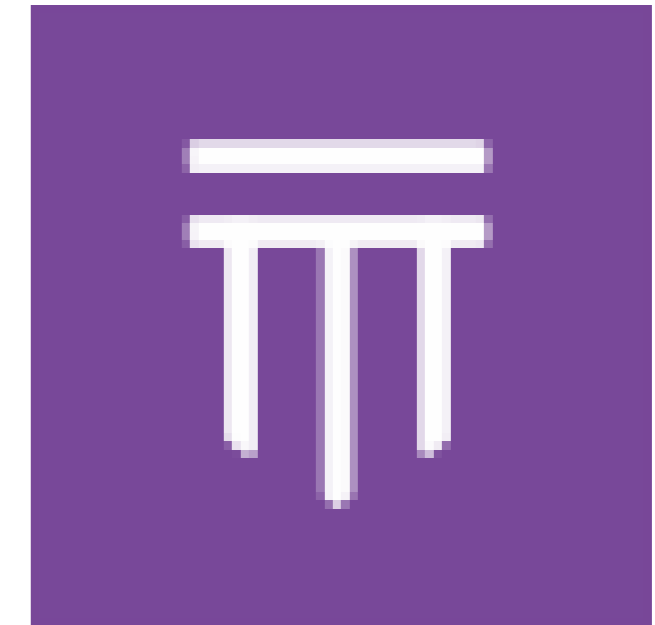


Bratislava, 11 December 2019

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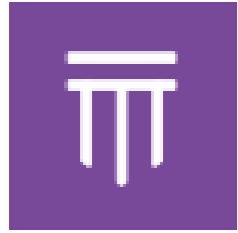
# Transitional justice



JUSTIN  
Judicial Studies Institute  
Masaryk University

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Katarína Šipulová



# Third Wave Transitions



## *Huntington*

## *Linz*

## *Share – Mainwaring*

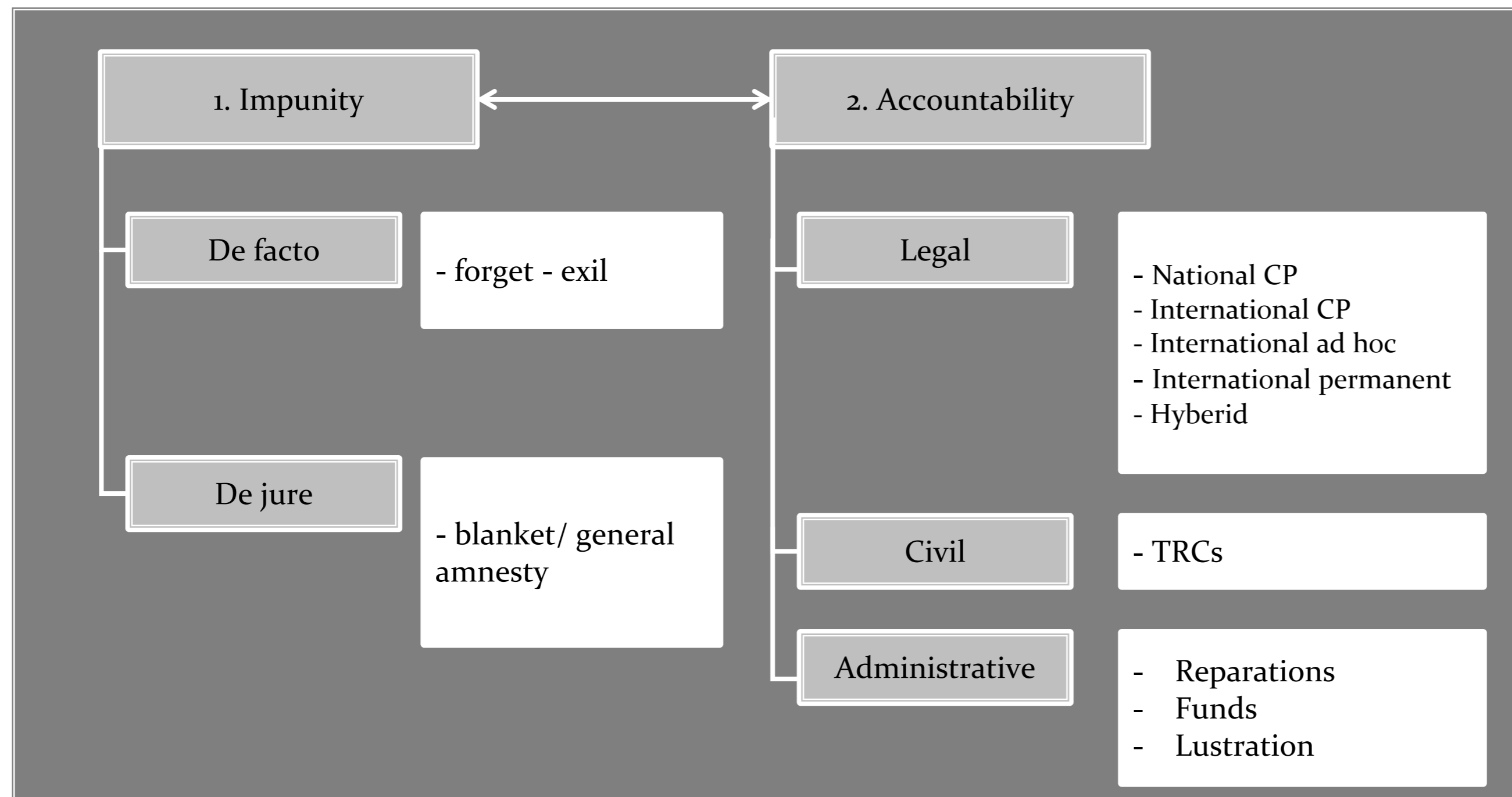
- |                    |   |                  |   |             |
|--------------------|---|------------------|---|-------------|
| (1) Transformation | = | reforma          | = | transaction |
| (2) Replacement    | = | ruptura          | = | breakdown   |
| (3) Transplacement | = | - (or ruptforma) | = | extrication |





# 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



# De-communicization (Transitional Justice in CEE)



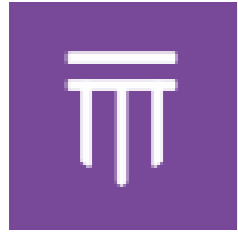
Source: Jack Ohman *The Oregonian* 1995



# CEE Transitions

## **Communist regimes:**

- large level of control of social/societal life
  - > new regimes are not able to eliminate all networks of communist nomenklatura
- Low organisation of opposition and dissent
- Socialism prevails the rule of law
- All state actors dominated by Communist parties
- Legal order is not there to constrain the government (ideal totalitarian system)
- Long duration of regimes



# Third Wave Transitions

## CEE

- quick pace
- impatient actors
- uncertainty
- cooperation with ComP



State	Round Table	Elections
Poland	February 6, 1989- April 5, 1989	4/8 June 1989
Hungary	July 13, 1989 – Sept.18, 1989	March 25/April 8, 1990
CSR	November. 26,1989- January 31, 1990	8/9 June 1990
DDR	December 7, 1989 – March 12, 1990	March 18, 1990
Bulgaria	January 22, 1990 – May 14, 1990	10/17 June 1990
Romania	January 27, 1990 – February 1, 1990	May 20, 1990

## Round Table Phenomenon



# Transitional Justice in CEE

What is the relationship between transitions and transitional justice?

Torturer problem

Revolved around the communist parties and their repressive apparatuses (secret services and the police)

Typical mechanisms:



# De-Communitisation

De-Communitisation = measures implemented by postcom countries in order to dismantle the Communist Party's hold on society

- Replacement of elites
- Restoration of the RoL
- Transition to multi-party system
- De-politicization of police
- Reestablishment of private property
- Transition from planned to market economy





# De-Communisation

## Typical mechanisms:

- a) criminal proceedings,
- b) lustration,
- c) access to secret files,
- d) restitutions, and
- e) symbolic condemnations of communist regimes

Can you identify the retributive/restorative axis?



# Lustration and vetting

Most frequently used and most controversial mechanism of CEE transitions

“[a] broad set of parliamentary laws that restrict members and collaborators of former repressive regimes from holding a range of public offices, state management positions, or other jobs with strong public influence (such as in the media or academia) after the collapse of the authoritarian regime”

- Broader sense: also opening of secret police archives and establishment of national memory institutes



# Lustration and vetting

Purges: non-democratic practice

Lustration: transitional measure, to consolidate the democracy

- Typically on legislative basis
- Important particularly in the first phase of a transition, when the GOV lacks sufficient legitimacy and trust
- First and harshest: CSR (wide group of targetted persons)
- Germany, Bulgaria, Albania, Hungary, Poland
- However, significant differences between countries



# Lustration and vetting

CSR, GDR, Albania: wide-reaching cleansing

Hungary, Poland, Lithuania, Estonia: truth-seeking and memory-building part.

Various theories

Important particularly during the first phase of transition, to establish new legitimate institutions

Retributive or restorative?

both elements, they are similar to strategic actors or insurance theories



# Lustration and vetting

## Criticism:

- International institutions
- Infringement of fundamental rights (passive voting rights, principles of democratic regimes)
- Prohibition of discrimination
- Right to a fair trial
- Unclear effect on democratization



# Strategies of Lustration

Roman David 2015

*Retribution – Revelation - Reconciliation*

	<i>Retribution</i>	<i>Revelation</i>	<i>Reconciliation</i>
<i>Individual responsibility</i>	<b>YES</b> (moral agent fully responsible for his actions)	<b>NO</b> (structural responsibility; blaming the system; acting under the duress)	<b>YES</b> (it is the wrongdoer who has to apologize – moral agent)
<i>Condemnation</i>	<b>YES</b> (- therefore punished)	<b>NO</b> (since they are not responsible and system is the one to blame, they shouldn't be punished)	<b>NO</b> (however, the wrongdoer is seen as capable of moral development)



# Access to Secret Files and National Memory Institutes

Typically complement lustration

Its character changes depending on the link to lustration

Access:

- Files compiled and created by the secret political police
- Information in the file, documentation itself
- Access to targeted individual v broader public
- East Germany (1990), Hungary (1994), Estonia (1995), the Czech Republic (1996), Bulgaria, Poland (1997), Romania (1999), Slovakia (2002), Lithuania (2006), and Latvia (2007).



# Restorative Mechanisms

## Reparations

- a whole set of victim-oriented measures
  - Restitutions
  - Rehabilitations
  - Compensations
  - Satisfactions
- 
- Most common in CE: rehabilitation of political prisoners, and restitutions of property





# Huntington

**Transformation:** impulse originates from members of the old regime

**Transplacement:** the old regime embarks on the journey towards democracy, but loses both legitimacy and initiative along the way –  
opposition reformers

**Replacement:** removal of unreformed government in full and  
replacement by the opposition

**Incentive to prosecute?**



## Moran

**X** regime transition, but repressiveness of the totalitarian regime and the position of dissent in it

Exit points (tolerance of emigration) and voice points (toleration of dissent)

**H: the more liberal the communist leadership, the more forgiving the new democratic elite**

**X Poland**



## Helga Welsh

### **Distribution of power between political parties & position of local communist party before and after the transition**

- Weak in CR
- Strong in Romania and Poland
- i.e. effect of both past and present determinants



# Kieran Williams, Aleks Szczerbiak and Brigid Fowler

## Draw on Welsh

- Divergence of lustration laws in CEE can be explained with reference to the access of the former opposition to power and their ability to create coalitions.
- Vigorous implementation of lustration (CSR, Poland, Hun) = countries that different in communist experience and transition, but had same intentions concerning lustration.



## Time as a variable

Sczerbiak 2002: contemporary factors: political scene, distribution of power, public opinion and mood in society **at the time the mechanism is implemented**

**Lustration are not necessarily meant to secure historical justice: might be used to solve ordinary struggles between political parties**



## Time as a variable

Nedelsky 2004: post-comm states struggle to adopt any legislation.

- How available the secret police files are
- Legitimacy of the former regime & re-legitimization of Postcommunist elites
- Public interest in de-communization



## Time as a variable

### **Nalepa: Skeletons in the closet**

- Communist parties initially insisted on rewarding their support of democratization, but later implemented exactly the screening policies they opposed.
- Why?



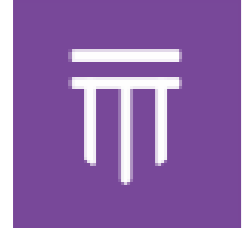
## Time as a variable

**Lavinia Stan: we should look beyond the lustration**

democratic political competition is crucial for explaining the paths of transitional justice in CEE

1. The role of the opposition during the transition
2. The degree to which the communist regime was repressive
3. The presence or absence of an experience with a pluralist system pre-communism





# Time as a variable

**Crocker**

Supranational influence



# Factors influencing a type of TJ in CEE

<b>AUTHOR</b>	<b>VARIABLE<sup>1</sup></b>	<b>FORMULA</b>
<b>Huntington</b>	Form of transition	Harsh transition = harsh prosecutions and lustration
<b>Moran; Nedelsky</b>	Character of previous regime and strength of opposition	The more repressive regime, the more vindictive new elite
<b>Welsh; Kornai – Rose-Ackerman<sup>2</sup>; Nalepa<sup>3</sup></b>	Democratic and political balance of power between the elites; partisan struggles	Introduction of repressive measures depends on a relative strength of elites
<b>Stan</b>	Partisan policy, time	Transitional justice decision is dependent on a combination of several variables
<b>Davis, Crocker<sup>4</sup></b>	External factors	Strength of domestic variables is diminished in transitional processes and EU and CoE conditionality



# Transitional Justice Decisions in CEE

Two general hypotheses:

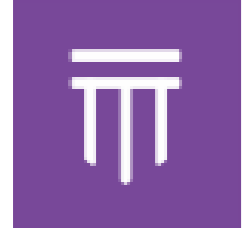
1. *Type of regime transition and form of transitional justice*
2. *Distribution of power between post non-democratic elites and the incoming elites*



# Strategies of Lustration

Negative lists

Positive lists



# Strategies of Lustration

Jan Kavan case



# Strategies of Lustration

Who should be the target?

What are the core problems of lustration?



# Factors influencing a type of TJ in CEE

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# Clash between TJ and HR

Transitional Justice introduces a different logic of punishment and reparation, often at odds with general conceptions of HR and international HR commitments

*Lustration: passive voting rights, employment rights*

*Access to secret police files: right to privacy*

*Condemnation of political parties: deformation of the free political competition*

*Reparations: arbitrary infringement on property rights.*

Who is to solve these conflicts? Newly established constitutional courts





# Role of courts in transitions

Why are elites willing to constrain their power?

Why are constitutional courts different in terms of independence, jurisdiction, competences and effectiveness?

Symbolic role (Hirschl, Schwartz)

- Separation of powers
- Rechtstaat
- Written catalogues of HR
- Agents of change
  
- Ramseyer
  - A mean to conclude longterm contracts of political parties and their voters
  - If a high probability of future independent parliamentary elections
  - If a low probability that current government easily wins next independent parliamentary elections

Ginsburg – insurance theory (democratization might lead to a loss of power + CC is a guarancy for minorities' rights)

Veto player theories



# How and when CCs emerge?

	Constitutional court	No constitutional court
Democracy	A	B
Non-democracy	C	D

B to A: fragmentation of party or institutional system, change of flexible Constitution needed (France, Belgium)




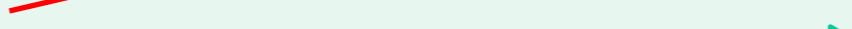
D to C: federalism, stabilization of regime, trust (Poland)

D to A: transition, change of regime

C to A: path dependency



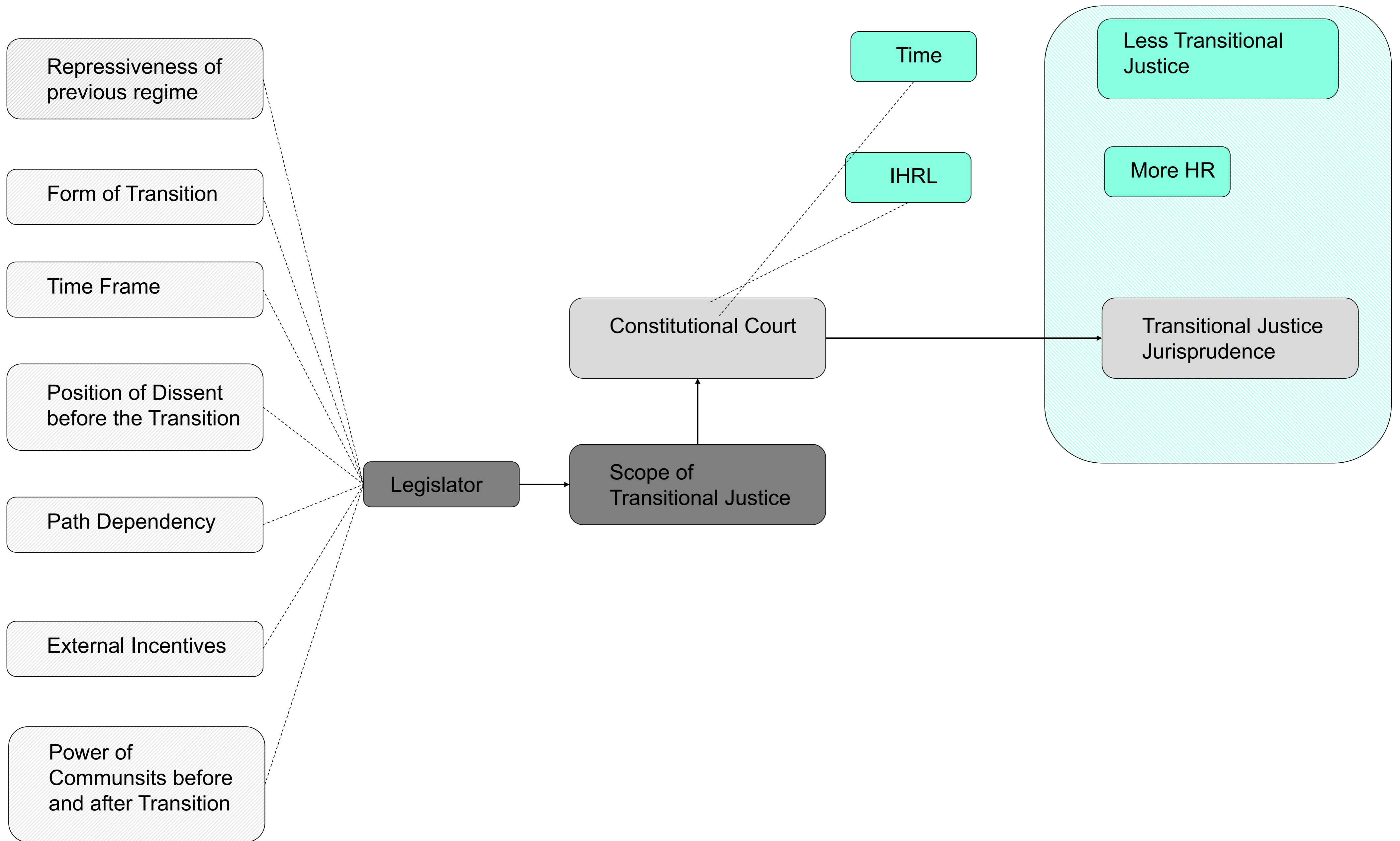
# How and when CCs emerge?

	Constitutional court	No constitutional court
Democracy	A  	B
Non-democracy	C  	D

A to B and C to D: difficult because of path dependency

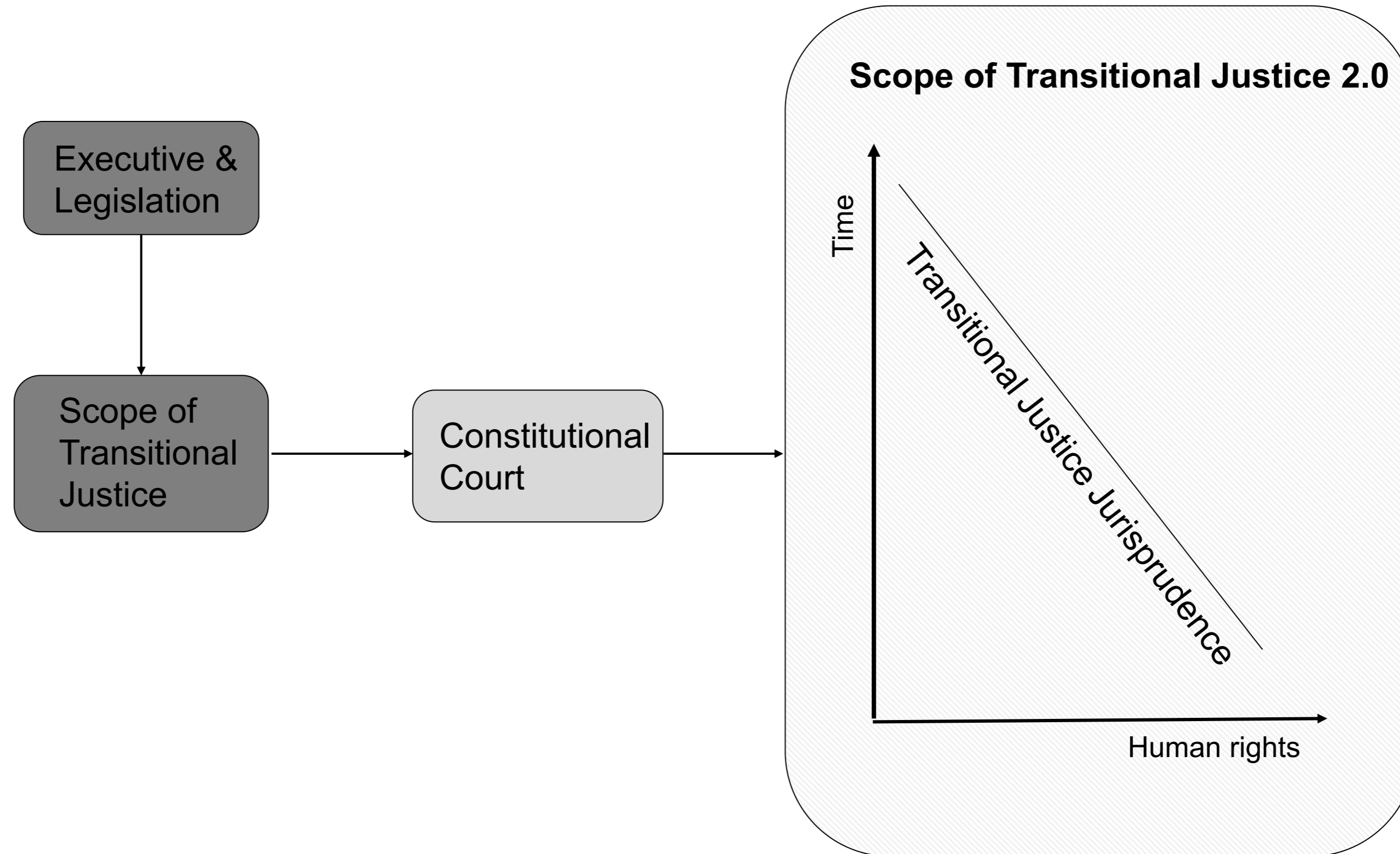
A to D: Ginsburg: phases

C to B: ?





# Constitutional courts in TJ processes



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Thank you for your  
attention