Article

“Now We Are Struggling at Least”: Change & Continuity of Surveillance in Post-Communist Societies from the Perspective of Data Protection Authorities

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Abstract

This article presents the results of an interview study carried out with sixteen data-protection authorities in Central and Eastern Europe. The study focuses on the way that data protection authorities reason about the past. The theoretical argument advanced in the text is that data protection in a post-communist context bears a specific historical significance due to the recent experiences with the extensive, coercive state surveillance that was systematized under the communist regimes. The article focuses on the institutional role conceptions of data protection authorities—a theoretical concept that denotes perceptions of the role of an organization within the larger institutional environment. High-level officials from data protection authorities in sixteen countries were interviewed about change and continuity in surveillance. The results show that historical reflectivity is not a dominant feature of the leadership of contemporary data protection authorities and that different countries differ considerably. The respondents least able or willing to discuss the topics of change and continuity are in societies with recent high-level surveillance scandals, such as Bulgaria and North Macedonia.

Introduction

The question of communist legacies has been central to students of Central and Eastern Europe since the fall of the communist regimes and the transformation to democracy in the region (see e.g., Barany and Völgyes 1995; Curry 1995; Dimitrova-Grajzl and Simon 2010; Wittenberg 2015). The concept of post-communism provides a tool with which to study such (dis-)continuities between communism and a superseding regime (Holmes 1997; Møller 2009).¹ The transformation to democracy and market capitalism in post-communist societies has proceeded with varying success: some societies have managed to transform successfully, while others are still—or again—characterized by severe financial and political problems (Ó Beacháin, Sheridan, and Stan 2012; for a recent assessment, see: European Commission 2017). The recent democratic backlashes in countries such as Hungary and Poland show that the post-communist democracies may be more fragile than was initially assumed, especially after European Union accession (Bunce, McFaul, and Stoner-Weiss 2010; Gandhi and Przeworski 2007). The difficulties of achieving “deep” change have been partly explained by the persistence of legacy political structures and high levels of corruption (Holmes

¹ The suitability of the term “post-communist” has been questioned, and it has been suggested that “post-socialist” is better, as it refers to the “real existing socialism” before 1989–1990. We use the term “post-communism” here because it is most commonly used in the literature.

2013; Kostadinova 2012; Łoś 2002; Wolchik and Curry 2011). Another fact that has been described is the persistence of legacies in public attitudes towards democracy and capitalism (Mieriņa and Cers 2014; Pop-Eleches and Tucker 2013, 2014). Thirty-five years after the regime change, the region still struggles with the legacies of its communist past.

In this article, we address two research fields that, for various reasons, suffer from complementary omissions: post-communist studies and surveillance studies. Both of these fields touch upon topics of great importance for Central and Eastern Europe, but they seldom interact. In the case of post-communist studies, scholars have discussed reforms dealing with the communist legacy but have not discussed issues of contemporary surveillance in depth. Surveillance studies scholars, in contrast, have devoted scarce attention to the possible legacies of surveillance cultures in post-communist societies. The special issue of this journal (Svenonius and Björklund 2018a) on the topic of post-communism, therefore, was a first step in introducing post-communist studies to the field. Only a few studies relevant to both fields have been published, for example, on video surveillance (Björklund and Svenonius 2013; Sojka 2013; Svenonius 2011; Waszkiewicz 2011), gated communities (Cséfalvay and Webster 2012; Gasiór-Niemiec, Glasze, and Putz 2009; Polanska 2011), the history of surveillance and control (Gabdulhakov 2018; Richterova 2018), activism (Lokot 2018; Mehrabov 2017; Spaiser et al. 2017), and public attitudes towards surveillance and privacy (Budak, Rajh, and Anić 2015; Budak and Rajh 2018; Friedewald et al. 2015; Svenonius and Björklund 2018b).² Despite these recent publications, no serious attempts to develop a theory at the intersection of post-communist studies and surveillance studies have been carried out. We seek here to bridge these research fields through an analysis of the legacies of communism, with a special focus on data protection.

We address one aspect of this topic below: the institutional role conceptions held by senior public officials in Central and Eastern European data protection authorities (DPAs), focusing especially on the communist past. An institutional role conception, as we explain in more detail below, is a way to highlight how representatives of an organization perceive and communicate the role of their organization (Bes 2017). In light of the problems outlined above, we analyze how public officials reason about the prospect of change and continuity in their respective countries. The analysis draws on data from interviews with sixteen DPAs carried out through the Like Fish in Water: Surveillance in Post-Communist Societies project. The paper contributes to studies of the Central and East European area and to studies on surveillance and data protection more generally, which has hitherto failed to grasp the peculiarities of post-communism. The analysis aims to provide another piece in the larger puzzle of communist legacies. It is guided by the following questions: *How do data protection commissioners reason about their historical role as protectors of citizens' personal data from undue surveillance? How do they make sense of surveillance then and now?*

We answer these questions using data from the Like Fish in Water project. We reflect upon the nature of the larger problem, i.e., that of the (dis-)continuity of surveillance and communist legacies. We identify two narratives in the data: the first acknowledges both the possibility of the continuity of surveillance and the limitations of data protection in the post-communist context; the second denies continuity and views data protection exclusively as part of the new regime, pertaining to the modern-day use of information and communication technology. These narratives highlight the sense of uncertainty that defines surveillance in Europe today—and not only in post-communist societies.

Protecting Personal Data in Post-Communist Societies

This section expands on the ideas of communist legacies and institutional role conceptions. We begin by discussing legacies of surveillance and the nature of a “clean break” as a way of constructing the *change* and *continuity* between political regimes after 1989–1990. The following subsection discusses DPAs and the idea of institutional role conception.

Post-Communist Legacies of Surveillance

Post-communist studies is a vast field of research that spans across all disciplines in the social sciences and humanities. One major issue has been the persistence of legacies from the communist period; another has been the legacies of the post-communist transformation process itself. A legacy is a societal phenomenon that existed during communist times and persists until today, affecting contemporary social or political life (Wittenberg 2015). The legacy framework assumes a certain “stickiness” of social and legal institutions. Contemporary work on communist legacies, therefore, takes a critical stance towards the idea that the post-communist period ended around the year 2000, which has been forwarded many times (see, for example, Clark 2002; Korek 2004). In this article, we consider that surveillance, in the sense that it is discussed in interviews with data protection officials, is a legacy phenomenon. Since institutional legacies are “sticky,” they resist transformation to a certain degree. A *change* in surveillance is thus a substantial transformation in the way that surveillance is organized, institutionalized, and carried out. *Continuity* denotes the persistence of formal and informal institutions from the previous regime. If we can identify legacies in contemporary post-communist societies, our understanding of societal change and the politics of history in Central and Eastern Europe will increase. For surveillance studies, the legacy concept provides a framework for understanding contemporary surveillance—not only in post-communist societies—from a critically minded and historically conscious perspective.

Svenonius and Björklund (2018c: 272–273) show that the question of how to understand legacies can be answered in different ways. The most relevant research for our purposes focuses on corruption and shows that informal networks responsible for state capture may date back to before 1989 (Holmes 2006, 2009; Kostadinova 2012). Stan and Zulean (2018) have demonstrated in their work on Romania that there was not always a “clean break” between then and now. Łoś (2018) has also shown this in several articles. Instead, many institutions in post-communist societies survived the transformation to democracy and are responsible for phenomena that we can observe today, such as surveillance being used for extortion and corruption. A reliance on surveillance as a means to exert political leverage has come to characterize the political culture of several countries in the region. For example, Stan and Zulean discuss Romania in detail and show that “there is a strong continuity between the communist and post-communist intelligence community” (Stan and Zulean 2018: 311). As recent wire-tapping scandals in Bulgaria, Poland, North Macedonia, and Romania show, corruption and extortion are directly linked with the distribution of resources for, and the ability to carry out, secret surveillance (see also Martin 2007).³ We can, therefore, deduce that there are—at the very least—institutional legacies involving corruption that are associated with communist surveillance, despite the fact that we cannot measure them directly. We now turn to data protection and the conceptual framework of this study, i.e., the idea of institutional role conceptions.

Data Protection in Post-Communist Societies

Data protection is a policy area of high relevance to the discussion of potential communist legacies. Most importantly, the communist regimes were built on rigorous political control. Vast resources were allocated to surveillance and political control to achieve political stability.⁴ The response of a democratic state to the problem of surveillance, besides security sector oversight, is data protection regulation (Esteve 2017; Kuner et al. 2012; Oostveen 2016). Data protection legislation is intended to regulate the use of data that arise from surveillance, making data controllers accountable and providing protection against illegitimate surveillance (Bennett 1992).

Data protection authorities are independent regulatory bodies that have a mandate to monitor and supervise the enforcement of data protection laws. They supervise the use of personal data, inform the public about privacy and surveillance, rectify illegal surveillance practices, and handle complaints (Jóri 2015; Raab and

³ In all of these countries, massive surveillance scandals have been uncovered during the 2010s in which information gathered by covert surveillance was used for corruption and to compromise political actors (see Dnevnik 2011; Davies 2018; G. K. 2013; and Prelec 2017).

⁴ These institutions have been thoroughly documented (Adelman 1984; Luca 2015; Persak and Kamiński 2005; Segert 1997).

Szekely 2017). Among other duties, they give opinions on legal texts, provide advice and recommendations regarding data protection, publish guidelines relating to data protection laws, and cooperate with similar authorities in other countries. The diversity of their activities makes it important that DPAs possess comprehensive knowledge on data protection in their countries, although Raab and Szekely (2017) have shown that they rarely do so. On the contrary, DPAs typically do not have sufficient resources to manage the wealth of responsibilities placed on them by data protection regulations.

Today, all post-communist societies have data-protection regulations in place, typically modelled after the European Union standard (Löfgren and Webster 2009). Most of the cases studied here have amended their legislation such that it is compatible with the EU General Data Protection Regulation (GDPR).⁵ The GDPR emphasizes that data protection authorities should be independent and autonomous bodies. Institutional independency is important for DPAs to be able to fulfil their functions. Even though the regulations under which DPAs operate mimic the EU GDPR, DPAs are organized differently and there is some variation in their institutional dependencies, such as the body that appoints the head of the DPA. For example, the Estonian DPA is a small office organized under the Ministry of the Interior, and the Data Protection Commissioner also functions as the Commissioner for the Freedom of Information. This can result in value conflicts.⁶ In Hungary, the autonomy of the DPA was restricted after 2012, and the Ombudsman was replaced.⁷ In Poland, in contrast, the DPA is a large independent agency with substantial influence. Thus, while the regulations are very similar, the organization and societal influence of a DPA can differ greatly, as some of the interviews analyzed in this paper demonstrate. Table 1 displays a selection of the formal competences of all sixteen DPAs included in this study. While the legal landscape seems uniform on a superficial level, the real differences lie in how the laws are implemented in practice.

The GDPR has brought uniformity to data protection in the EU. In post-communist societies, and post-authoritarian societies more generally, data protection authorities arguably *also* have a historically defined task to ensure the continued existence of a free public space and private sphere in which citizens can develop as democratic subjects (Eichenhofer 2017; Mordini 2008). Given their important role within the democratic system, the role that these institutions play with respect to communist legacies of surveillance has been questioned. This issue remains unaddressed by the literature on DPAs. Instead, this literature focuses on the formal competences of DPAs and on the effectiveness of data protection (Bennett 2012: 412). Research into the role of DPAs does not specifically address post-communist countries. Rather, it occasionally touches upon these countries as part of a larger comparative study (Raab and Szekely 2017; Schütz 2012). To date, the historical aspect of data protection remains unexplored, which is unfortunate in light of the ongoing shift to more authoritarian politics discussed above. The present study provides insight in this fascinating but unexplored field of research.

⁵ The GDPR had, however, not come into force at the time of the data collection. The GDPR does not change the nature of data protection, and it is not discussed at length in this paper.

⁶ Estonia has well-developed and extensive public records, and, in some cases, these records include sensitive data such as the membership records of political parties. The public nature of the records is a means to fight corruption. Value conflicts between freedom of information and data protection can arise, for example, when information is requested that is also personal data.

⁷ See *European Commission vs. Hungary* (2012, Case C-288/12). In this case, the EU Court of Justice ruled against the state of Hungary, which had limited the autonomy of the data protection agency by replacing the data protection ombudsman prematurely. This violated the previous data protection directive EC 95/46.

Country	EU member state	Also freedom of information office	Head of DPA appointed by	Can issue fines
Albania	No	Yes	Assembly	Up to ALL 500,000
Bosnia & Herzegovina	No	No	Government	Up to BAM 150,000
Bulgaria	Yes	No	Assembly	GDPR, up to EUR 20 million
Croatia	Yes	No	Assembly	GDPR
Czech Republic	Yes	Yes	Government	GDPR
Estonia	Yes	Yes	Government	GDPR
Hungary	Yes	Yes	Government	GDPR
Latvia	Yes	No	Government	GDPR
Lithuania	Yes	No	Government	GDPR
North Macedonia	No	No	Assembly	Up to EUR 2,000
Moldova	No	No	Assembly	No; criminal code applies
Poland	Yes	No	Assembly	GDPR
Romania	Yes	No	Assembly	GDPR
Serbia	No	Yes	Assembly	Up to RSD 2 million
Slovakia	Yes	No	Assembly	GDPR
Slovenia	Yes	Yes	Assembly	GDPR

Table 1: Overview of formal DPA characteristics. Source: the authors. Legal documents are available at DPA websites. An extended table with more detail is available from the authors. Last updated: January 2020.

Institutional Role Conceptions

A particularly interesting part of the literature on DPAs concerns the institutional role conceptions that DPA officials develop (Bennett 2008; Jóri 2015). Whereas *role* is an expectation on an institutionally defined position (Niemann 2013), an *institutional role conception* denotes the attitude that (DPA) officials have towards the role of their organization within the larger institution of personal data protection (Bes 2017: 538). The two concepts exist in the same universe, but the latter rather addresses the attitude regarding the expectations that one can legitimately hold about, for example, a DPA. Their institutional role conceptions are expected to influence how rules are enforced, what areas the DPAs focus on, and how the DPAs view the problem of surveillance in general (Hustinx 2009). These regulatory bodies occupy a central position in data protection enforcement, and it seems reasonable to ask how their representatives view past and present surveillance.

Personal data protectors face the difficult tasks of supervising the use of personal data in an increasingly digitalized society and educating citizens about surveillance. In Peters's (2009) terms, bureaucrats must be managers, policy makers, negotiators, and democrats all at the same time. We expect the DPA representatives to present their authorities as new, forward-looking institutions that are not burdened by the weight of the communist past. That is, we expect them not to *historicize* their own role in the transformation to democracy. Naturally, the main preoccupation of these agencies lies in providing information and ensuring compliance with data protection legislation (Hustinx 2009). In other words, we expect that their institutional role conceptions will not be constructed in terms of continuity from communism but in terms of change. On a normative level, one may consider a high sense of historical consciousness to be preferable in the post-communist context, as this may influence institutional role conceptions and possibly also the range of practices in which such institutions are willing to engage. What is at stake are the types of societies that develop in post-communist Europe, as well as which institutional forces are able to erect barriers against a continued use of illicit surveillance and which are able to create a democratically regulated intelligence

sector (Stan and Nedelsky 2015). We return to this discussion about historicity at the end of the paper. Immediately below follows a section on methodology. Subsequently, we present the empirical data analysis.

Research Design

This study is a qualitative survey based on interviews with representatives of sixteen data protection authorities in Central and Eastern Europe and the Balkans. This section describes the data collection and sampling and discusses the methods of analysis. Strengths and weaknesses of the approach are detailed.

Sampling and Data Generation

This article presents some of the results from the Like Fish in Water project. This project was a comprehensive research effort carried out at Södertörn University in Sweden from 2013 to 2016 and compared post-communist societies in Europe. Twenty countries comprise post-communist European societies.⁸ It had initially been intended to include all twenty countries in the sample, but this was not possible. Russia, Belarus, Montenegro, and Ukraine were excluded either because of their status as (semi)-authoritarian regimes (Russia, Belarus), which renders the issue of data protection problematic in the first place, or because of access problems (Montenegro, Ukraine).⁹ Interviews were carried out with all of the remaining sixteen DPAs, fourteen conducted in the fall of 2015 by Dr. Ekaterina Tarasova and two in November 2013 and April 2014, respectively, by researchers associated with the Like Fish in Water project.¹⁰ Nine of the interviews were with the head of the relevant data protection authority, while seven were with other representatives. Frequently, several interviewees were present—between two and five people—particularly on the occasions when the commissioner or director general was absent. These representatives included deputies of commissioners/directors, employees in the international department, legal department (predominately the heads of these departments), and (in a few cases) other employees. Although we attempted always to interview the head of the authority, this was not possible in all cases.¹¹ Nevertheless, the selection is close to a complete sample of all post-communist data protection authorities.

Studying Role Conceptions as Representations in Officials' Talk

We focus here on one of the questions that dealt with legacies from communism that we consider to warrant a separate analysis. The wording of the question differed somewhat between interviews, but the basic phrasing was "Do you think there is any connection between surveillance nowadays and surveillance in the previous political regime?" Respondents were not prompted by the interviewer with regard to the kind of connection or surveillance that was implied and were given the liberty to interpret the question in their own fashion. This question was inserted at the end of the questionnaire, a position that we chose due to its potentially sensitive nature. The question was given an open formulation in order to leave room for respondents' interpretations. As expected, responses to the question differed considerably. Some DPA representatives (for example, Poland) reacted positively and discussed the issues of communist legacies and surveillance at length, whereas others (for example, Serbia) reacted in a resigned way and openly expressed their skepticism about the feasibility of effective data protection in their country. The discussion of legacies above shows that some respondents find the idea that behaviors or institutions remain from communism to be quite unthinkable. We believe, however, that the interview question was motivated by the role of DPAs; they must counter precisely the misuse of personal data that was characteristic of the communist regimes.

⁸ Estonia, Latvia, Lithuania, Poland, Hungary, the Czech Republic, Slovakia, Belarus, Russia, Ukraine, Moldova, Romania, Bulgaria, Albania, Slovenia, Croatia, Bosnia and Herzegovina, Serbia, North Macedonia, and Montenegro.

⁹ Ukraine was excluded from the analysis because of the unclear state of the personal data protection authority. When the interviews were carried out, the office of the Commissioner for Human Rights (Ombudsman) was not active.

¹⁰ Fifteen were face-to-face interviews and one (Slovakia) was conducted via email. The Slovakian DPA completed the questionnaire in a written form and sent it by mail and email. The Hungarian DPA submitted a written document after the interview, as the commissioner had been compelled to leave during the interview.

¹¹ Interviews are listed at the end of this paper.

The interviews followed a predetermined questionnaire, but respondents were allowed to develop their thoughts on each item or topic in order to make a certain degree of flexibility possible (Lewis-Beck, Bryman, and Futing Liao 2004: 1021). All interviews were carried out in English and were recorded. The average duration was sixty-seven minutes (the shortest was forty-five and the longest 104 minutes). All interviews were transcribed by research assistants or by the researchers. Coding was conducted by both authors independently in order to strengthen the intersubjectivity of the analysis and thus the validity of the results (Bergström and Boréus 2005; Weiss 1995). Coding was carried out inductively, the approach approximating the principles of grounded theory (Corbin and Strauss 1990). The output of the initial coding was continuously compared with the corpus and abstracted reiteratively in order to identify general patterns in the data (this approach is also described by Charmaz 2006). Subsequently, the coding sheets from both authors were compared, differences discussed and adjudicated. The analysis below presents two themes generated through the analysis of the data. In each theme, we distinguish between sub-narratives of *continuity* and *change* in terms of surveillance.

Limitations of the Study

The study has at least three potential limitations, all of them related to the nature of the data. The first one concerns the language of the interviews. Neither the respondents nor interviewers were native English language speakers. It is possible that the use of English limited the ability of respondents to interpret the questions and to express themselves in their replies. To mitigate this, interviews were assisted by interpreters in the three cases in which the interviewees felt it to be necessary. Generally, the respondents did not reply in grammatically correct English and their original talk has been preserved in the quotations given below. We believe, however, that, despite the language limitation, the interview format allowed interviewees to explain their responses in more detail if they felt the need to do so.

The second limitation is a failure to consider all possible explanations for variation in the responses given by interviewees. To a certain extent, we “essentialize” the post-communist societies in this article by failing to compare them to other European countries and assuming that the DPA leaders represent much more than they possibly could. The reason why we nevertheless chose to carry out the study in the present form is that we believed that material presented by DPA representatives about the past carries meaning. During interviews, respondents represented their organization and generally did so using the discursive means at their disposal. These “semantic toolboxes” are what this study is about. In some cases, the representatives were at a loss to respond; in others, they reflected extensively. We believe that this carries meaning regardless of other factors, such as the interview context, individual variation, and language skills.

A third, related, weakness is that we focus on a sensitive topic. It is possible that respondents felt uncomfortable discussing the possible continuity of surveillance. However, even non-responses can be meaningful, as was the case in this study. Some respondents, such as the Polish DPA commissioner, chose to give lengthy responses. Others, such as the North Macedonian DPA representative, chose not to respond to this question at all. We believe that this is not a coincidence but tells us something about politics—and, by extension, communist legacies—in those societies.

Continuity and Change in Surveillance

This section analyzes the interview data, focusing on the responses to a questionnaire item on continuity and change. The analysis consists of two main parts, the first dealing with the “clean break” narrative and its contingencies. This part focuses on how DPAs represent democratic governance and their role in it. The second part focuses on changes in technology and the differentiation of actors involved in large-scale data collection as well as changes in the aims of surveillance that the DPA representatives discuss. Subsequently, we discuss the results and reflect further on the role of data protection in post-communist societies.

New Regulations and Old Appetites for Control

Not all DPA representatives knew how to respond to the question about continuity and change between the communist and democratic regimes. The question was frequently met with a sense of surprise. For some modern day DPAs, the democratic system of governance is taken for granted and any indication that it may be contingent upon the past strikes them as almost preposterous. In this section, we present the analysis of how respondents reason about the past. We argue that the dominant narrative does not recognize the past as pertinent to present-day data protection authorities. We then present two ways in which some commissioners *did* bring up the past, which illustrate that the role of an ahistorical DPA is not naturally given.

A majority of the respondents—eleven out of sixteen—responded as expected and discussed how the democratic system represents a change from the communist one. These respondents described the institutional role of the DPA in this system. They presented the view that “We started to create our own institutions from the point of zero” (DPA Estonia) and that “Now in democracy we are totally in a different situation” (DPA Albania). In Hungary, the DPA representative emphasized the existence of constitutional rights, and, in Romania, the representative emphasized the possibility for public debate on surveillance issues and the ability for individuals to prioritize between security and fundamental rights (DPA Hungary; DPA Romania). In other words, the general reaction to the question was that “Motivations probably are different” from before (DPA Slovenia). This suggests that the historical consciousness of the DPA officials is very low, and they regard their surveillance in the past as something that is no longer relevant.

Instead, the DPAs frequently described their institutional roles as part of a modern and effective machinery that, by virtue of its existence, has an important impact. A very clear example of this was given by the Lithuanian DPA: “Now it’s regulated. In most cases all [intelligence] services might do surveillance only having ruling of the court.... If this surveillance is fulfilling any entity, he or she should register in our public register of data controllers. And we are checking for what purposes, which scope of data are collected by this surveillance and how long this data are retained” (DPA Lithuania). In this respondent’s view, there is a direct correspondence between actual surveillance practices and the law. The respondent does not reflect on the fact that much intelligence work takes place in legal grey zones (James 2016: 55–56), which tells us something about how he views the role of data protection commissioner and the position of the agency. The past is considered an irrelevant factor for current institutional practices, and the DPAs are neutral and effective translators of the legal norms into the real world.¹²

In contrast to these respondents, a number of DPAs highlighted a degree of continuity (in a few cases, there were instances of both continuity and a “clean break”). They did this in two ways: either by highlighting cultural legacies, such as memories or lack of trust, or by establishing continuity in surveillance practices between then and now. The DPAs who used the former method included the Hungarian, Polish, and Slovak respondents, who all discussed communist legacies in their respective societies. The Hungarian and Slovak DPAs described the persistence of strong memories of the communist regimes as a major factor in political life in their respective countries, foremost for the parts of the population that experienced life under communism (DPA Hungary; DPA Slovakia). The Hungarian DPA claimed that the past provides a fundamental cultural experience on which citizens can draw, and this means that Hungarians in general understand the importance of privacy (DPA Hungary). The Slovak respondent stated that communist legacies today are a low awareness of privacy and a low confidence in public authorities. Finally, the Polish DPA noted that the first Polish legislation on data protection was passed in 1997 when older ways of thinking dominated, which led to cultural suspicion of the state being built into the law. In summary, these respondents talked about history as a cultural effect rather than something that actually happens today. Thus, even though the respondents share a historical consciousness, it does not affect the expectations placed on the DPAs per se and does not constitute what we here understand to be “legacies.”

The group of DPAs who used the second method (establishing continuity in surveillance practices) included the Czech, Moldavian, Serbian, and Slovenian DPAs, who highlighted the contingencies of the past political

¹² These claims could be contested, of course, given that many post-communist DPAs are working in environments in which illicit surveillance is abundant and where the efficacy of the state in the area is limited (Innes 2014).

regime with respect to contemporary surveillance. This dominated the responses in the cases of Serbia and Slovenia. To an extent, this relates to the present lack of effective regulation in these countries, which allows people and public institutions a high degree of autonomy with respect to, for example, surveillance. Serbia is one such case; their DPA commissioner stated: "Nothing has changed." The Serbian DPA commissioner gives the most critical response of the countries included in this study:

Basically nothing has changed but from... but there is no connection when you are speaking about the means... Today... nowadays when you say wiretapping, the first thing that come across people mind is that abusement [*sic*] and secret services that someone's rights are violated and so on but this is realistic association.... So in the countries such as this where are no rules and no regulations and where in internet you can buy most sophisticated espionage equipment don't you think that those people... those equipment could be used in surveillance and wiretapping of people for use of certain companies, political structures, criminal activities and so on? (DPA Serbia)

This quotation tells a rather different story than the quotations given above in which the radical differences were highlighted or in which the past is mainly a fragment of collective memory. Here, a clean break did not take place, and the availability of surveillance technologies increased. Data protection authorities seem powerless in this context.

A slightly more optimistic view is represented in the Moldovan response, which stated that there is now less monitoring and that data protection does provide a means to "combat" surveillance:

Respondent 1: "Now we have means to combat actually this by as a data protection authority for instance maybe like in Soviet Union there were no...there were no one to regulate this now we are trying we are struggling at least."

Respondent 2: "No one no one can impose to... to their will and... so it was another regime nowadays I told you about the risks that you can never know about that you were under surveillance but about 20% or 25% you have the chance to know about it... in the Soviet regime... no chance." (DPA Moldova)

The main difference between the current situation and the period spent as part of the Soviet Union, as expressed in these quotations, is that today there is a lesser degree of political control and a higher chance of discovery. Respondent 1 states that "Now we are struggling at least," which tells us much about how she views the role of the DPA in Moldova. The phrase presents a picture of an agency with little "real" power and whose role in relationships with other institutions is weak and defensive. There is always the potential for excessive surveillance. In Slovenia, the DPA representative formulated this idea as an "appetite for control" that is present in all societies: "The appetites for control are present also today but maybe the implementation and the bodies who try to implement... they are different." Back then, it was mainly human surveillance by the state; now it is vastly more powerful: "No security service from the old regime could dream of the data collection that is now being processed and not only by public sector, but especially by also private sectors" (DPA Slovenia). This suggests that data protection has an enormous task. Today, it is "a bigger challenge than it was" (DPA Slovenia). The Czech DPA, in turn, stated that surveillance today is ubiquitous—it is a kind of mental problem. The DPA has a role to play in this context: "What we try to explain also to the police and other such authorities is that it is important how the data [are] collected, for example, the footage from the cameras, how it is used. Or that there must be measure[s] taken, security measures, that these data cannot be misused. This is where we see our aim" (DPA Czech Republic). These respondents thus highlighted the difficulty of addressing surveillance issues in a societal and regulatory climate in which these issues have little importance and a weak legal standing. The institution responsible for data protection places certain expectations on the authorities tasked with implementation, but this role is difficult to fulfil. In these interviews, the certainty of the majority of DPAs described above is absent. Instead, they paint a rather gloomy picture of the prospects for data protection.

Another fact increases the more pessimistic view about the efficacy of DPAs in some post-communist societies. This is the fact that, in some of the countries in which the most dramatic surveillance scandals have occurred, the DPA representatives do not have much to say in reply to this interview question. This was the case for Bulgaria and North Macedonia, for example, and, to a certain extent, Albania, where the interviewees initially laughed insecurely, almost out of shock. The responses of the DPAs differed considerably and depended on the political situation in their respective countries. In terms of historical consciousness, the representatives of some institutions brought these issues up, but most presented the narrative of a "clean break" with the past and democracy as something so different that continuity from before is not conceivable. While this may appear strange to an observer focusing on surveillance, the officials tasked with data protection do not see their roles as being related to the past. Instead, they see new regimes, new technologies, and new actors.

"Now it's Very Sophisticated, this Surveillance"

We now turn to these new technologies and new actors. The respondents described other differences in surveillance between previous and present political regimes in addition to the establishment of the institutional frameworks to protect personal data. Such changes concern the development of surveillance technologies, the emergence of a broader range of actors, and the changes to the aims of surveillance more generally. Technological development and the involvement of new, non-state actors were brought up in almost all of the interviews. However, the way that the respondents described the changes was not univocal and differed with the national context.

The respondents stressed that contemporary surveillance differs from that used previously in terms of the technologies used: "Previously, there was not so many technologies for surveillance" (DPA Latvia) and "The means of surveillance are not comparable" (DPA Serbia). In the words of the Czech Republic DPA: "Now it's very sophisticated, this surveillance. You can for instance... your mobile phone is very good instrument for your surveillance, for instance. Now could be TV in your living room very good instrument for your surveillance as well. But something like one century ago, it was only some secret policeman going two steps behind you...." The respondents from the Czech Republic also noted that "Now you *must* live under some kind of surveillance..." (DPA Czech Republic). Developments in surveillance technologies have increased insecurity since, as the respondents emphasized, it is now not possible to check whether a person is under surveillance. The Czech Republic respondents suggested that this insecurity is a bigger problem than it was previously because of the mass character of the surveillance. Altogether, it seems that the development of surveillance technologies and the emergence of a broader range of actors and purposes of surveillance have created a growing sense of uncertainty. The DPAs cannot understand how all of them can be regulated.

Not all DPAs reasoned in this way. The Czech Republic DPA drew on a traffic analogy: "Nobody wants to forbid the cars, but it's about rules, traffic rules, and data protection acts, data protection law, is something like traffic rules for cars. Data protection law is about rules for using, handling, data. So, yes, one hand we all know that data, it is the blood of the modern society, but there shall be limits and rules how to use them properly and not harm the privacy of an individual" (DPA Czech Republic). Inherent in the traffic analogy is, of course, that most people break the rules more or less frequently and that powerful or wealthy drivers can afford both parking fines and speeding tickets, which allows them to drive as they please. In addition, if the controlling agency does not possess the means to withdraw drivers licenses, or if it is systematically impaired by dependency on a higher authority, enforcement is likely to be weak.¹³ Thus, the Czech Republic DPA may have wanted to express its role as the regulator of societal blood flows but has (possibly inadvertently) shown with great accuracy the problems and the uncertainty that the agency is facing.

A second aspect of the narrative of change concerns actors. The range of actors that use surveillance technologies is much broader than before. "In previous times the surveillance coming from the state and

¹³ It can be mentioned in passing that Croatia, Latvia, Lithuania, Poland, and Romania all have traffic mortality rates around ninety per million inhabitants, which are the highest in the EU (Eurostat 2017).

today it's not only the state" (DPA Latvia). Today, anyone can install surveillance technologies. The only apparent difference is that data protection authorities supervise them. The growing range of actors involved in surveillance makes the regulation of surveillance more complicated, particularly as the population has low awareness about these issues. Thus, the difficulties of overlooking the range of actors within the regulatory reach of a DPA helps to ensure that intensive surveillance continues.

As new types of actor have arisen, the aims of surveillance have broadened and are now not just political. Some respondents perceived the aim of surveillance to be the same on the abstract level: "to control the environment and the people" (DPA Hungary). However, a more detailed discussion about aims in other interviews suggests that the respondents perceived several substantial changes, the main one being that surveillance is no longer deployed to silence or liquidate single individuals: "The great difference is that nowadays the surveillance is mostly a preventive measure, not aimed at specific individuals, but as a protective measure or as a measure of national security for example, but is not meant to liquidate someone or to pursue someone and put him under pressure, no. And this is the I think the big difference" (DPA Czech Republic). There is, however, no guarantee that personal data is not abused, and some respondents pointed out that the lack of any guarantees or efficient accountability may reinforce uncertainty.

To summarize, our interpretation of the responses to the question about continuity and change identifies two main categories: in the first, there is the stable idea that the contemporary democratic system is constructed around a very different logic than the communist one. The other category contains representations of continuity, for example, in the Serbian case. In this narrative, however, the increasing complexity of surveillance practices in Europe stands in contrast to the rigid security structures that were in place during communism. It is, therefore, not surprising that the respondents in some cases were not sure that the DPA can fulfil its tasks.

Conclusions: Data Protection as a Historical Endeavor?

This study analyzes how representatives of post-communist DPAs reason about the communist past and the prospect of legacies affecting contemporary surveillance practices and data protection in their respective societies. It presents interview data from sixteen post-communist DPAs that were generated from 2013–2016 during the *Like Fish in Water* project. DPAs generally work in very complex institutional environments. However, the particular historical role of data protection and problems with state efficacy (e.g., in Serbia) in post-communist European societies make these societies unique.

This study posed two research questions: How do DPA representatives reason about their agency's role in history with regard to the communist past? And what do they think about surveillance today and during communism? Most DPA representatives do not situate the institutional role of their authority in a context of a historical responsibility. Clearly, the regimes in Central and Eastern Europe have changed tremendously since 1989–1990. In several ways, however, the responses describe a grey scale between the idea of a "clean break" between then and now and the idea of continuity between then and now. The responses highlight the different conditions under which data protection operates in the different countries. Generally, however, the DPAs do not consider there to be significant continuity. Rather, the responses in some cases indicate an inability and uncertainty in society about how to relate to the rapid political events and technological development. Several DPAs emphasized the limited capacity available to enforce data protection regulations, and some were reluctant to even consider the prospect of understanding their institutional role in historical terms. The differences between the different societies are vast, as were the natures of the regimes that were in place before the fall of the iron curtain. A theory of post-communist surveillance must take these differences into consideration.

The continuity of surveillance and its potential connection to high-level corruption and state capture was also not addressed by the DPAs, but their replies allow us to reflect on what post-communism and surveillance mean in contemporary Europe. The institutional designs of the EU were introduced into political settings without the necessary institutional support and often with insufficient resources. If

regulation is insufficient, there is a risk that DPAs maintain an image that they protect the personal data of citizens while, in reality, they stabilize an insensitivity to privacy inherited from the previous regimes. Post-communist DPAs, one can argue, thus epitomize the "in-between-ness" of post-communism: their practices demonstrate communist legacies, but their principles symbolize the new democratic societies that created them. In the new world, data protection is not predominately an historical endeavor but an administrative one.

This being said, some aspects deserve further discussion. A common way to discuss surveillance is to recognize that a "surveillance drive" persists from the past regime but to point out that the political context today is different and that the resources for surveillance are in different hands. The results presented here provide short glimpses of this recognition and experiences with mass surveillance. Citizens in societies without a communist or authoritarian past may never reflect upon the oppressive aspect of such surveillance, but people who grew up in such circumstances before 1989–1990 share a certain experience, despite other, important differences. It is, therefore, understandable that citizens react with fury in Bulgaria, Macedonia, Romania, and other societies in which secret surveillance has been deployed for purposes of corruption.

Legacies are more material in some societies than in others. The Serbian DPA representative stands out among the interviewees described here as both articulate and skeptical about the idea of effective data protection in Serbia. The others are more optimistic. In some countries, legacies appear to be more cultural in nature, as a shared instinct, memory, or idea about legitimate power. The DPAs in EU member states are more confident in their tasks, whereas interviewees from non-member states are more pessimistic. The way that the past haunts the present may differ between states that are members of the EU and those that are not. It will also be affected by the aspect of surveillance that is in focus and whether the question regards high-level corruption or more mundane, routine surveillance. The difficulties of fighting corruption and illegal surveillance in Bulgaria, Hungary, Poland, and Romania provide us with sobering evidence that EU membership is not enough. Data protection officials see the prospects of overcoming the problems of the misuse of surveillance and illegal exploitation of personal data as poor.

This study adds to knowledge on post-communism and surveillance, primarily because it contributes empirical data to a field that is virtually non-existent. Much remains to be discovered, but the interesting prospect of looking more closely at the DPAs of non-EU member states and comparing their work with that of DPAs in member states will be a fruitful next step. Additionally, the article contributes to post-communist studies to the extent that it highlights surveillance and data protection as fields of inquiry that have hitherto not been discussed. Data protection is not a policy area but enjoys a central function as the regulator of surveillance. Problems may result when data protection commissioners do not reflect on the importance of an historical perspective on their institutional practices.

This study did not include any Western societies or other European post-authoritarian societies, such as Portugal, Spain, and Greece. The rationale for examining only post-communist societies is that they share cultural experiences of communism as a political system. Other researchers have studied the more general conditions for carrying out data protection in Europe (e.g., Raab and Szekely 2017). Future research could build on this study and compare post-communist societies with other post-authoritarian societies. It may be more fruitful to discuss the shared experience of authoritarian surveillance in the context of secret intelligence apparatuses, rather than just data protection.

Whereas the predominately English-language literature on post-communism engages in a continuous problematization of substantial change in Central and Eastern Europe in terms of legacies, many people in the region consider the question of continuity from the communist era as somewhat curious (Svenonius 2011). There is an understandable desire to view the regime changes that occurred in the early 1990s as "clean breaks." The period before 1989–1990 matters only to the people in these regions as memories, as exciting museums for tourists, and as rhetorical devices for political demagogues (Esbenshade 1995; Mink and Neumayer 2013). In this view, the difference in political logic that guides communist and democratic regimes warrants a more forward-looking view that focusses on solving existing problems—i.e., stressing

change—and not tracing them back to their root causes—i.e., stressing *continuity* (Björklund 2013). However, failing to conceptualize continuity brings the risk of being blind to the possibilities of historical regularities and, ultimately, the risk of re-institutionalized authoritarian surveillance. This is why the literature on post-communism is concerned with legacies, and it is the reason why we chose to focus on DPAs in this article. Much is at stake. In times marked by the resurgence of authoritarian politics, right-wing populism, and lethargy with regard to civil liberties such as privacy, data protection may not be very popular, but it is none the less important.

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Interviews

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- DPA of Bosnia and Herzegovina. 2015. Two interviewees, including the head of the DPA. Interview by Ekaterina Tarasova. Personal interview. 104 minutes. Sarajevo, BiH, November 12.
- DPA of Bulgaria. 2015. Four interviewees, including the head of the DPA. Interview by Ekaterina Tarasova. Personal interview. 56 minutes. Sofia, BG, December 8.
- DPA of Croatia. 2015. One interviewee, the head of the DPA was not present. Interview by Ekaterina Tarasova. Personal interview. 69 minutes. Zagreb, HR, November 11.
- DPA of the Czech Republic. 2015. Two interviewees, the head of the DPA was not present. Interview by Ekaterina Tarasova. Personal interview. 93 minutes. Prague, CZ, October 21.
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- DPA of Serbia. 2016. One interviewee: the head of the DPA with an interpreter. Interview by Ekaterina Tarasova. Personal interview. 66 minutes. Belgrad, RS, February 24.
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