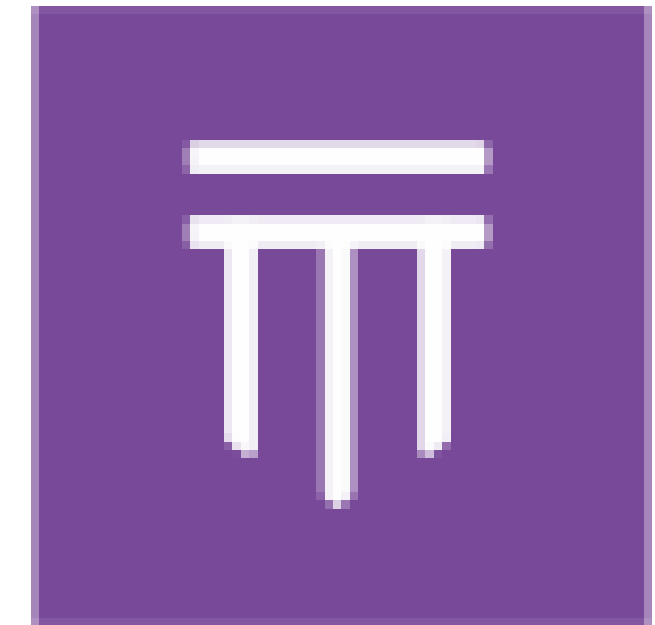


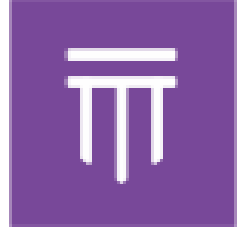
Brno, 15 September 2021

Transitional justice



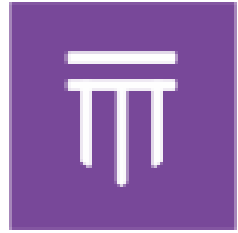
JUSTIN
Judicial Studies Institute
Masaryk University

Katarína Šipulová



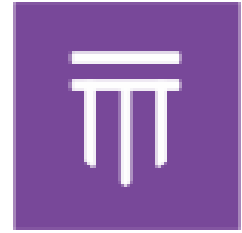
Outline

- Course requirements
- What do we need to know about a transition?
- What is Transitional Justice?



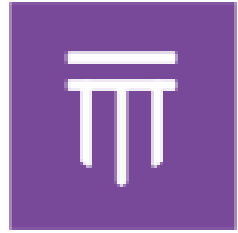
Course requirements

- Exam and requirements:
 - 2 position papers (1500 words long)
 - *Analytical*
 - *Grounded in theory*
 - *Feel free to state your position*
 - *Debate*
- *Exam: written, open-ended questions*

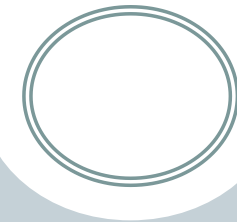


What is a Transition?

- When?
- Transition from what?
- How long does it last?

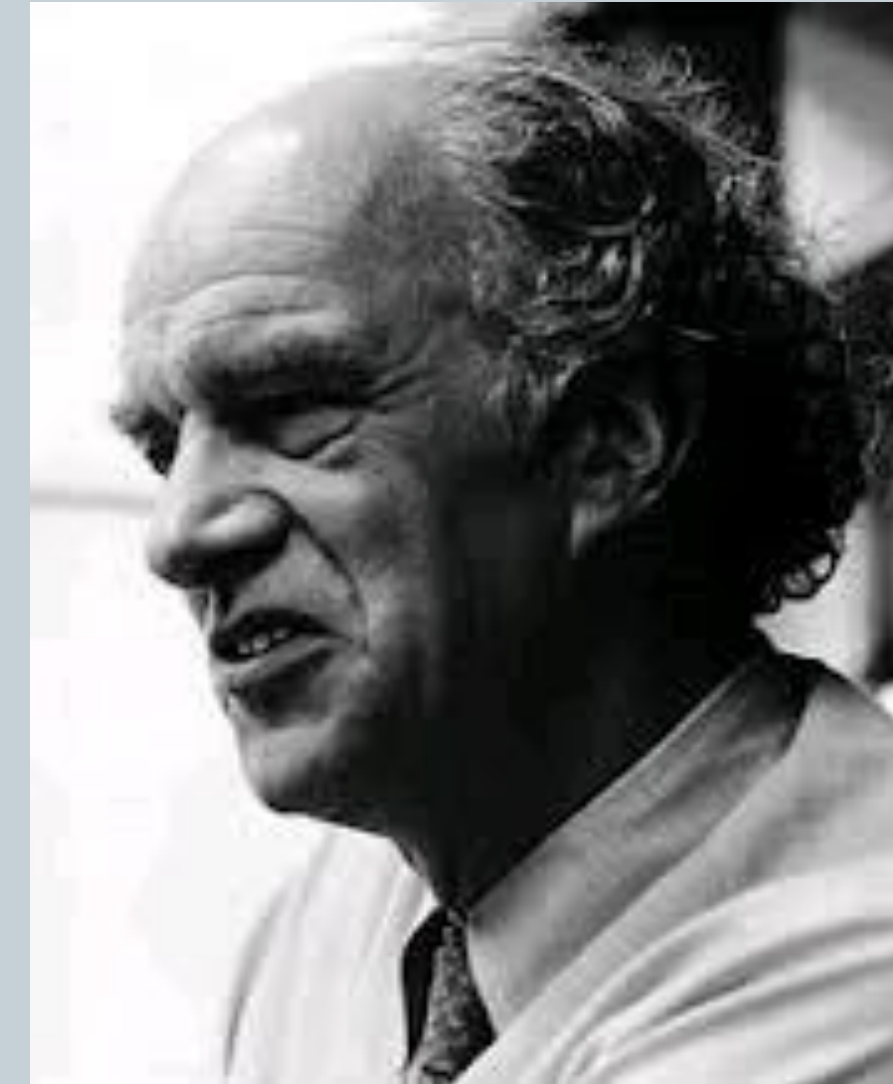


Theory of transition



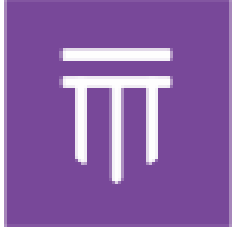
Dankwart Rustow

1. national unity = statism
2. preparation = liberalisation
3. decisive phase = **transition**
4. habitation = **consolidation**



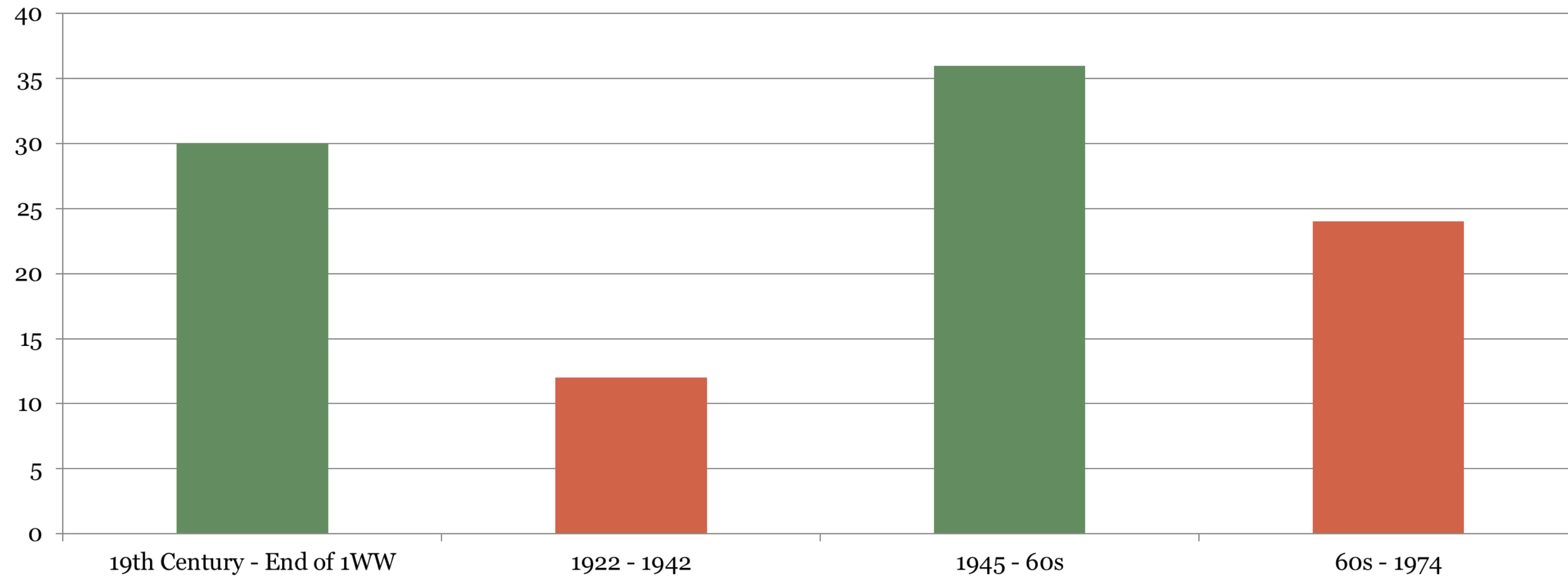
Przeworski

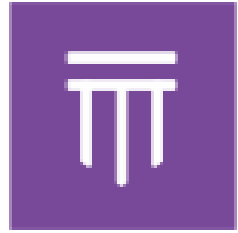
There is no unitary model
of transition or
consolidation



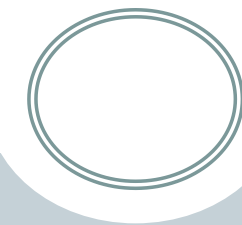
Democratization

Number of Democracies





Third Wave Transitions

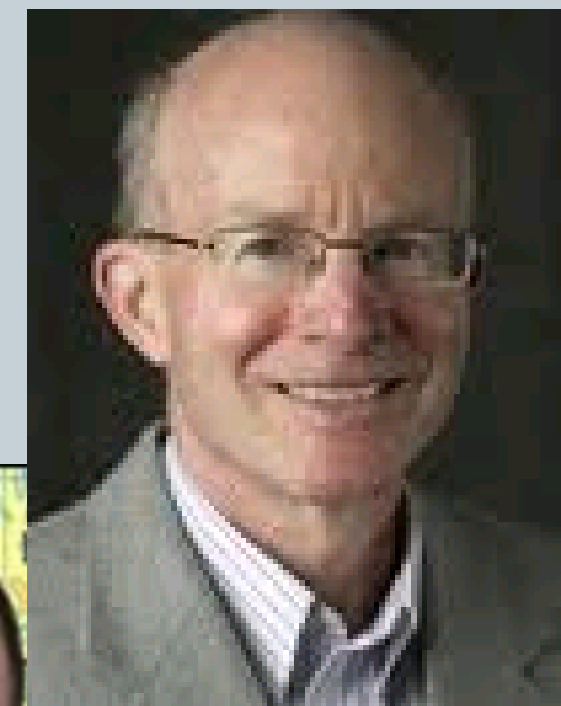


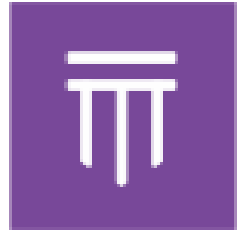
Huntington

Linz

Share – Mainwaring

(1) Transformation	=	reforma	=	transaction
(2) Replacement	=	ruptura	=	breakdown/collapse
(3) Transplacement	=	ruptforma	=	extrication

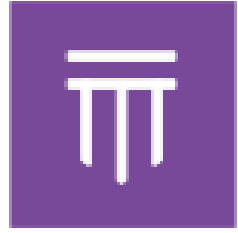




What is Transitional Justice?

*a set of **judicial and non-judicial mechanisms** (institutions, policies, and practice) designed to deal with atrocities and large, almost systematic violations of human rights in the process of **transition, aftermath, or anticipation** of the fall of a past non-democratic regime*

(Neil Kritz)

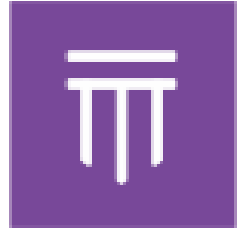


What is Transitional Justice?

Ruti Teitel: the view of justice associated with **periods of political change**, as reflected in the phenomenology of primarily **legal responses** that **deal with the wrongdoing of repressive predecessor regimes**

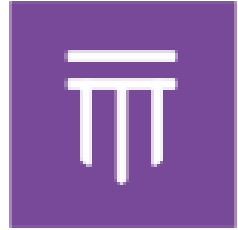
Encyclopaedia of Genocide and Crimes Against Humanity: framework for **confronting past abuse** as a **component of a major political transformation**. This generally involves a combination of complementary **judicial and non-judicial strategies**

UN Secretary-General: **the full range of processes and mechanisms** associated with a society's attempts to **come to terms with a legacy of large-scale past abuses**, in order to ensure **accountability**, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels on international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.



What is Transitional Justice?

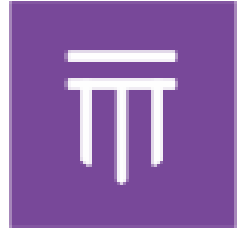
- it follows primarily political goals (although addresses also legal, historical and philosophical questions of justice)
- It aims to challenge the legitimacy of old structures and political practices and
 - to facilitate a moral, political, and legal break from previous regime
 - to establish and stabilize the democratic legitimacy of a new elite
 - to lay ground for development of new civil society
 - to deter future repetition of HR atrocities



Where is transitional justice happening?

Typically used by: new elites striving to come to terms with atrocities committed by the previous regime.

- *Postconflict societies*
 - *Aiming for democratic transition*
 - *Authoritarian postconflict societies with strong cleavages*
- *Other regime transitions recognising past regime's crimes*
 - *To democracy*
 - *Away from democracy*
- *When is TJ happening?*
 - *During transition*
 - *In the aftermath of transition*
 - *In the wake of the transition*

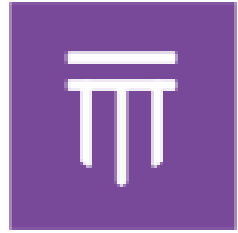


Historical and legal roots

- 1992 Salzburg (Charter 77); Ruti Teitel and Neil Kritz
- Aeschylus' drama *The Oresteia*: *“The matter is too big for any mortal man who thinks he can judge it.... I shall select judges of manslaughter, and swear them in, establish a court into all time to come.... I established this tribunal. It shall be untouched by money-making, grave but quick to wrath, watchful to protect those who sleep, a sentry on the land.”*
- Ruti Teitel: Latin America
- John Elster – Closing the Books: historical examples, including WW2

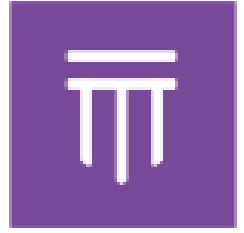
Legal roots:

- Jus post bellum
- Jus ad bellum (UN Charter)
- Jus in bello (Hague and Geneva Conventions)
- Kantian imperative of punishment
- Deterrence and peacekeeping



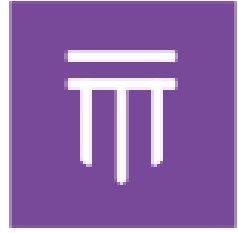
Historical roots





Dilemmas of transitional justice

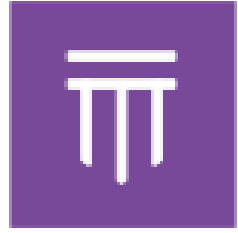
- Missing unified theory
 - Truth v justice dilemma
 - Peace v justice dilemma
 - Democracy v justice dilemma
- Adjective **transitional** is misleading
 - Winter and Hansen: any normative changes inside of a political system
- What law to apply?
- Whom to prosecute?
- Retroactivity?



Actors of transitional justice

- **International – National**
 - International organisations
 - UN
 - International courts and tribunals
 - TRCs
 - states

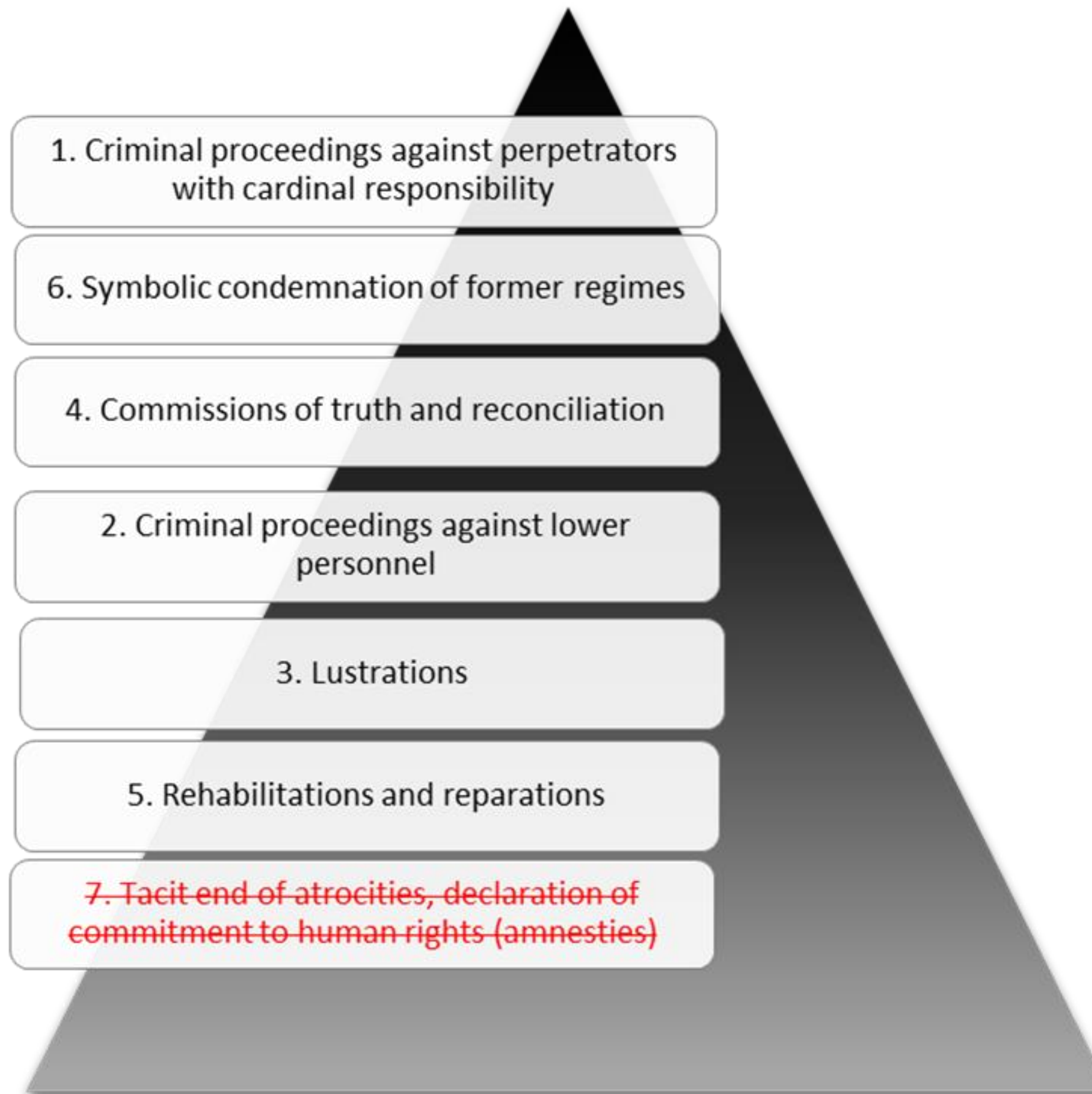
- **State – Non-state**
 - Governments
 - Opposition (dissent, new elites)
 - Judiciary (ordinary and constitutional courts)
 - NGOs
 - Civic society
 - Church

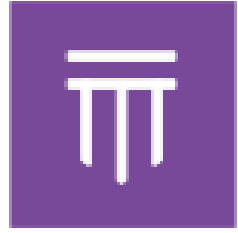


Transitional Justice Mechanism

Transitional Justice

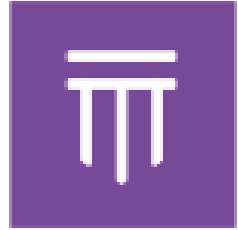
Brian Grodsky (2009)





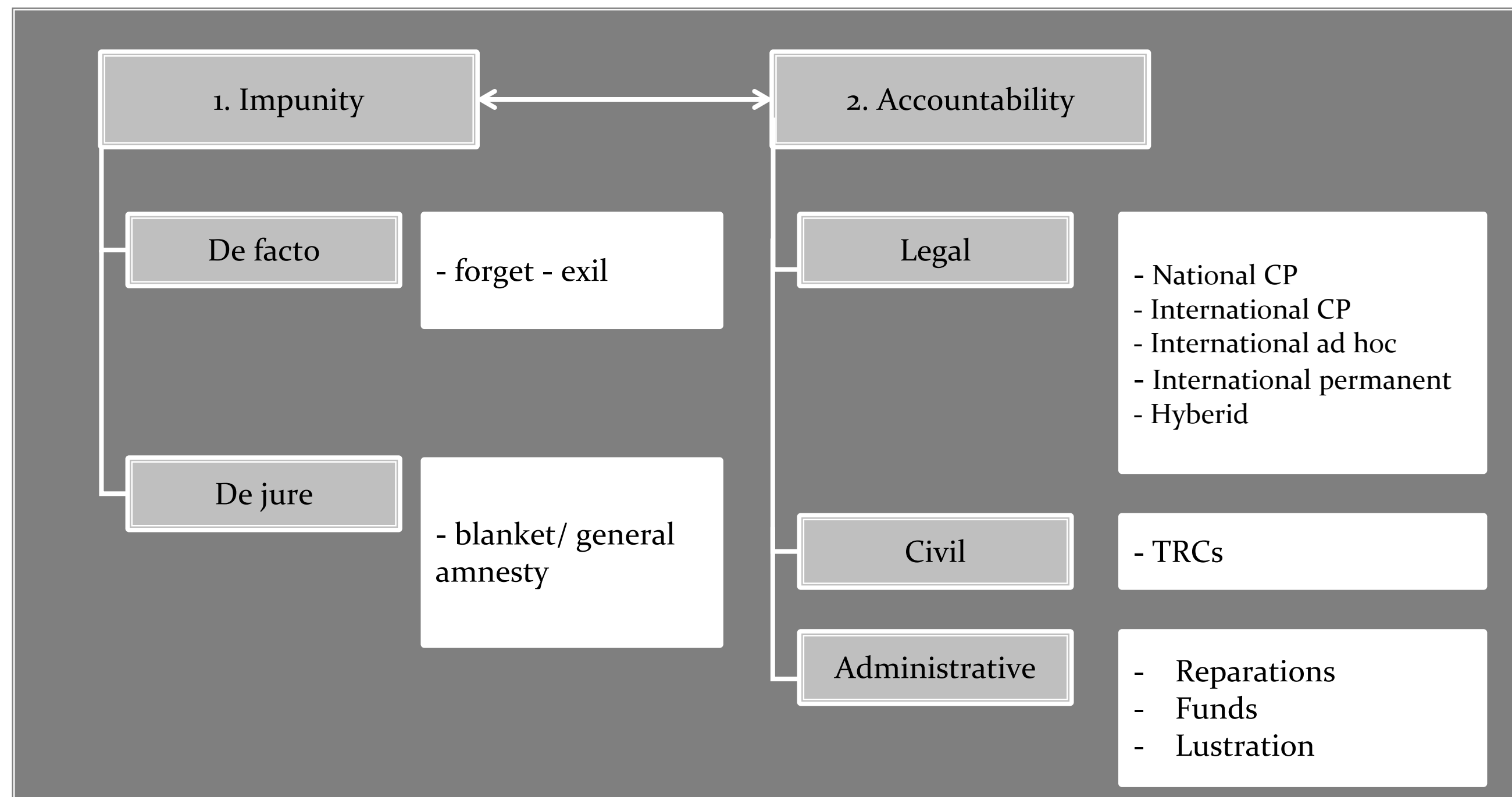
Trends in transitional justice

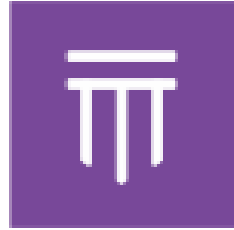
- Internationalisation (externalisation) of TJ
- Increasing number of actors
- Increasing range of mechanism
- Smaller space for manoeuvre for states



TJ and international law

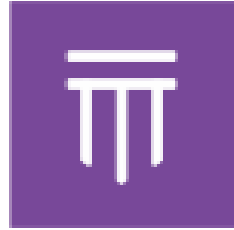
- first: domestic justice processes following regime transition
- now: globalizing movement of HR: new normative expectations
- Punish v forget dilemma
- Controversial stance on amnesties





Factors influencing a type of TJ

AUTHOR	VARIABLE¹	FORMULA
Huntington	Form of transition	Harsh transition = harsh prosecutions and lustration
Moran; Nedelsky	Character of previous regime and strength of opposition	The more repressive regime, the more vindictive new elite
Welsh; Kornai – Rose-Ackerman²; Nalepa³	Democratic and political balance of power between the elites; partisan struggles	Introduction of repressive measures depends on a relative strength of elites
Stan	Partisan policy, time	Transitional justice decision is dependent on a combination of several variables
Davis, Crocker⁴	External factors	Strength of domestic variables is diminished in transitional processes and EU and CoE conditionality



Factors influencing TJ decisions

I. Static variables	II. Dynamic variables
A. Repressiveness of the non-democratic regime	A. Relative power of the communist party after the transition
B. Time frame	B. Leftist – rightist governmental ideologies
C. Relative power of the communist elite before the transition	C. Skeletons in the closet
D. Position of the dissent before the transition	D. Externalities: international pressure
E. Position of the judiciary in previous regime	
F. Previous experience with democracy	
G. Previous experience with transitional justice	
H. Form of transition	

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Thank you for your
attention