can—but does not automatically have to—contribute to democracy, for example by (re-)building trust in institutions and among divided societies, former combatants, enemies or ethnic, linguistic or religious groups. Some mechanisms aim to reconcile societies and their former opposing parties, others focus more on building trust in institutions and others again seek to acknowledge and remember past injustice through memorials, compensations or apologies.

Hence, in analytical terms, TJ measures aim at dealing with an unjust or atrocious past in order to delegitimise that era's leadership (on all levels) and political system, and at the same time, these measures aim to re-establish and legitimise a new political and, hopefully democratic but certainly different, regime.⁹ This way, researchers and policymakers can draw direct or indirect links to present political, legal and economic shortcomings and defective democratic performances to the past. TJ measures can affect both autocratic and democratic regime change and consolidation, depending on how inclusive and exclusive, and by what political intentions these measures are applied by policymakers and society.

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⁸Mihr (2019).

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