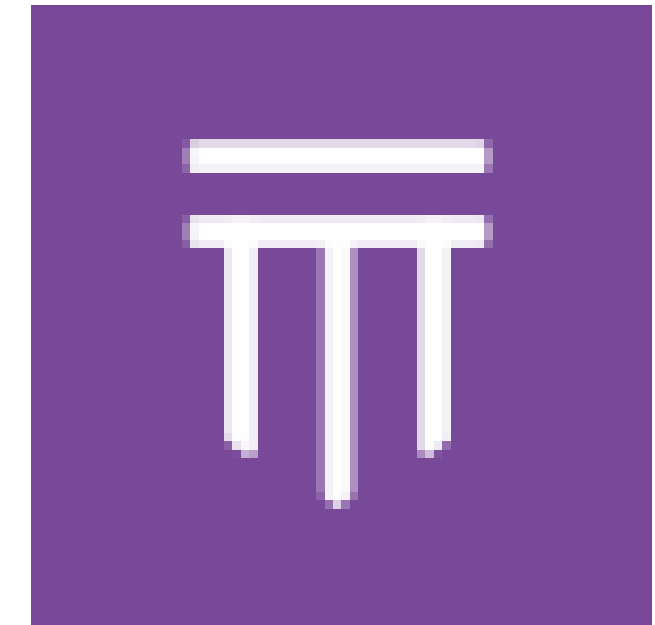


Brno, 1 December 2021

Transitional justice

Democratization

EU



JUSTIN
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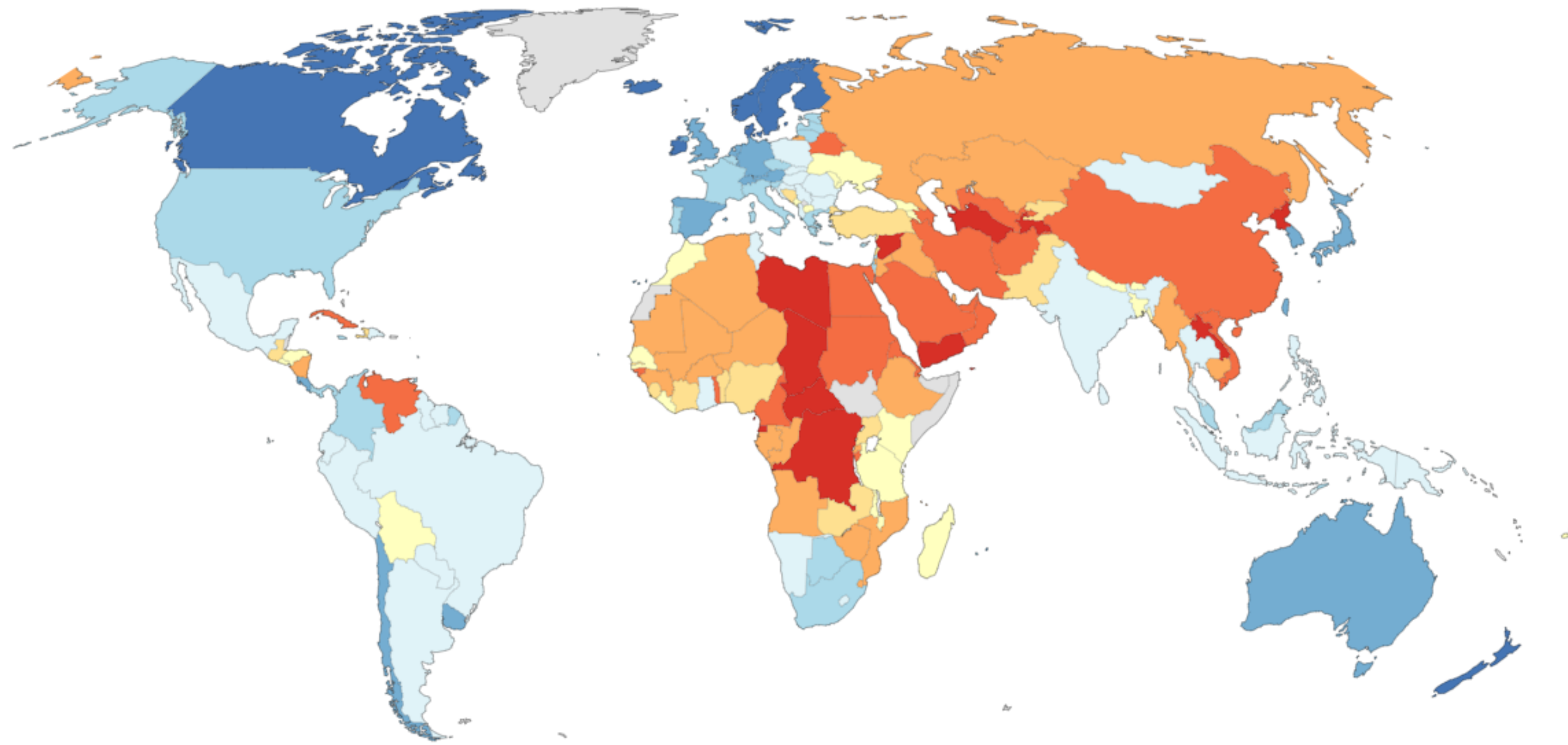
Regimes typology

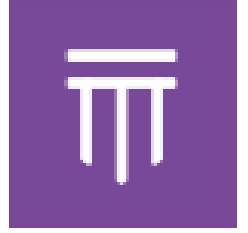
	Autoritarian	Totalitarian	Democratic
Accountability	NO	PARTLY	YES
Political interferences into civic life	YES	YES – extreme	LIMITED
Ideology	WEAK	STRONG	WEAK
Police, use of fear	YES	YES	PARTLY/NO
<i>De facto rights</i>	SOME	NO	YES



Economist: Global Democracy has a bad Year

Global Democracy Index 2020

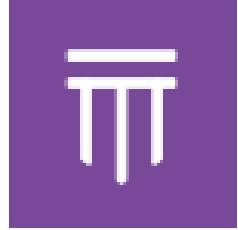




Classic Transition Theory: Schmitter, O'Donnell and Whitehead: Transitions from Authoritarian Rule

They address interactions in negotiations between

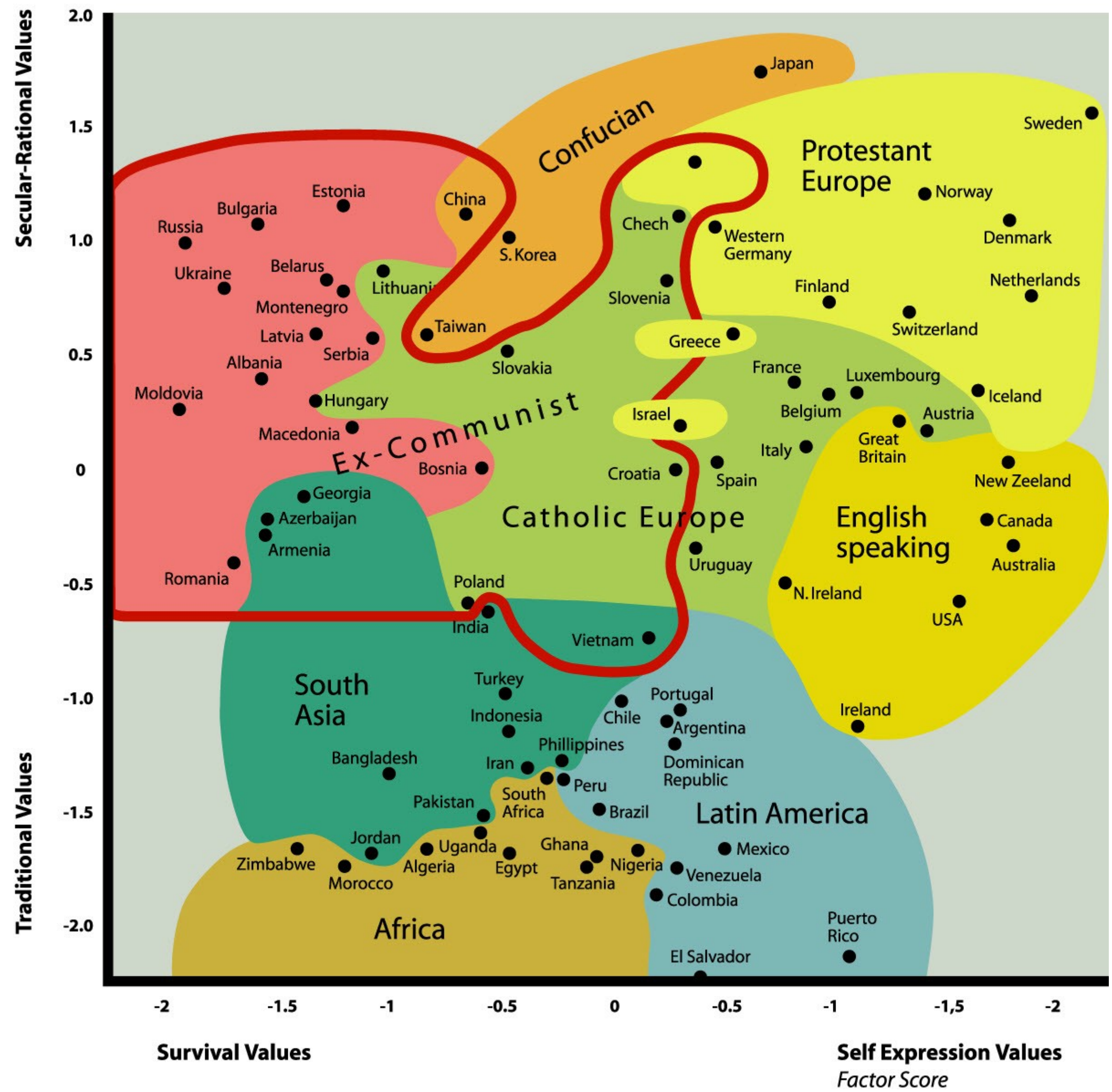
- authoritarian leaders
 - Democratic opposition
-
- They differentiate
 - Economic conditions
 - Political negotiations
-
- Democratization is a process, which can be explained by
 - Theories of rational choice (Przeworski)
 - Interactions between elites
-
- Political transition: is the interval between 2 political regimes. On one hand, it marks the process of dissolution of the authoritarian regime, on the other the installation of a form of democracy, return to authoritarianism or revolution.

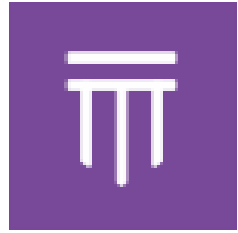


Congruence Theory

1. If institutional setup corresponds to cultural needs: **equilibrium**
2. If institutional demand is higher than cultural demand: **democratization is not moving forward**
3. If institutional demand is smaller than cultural demand: **democratization is increasing**

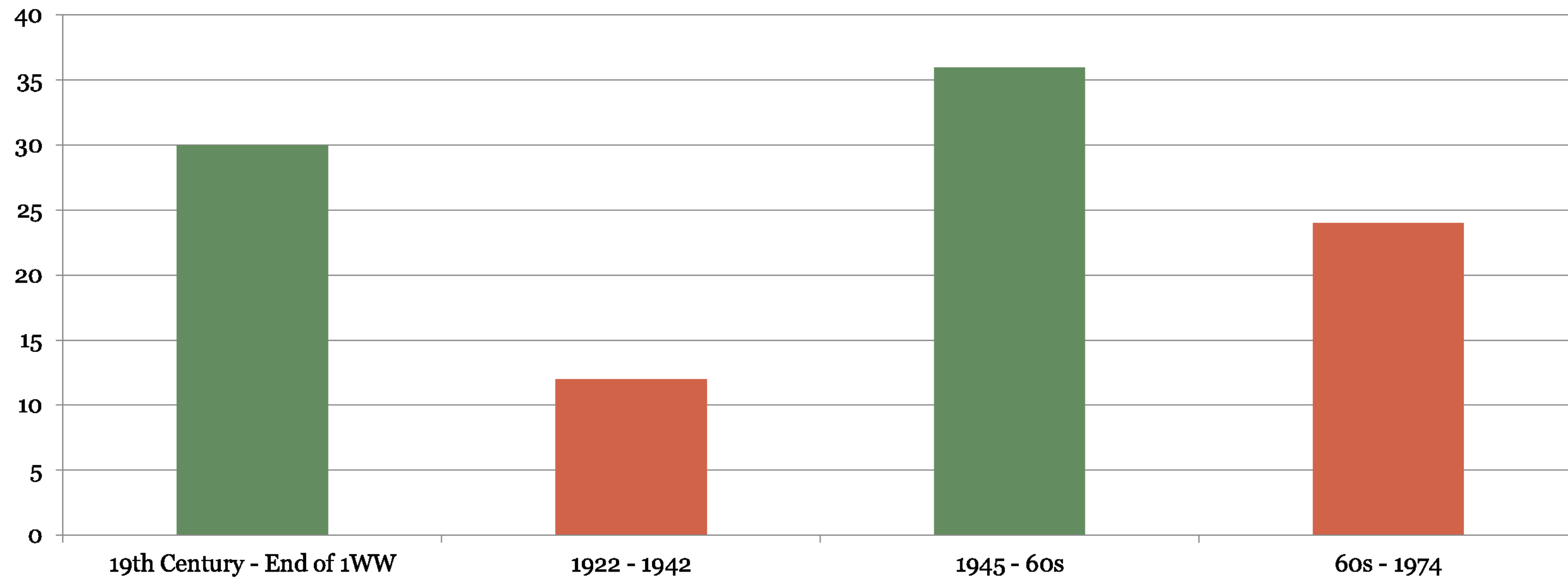
Inglehard & Welzel 2005: cultural map





Third Wave of Democratization

Number of Democracies





Authoritarian regimes

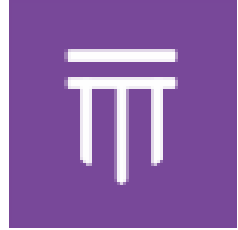
First wave: mostly absolut monarchies, feudal aristocrats

Second wave: fascist states, colonies, personalized military dictatorships (most of those have some past democratic experience). Decolonisation and interventions

Third wave: single-party regimes (revolution/socialism)

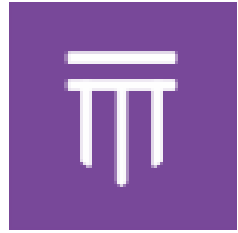
Military regimes

Personalised dictatorships



Authoritarian regimes

Processes	REGIMES			
Transformation	HUN, BUL, TAIW, MEX, USSR	Spain, India, Chile	TUR, BRA, Peru,, ECU, GUAT, NIG, PA, SUD	
16	5	3	8	0
Transplacement	Pol, CSR, NIK, MON	Nepal	BOL, URU, HON, E.SAL, KOR	
11	4	1	5	0
Replacement	NDR	PORT, ROM, Philippines	GREECE, ARGENTINA	
6	1	3	2	0
Intervention	Grenada		Panama	
2	1	0	1	0
TOGETHER				
35	11	7	16	1



Third Wave Transitions

Huntington

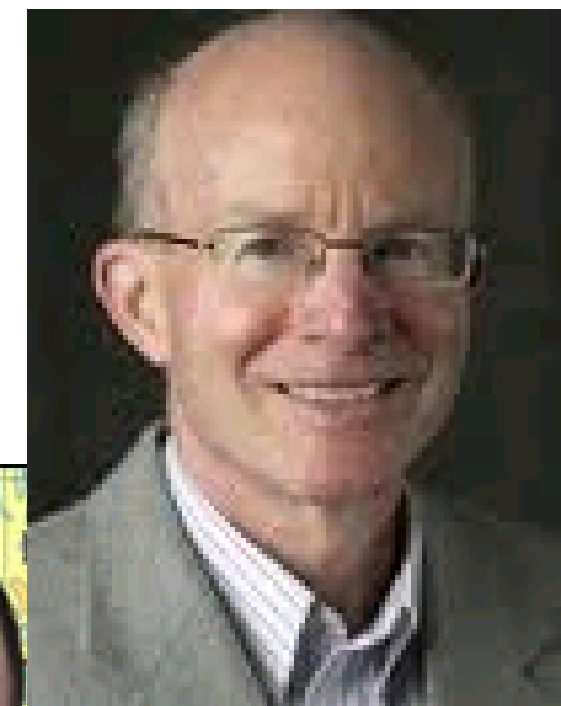
Linz

Share – Mainwaring

(1) Transformation = reforma = transaction

(2) Replacement = ruptura = breakdown/collapse

(3) Transplacement = ruptforma = extrication





1. Transformation

Regime transition is in the hands of the ruling elite = the state is democratizing on its own, the elite ends the functioning of one regime and changes – **transforms it** - into another, democratic system

In practice, very difficult to point out differences between transformation and transplacement

Approx. 16 out of 35 states of the third wave
SPAIN, BRAZIL, HUNGARY



1. Transformation: 5 stages

1. Reformists appear among leaders

- Staying in power is more costly than leaving the government
- Reducing the risk of opposition gaining more powers
- Belief that old leaders will not lose power and influence informally
- Democratization would help the country
- Democratization might be the correct (normatively) form of governance

2. Reformists gain power

- It is the reformists who govern the regime
- By death of authoritarian leaders (Franco in Spain)
- In some countries, we see a regular exchange of the person of the governor (BRA, MEX)
- Coup d'état (Peru, Hungary, Turkey)

3. Liberalization fails

- The problem of long-term stay in power, reformists are quickly changed

4. Backwards legitimization

- Making sure that old elites will not question the new regime, mild cleanses of the government – weakening of old allies

5. Cooptation of the opposition

- The need to look for new partners -> ruptura pactada



1. Transformation

Huntington's guidelines:

1. To secure political base and delegate power on supporters of democracy
2. Use nondemocratic procedures to legitimize the regime
3. Slow shift of politics – less dependency on governmental groups which are against the change
4. Readiness to face steps taken by opponents
5. Control and initiation
6. Low expectations
7. Support of non-radical opposition
8. Atmosphere of inevitable change



2. Replacement

- Reformists are weak or not present at all
 - The leader of democratization = opposition
 - Radical change in power
 - Only 6 states of the third wave until 1990, mostly personalised dictatorships (not so much military regimes or single party regimes)
-
- 3 STAGES
 1. Fight to establish the regime fall
 2. Regime fall
 3. Fights after the regime falls



2. Replacement

- Huntington's guidelines
 1. Focusing on illegitimate regime: hit politically salient questions (corruption, brutality, HR violations)
 2. Appeal to discontent groups – including former allies
 3. Cultivation of generals – support of army is crucial
 4. No violence rule
 5. Public opposition towards the regime
 6. More contact with third countries and media
 7. Unified opposition
 8. Very fast capture of power after the regime falls – opposition needs to have charismatic leader ready to seize the power!



3. Transplacement

- Cooperation of government and opposition:
 - The government is willing to negotiate but won't be burdened by the change
 - 11 transitions of the third wave
 - Poland ,CSR, Uruguay, Korea
 - Dominant groups in government and opposition cannot act unilaterally – negotiation according to the distribution of power
 - Ideology weakens both sides – opposition must be aware that it won't be able to take the government down on its own



3. Transplacement

- Huntington's guidelines
- Government
 1. Isolation and weakening of the regime supporters
 2. Takes initiative
 3. Secures the support of the army
 4. Channels for negotiation of core questions with the opposition
 5. Negotiations – support of army
- Opposition
 1. Mobilization
 2. Moderation
 3. Negotiation, compromise
 4. Negotiation and talks with an out view of winning the elections
- Government & Opposition
 1. Speed and solution to key wuestions
 2. Agreement on the form of democracy
 3. Compromise and willingness to step down from controversial requests
 4. Agreement – the only alternative
 5. *When it doubt, compromise!*



Questions

- Why not all post-communist countries managed to successfully complete the transition?
- Political elites started to build its consensus on ethno-nationalistic principle. Was this the reason why the violence in Balkan countries was inevitable?



Typical problems of consolidation

- General citizenship for all
 - All inhabitants are citizens
 - Problems for Baltic countries (x Russia), Roma minorities
- Active organisations
 - Civic society
 - Too many groups, too little membership
- Rule of Law
 - Independent judiciary – how?
- X Corruption
 - Good governance
 - Informally nested networks and alliances
- Redistribution
 - Welfare state, solid grounds from communist era?
- Non-discrimination
 - Ethnic and gender equality
 - Historical and cultural path-dependency
- Fight against the fraud
 - Free and equal elections
 - Fraud does happen but most mistakes are due to inexperience



Democratization - concept

- Trademark of the 20th century?

- Conceptualization: R. Dahl: Polyarchy

1. Control of the executive power by elected authorities
2. Elected bodies – regular election
3. Broad passive electoral rights
4. Broad active electoral rights
5. Freedom of speech
6. Freedom to receive information guaranteed by the law
7. Freedom to assemble

- Schmitter – Karl

8. Constitutional competence of elected representatives CANNOT be over-ruled by the opposition or unelected bodies
 - **what would this mean for courts and human rights?**
9. Autonomy and sovereignty



Conceptualization of democracy

- What is democracy?
- Schmitter – Karl: modern political democracy is a system of governance where governors are accountable to their citizens who act via their elected representatives
- Governance
- Governor
- Public
- Citizens
- Elected representatives
- Jefferson: A democracy is nothing more than a mob rule, where 51% of the people may take away the rights of other 49%
- Is it true?



Conceptualization of democracy

- Liberal democracy
- Social democracy
- Constitutional democracy
- Representative democracy
- Deliberative democracy



Conceptualization of democracy

- Liberal democracy
 - Francis Fukuyama
 - “The twentieth century saw the developed world descend into a paroxysm of ideological violence, as liberalism contended first with the remnants of absolutism, then bolshevism and fascism, and finally an updated Marxism that threatened to lead to the ultimate apocalypse of nuclear war. ... The triumph of the West, of the Western idea, is evident first of all in the total exhaustion of viable systematic alternatives to Western liberalism.”
- Constitutional v Representative democracy
- Deliberative democracy
 - Liberal model
 - Republican model
 - Deliberative model (Habermas)
 - The public sphere creates the political opinion
 - The state realizes it
 - Places focus on identities of citizens and groups, attempts to achieve equality
 - Discussion, dialogue, discourse -> formulation of needs and requirements
 - Elster, Goodin, Benhabib, Fung-Wright, Cohen



Conceptualization of democracy

- Seymour Martin Lipset: socio-economic conditions of democracy
- Theoretical link between the level of development and probability of democratic governance
- Exceptions?
- Conditions:
 - Socio-economic development
 - Industrialization
 - Urbanization
 - Wealth
 - Education
 - Open class system, large middle class -> democratic transition & democratic stability
 - (Lipset theory of modernisation)



Conceptualization of democracy

- Diffusion theory
 - Neighbouring countries
 - Intervention
 - Exit points
 - Security



Democratic consolidation

- What are the conditions?
- When does back-sliding occur?
 - Civic society (D, K)
 - Crisis (D, -K)
 - Source of elite's wealth: land x capital (-D, -K)
 - Political institutions (D,K)
 - Inter-societal inequality (D, -K)
 - Middle class (D,K)
 - Globalization (?D, K)
- Development and HR
- Development and democratization
- Where do populist movements fit?



Transitional Justice and the European Union



Transitional Justice and the European Union

- 2015 EU's Policy Framework on support to transitional justice
 - Openly underlines the commitment of the EU to TJ processes and the fight against impunity
 - Common heritage
 - Experience of all MS
 - Ability of the EU to help post-conflict and post-authoritarian societies
- Yet, until 2015 no definition of TJ
- Policies on ad hoc character, patchy, inconsistent



Transitional Justice and the European Union

- 1989, democratization and enlargement
- EU as an anchor (Moracsik) for post-communist countries
- Post-com countries as an opportunity for the EU to consolidate democratization processes on the continent
- 1993 Copenhagen Summit of the European Council: ambitious plan to overcome the burden of the divided Europe
 - Adoption of the very first political criteria on membership
 - Democracy, RoL, HR, protection of minorities, fundamental values of the Community...
 - Impact on how countries democratize + how they address TJ issues
 - Interest to oust former communists and elites not-committed to democratic values
 - How to stabilise and consolidate democracies?
- Nowadays
 - Backsliding
 - Foreign-policy goals in Balkan countries (entry to Turkey/East Asia)



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EU&TJ: Starting point

- 2001: proposal on Council Framework decision on combating racism and xenophobia
 - Lack of agreement
 - Progress only in 2007 under German presidency
 - Moral obligation to legislate on hate speech and racist rhetoric
 - Aim: to find a minimal level of harmonisation of individual criminal liability for proliferation of racist and xenophobic ideas and views
 - References to historical experience, Nuremberg trials, Rome Statute of ICC
 - Adopted in 2008, but the negotiations uncovered deep differences among MS on the gravity of the crimes of Nazi and communist regimes
- April 2008 European hearing on the crimes of genocide, crimes against humanity and war crimes committee by totalitarian regimes
 - Common platform
 - Historian, lawyers, political scientists, politicians
- Should communist crimes be condemned together with Nazi crimes?
 - Germany is against
 - Does EU have a competence?
 - WE appears to be unsensitive towards the suffering of CEE countries



EU&TJ: Starting point

- 2008 Stockholm Programme
 - Covering 2010-2014
 - External relations and development policy, including transitional justice
 - EU institutions should support and promote EU and state activity against impunity, fight crimes of genocide and CAH, foster cooperation with ICTs, ICC in particular, etc.
- experience of MS is diverse, but EU is an area of shared values which are incompatible with such crimes
- There is no single blueprint for TJ (Ecouncil and MS), but UE has normative preferences (convergence towards international law)
- Talks about using Article 83 TFEU as the legal basis for possible criminalisation of public condoning, denying or grossly trivializing crimes of totalitarian regimes



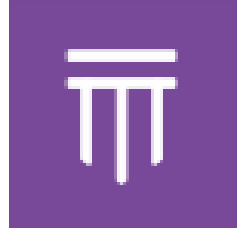
EU&TJ: Starting point

- Strongest focus: international criminal justice and ICC
- EP resolution on EU support for the ICC
 - Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide committed the Union to support those political leaders in transitional areas who promote and are committed to democratic values



EU&TJ: Common Framework

- 1. criminal justice
 - covers the most serious crimes under international law and draws on the legacy of the Nuremberg and Tokyo trials
 - 2 truth seeking
 - the establishment of truth and reconciliation commissions, and the collection and preservations of documents, archives, and other evidence of past crimes.
 - 3. reparations
 - presume an acknowledgment that human rights were violated and the need to rectify this dwells in the right to remedy
 - 4. institutional reform, guarantee of non-recurrence
 - focuses on the reform of institutions which were either instruments of repression and injustice, or which lack technical capacity
-
- Apart from international criminal justice, very victim-centred approach



EU&TJ: Enlargement process and European Conditionality

- Mudde-Sedelmeier and Merlinger: Eastern enlargement
 - 1. attempt to use the enlargement to spread HR and democratic norms
 - EC declarations, Phare, ...
 - 2. accession condition
 - Copenhagen criteria 1993 (HR and democracy)
 - 3. normative revision of Treaties



HR in the enlargement process

- 1962 Birkelbach report
- Declaration on the European Identity
 - Relationship of 9 EC members towards the third countries
 - *Determination to defend the principles of representative democracy, of the rule of law, of social justice – which is the ultimate goal of economic progress – and of respect for human rights.*
- 1977 Joint Declaration (EP, Council, Commission)
 - To defend the FR derived from the national constitutions and the ECHR, adopted by CoE
 - Although protection of HR is not the main task and goal of the EC
- 1978 Declaration on Democracy (EC)
 - First election of the EP
 - Objection of EC should any of the member states backslide to authoritarian government
 - *Matthews v Doego* case



Copenhagen Criteria

- Definition of fundamental values and political conditions of membership
- Take over the definition of democratic character imposed by A237 EEC Treaty
 - To minimize the risk of backsliding
 - Democracy
 - Rule of law
 - Functioning of market economy
- 1998: transformed into Council Regulation EC No 622/98
- The very same year, democratic principles in Preamble and Article F TEU = new Grundnorm
- Amsterdam: transfer of Copenhagen criteria into Article 7
- And membership criteria: Article 49

Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3

(ex Article 2 TEU)

1. The Union's aim is to promote peace, its values and the well-being of its peoples.
2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

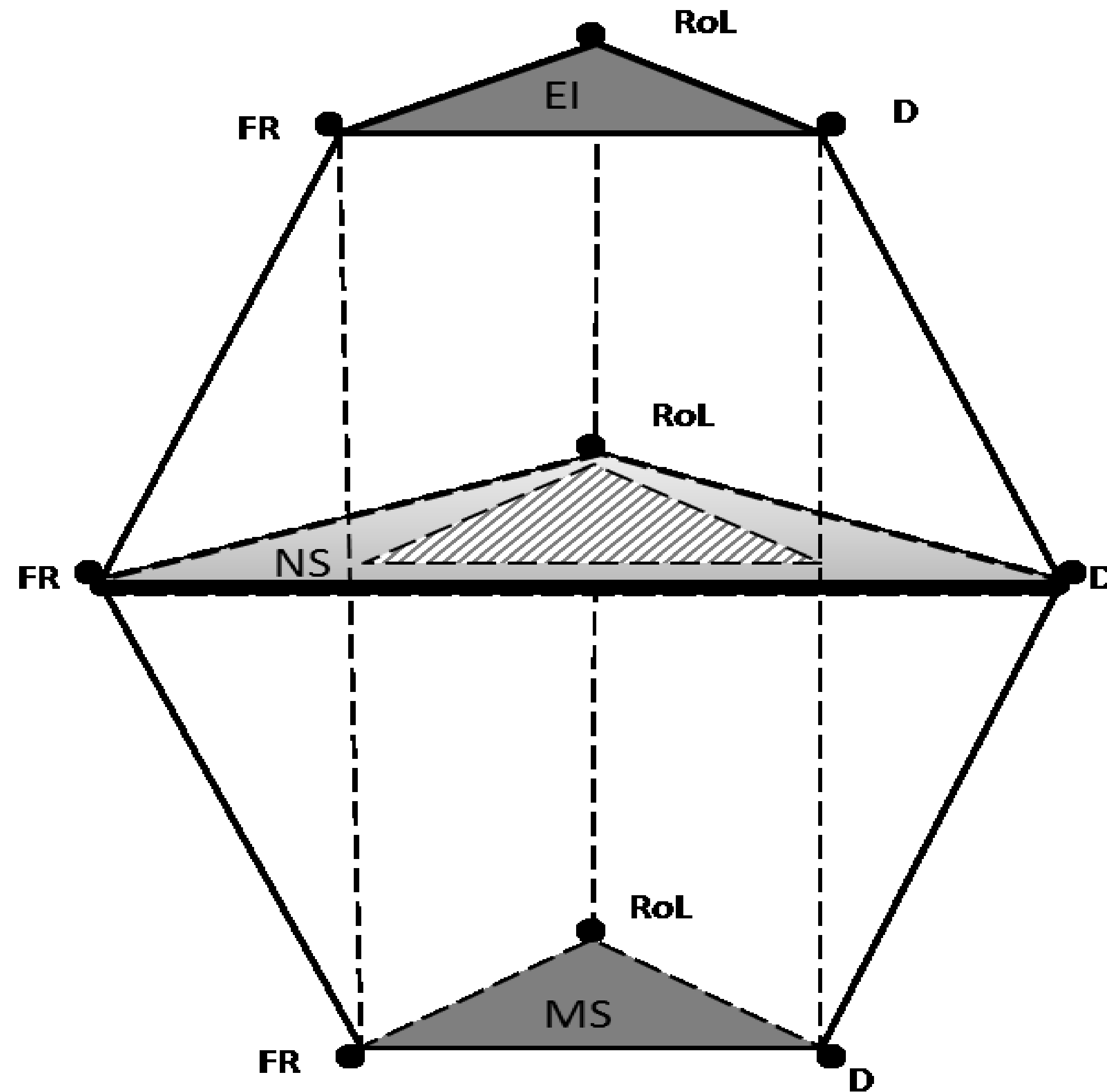


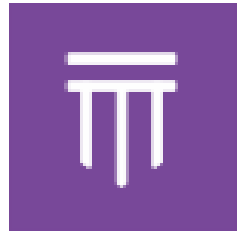
A2 Control

Policy instruments	Sanction mechanism, Article 7 TEU	Control
	International peer pressure	Convergence
	Evaluation reports of the accession process/CVM	Conditionality
	Issue linkage (loans, package negotiations)	Control (indirect influence)
	Pre-accession influence + networking (social learning)	Contagion
Legal instruments	Infringement	Control (indirect influence)
	Preliminary ruling procedure	Control

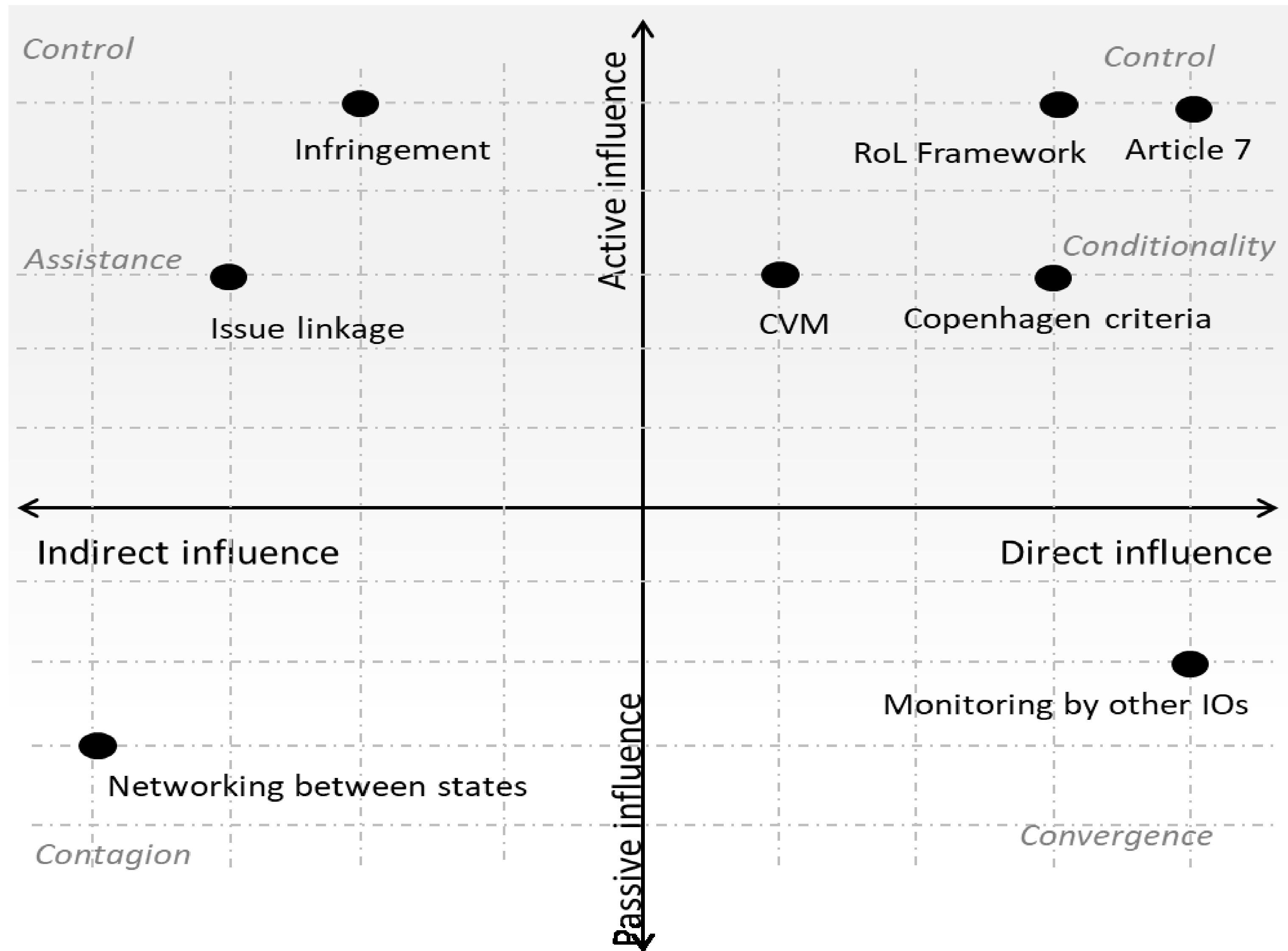


A2 triangular protection





A2 Control



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Thank you for your
attention