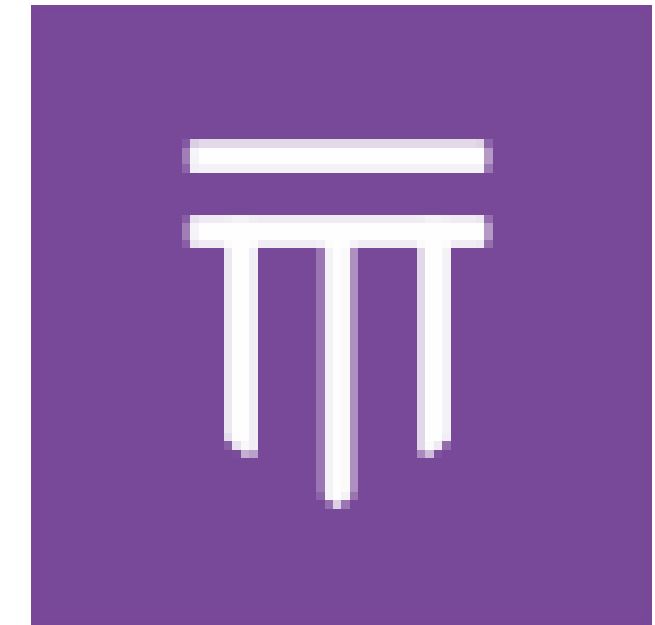


Brno, š3 November 2021

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# Transitional justice

## Lustration, Secret Police Files, and Rehabilitations



JUSTIN  
Judicial Studies Institute  
Masaryk University

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Katarína Šipulová



# CEE Transitions

## Bulgaria

- Ideal totalitarian rigid regime (Zivkov, very close to USSR)
- Marginalised opposition
- Coup d'état inside of the communist party -> round table talks under the communist party leadership (Petar Mladen)
- Summer 1990: election, but! No pluralist democracy

## Romania

- Last democratizing state of CEE
- Regime: combination of totalitarianism and sultanism
- Ceausescu's regime
- Bloody transition
- No opposition, no possibility of a negotiated transition
- A lot of external pressure
- Ion Iliescu



# CEE Transitions

## Romania

- 1. Low political institutionalization and mobilization
- 2. Communist party is able to preserve its influence
- 3. Interconnection of communist (socialism) and nationalism



# CEE Transitions

## Poland

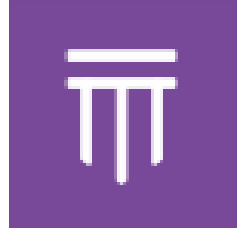
- Democratization without de-communisation
- Spanish model, thick line behind the past
- Regime: corrupted clientelism
- Opposition relatively well organised in 1980s (Solidarity – Polish United Workers' Party)
- Martial law in 1983
- Round-table: ruptura pactada (Mazowiecki)
- Jaruzelski attempts to keep the legitimacy, democratic elite is divided in how to transit -> in the end, the communist party is stabilised in the new democratic regime
  
- Contracted election comes as a surprise to the communist party, however, it is exhausted
- New PM Mazowiecki: thick line between the present and past (worried to jeopardize the agreement reached at the round table). Also, the first country to transit – he does not want to issue a negative signal of retaliation to Moscow



# CEE Transitions

## Czechoslovakia

- Harshest episode of the regime: 1950
- Different in Slovak and Czech part
- 250 000 people sentenced for political reasons during 1948-1989, half of those in absentia
  - Executions, prisons, labour camps, uranium mines
- Prague spring 1968 – socialism with a human face / Warsaw Treaty army interventions and again, purges
- Jan Palach
- Charter 77 in December 1976: 239 signatories, 8 were Slovaks



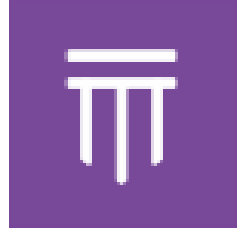
# CEE Transitions

## East Germany:

- The core question of unification:
  - What to do with the files, documents and information collected by Stasi?
  - Stasi: around 100 000 employees (plus secret agents plus collaborators)
  - The sword and the shield of the communist party
  - Part of the documentation destroyed in the last year of GDR

Core principle: *Vergangenheitsbewaeltigung*

- *developed already after 2WW*
- *who forgets his own past will repeat it*



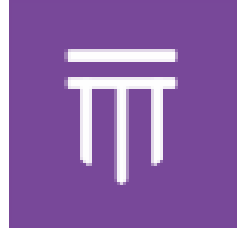
# Lustration and vetting

## *Lustratio*

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

- Vetting and screening of state institutions
- Particularly important in the **first phase of transition** (when GOV bodies lack sufficient legitimacy and trust)
- Most radical lustration programmes: **Czechoslovakia and East Germany**
  - Accusation-based lustration
  - Positive confirmation leads to exclusion from public policy life
  - Targets mostly former higher ranked communists and secret agents
- Spread of the mechanism to Bulgaria and Albania -> positive confirmation: loss of employment (connection with Comm Party or secret services)
- Hungary and Poland: only 1994, 1997





# Strategies of Lustration

Extensive differences among CEE states.

- CSR, GDR, Albania = wide-reaching personnel cleansing of society
- HUN, POL, Lithuania, EST = truth-seeking and memory-building
  - Confession = option to stay and continue political activity
- What is the positive of a confession system?



# Strategies of Lustration

Roman David: what are the theoretical and moral objectives of lustration?

Exclusive (Czechia)

Inclusive (Hungary)

Reconciliatory (Poland)

*Why do states differ?*



# Strategies of Lustration

Horne and Levi

1. *As interparty competition increases in intensity, legislators will attempt to expand the scope and duration of lustration laws*
  - (a) *unless socialist (...) parties come to power*
  - (b) *unless there is evidence of popular voter rebellion toward the continuation of lustration laws*
  
2. *The greater the insulation of constitutional courts from politics*
  - (a) *the less likely it is that lustration laws will be extended*
  - (b) *the more likely that these laws will be declared unconstitutional or otherwise limited in scope*
  
3. *The greater the pressure from important international bodies, the more likely it is that a cross-party coalition will form to end lustration.*



# Strategies of Lustration

Nalepa:

*Skeletons in the closet: if post-communist anticipated losing power to anti-communist forces, under sufficiently restrictive parliamentary procedures, the post-communist could shield themselves from excessively harsh legislation by pre-emptively passing a less punitive version of lustration than the anti-communist would have.*

*On the other hand: democratic opposition might sometimes fear the lustration*

Przeworski: CEE communist at the end of 1980s preferred transitions in which they could continue in their political careers opposed to where they were completely deprived of power

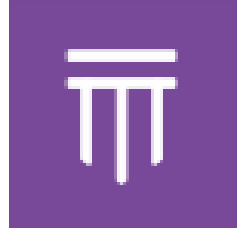


# Strategies of Lustration

Roman David 2015

*Retribution – Revelation - Reconciliation*

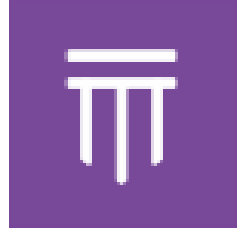
	<i>Retribution</i>	<i>Revelation</i>	<i>Reconciliation</i>
<i>Individual responsibility</i>	<b>YES</b> (moral agent fully responsible for his actions)	<b>NO</b> (structural responsibility; blaming the system; acting under the duress)	<b>YES</b> (it is the wrongdoer who has to apologize – moral agent)
<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)



# Czechoslovak Lustration

Generally:

1. The Federal parliament HAD the legitimacy to implement lustration RIGHT AFTER the revolution
2. The most excessive parts were removed by the Constitutional Court
3. Twice prolonged: 1995 and 2000: contrary to the Rule of Law?



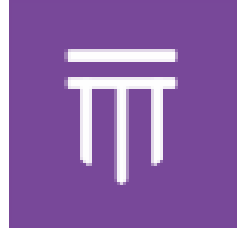
# Czechoslovak Lustration

## Two lustration acts

1. Large lustration Law 1991
2. Small lustration law 1992 (targeting only members of police and prison guards)

## Reasons

- Disruption of personal continuity
- National security
- Protection of rights
- Truth revelation
- Protection of territorial integrity
- Public trust



# Czechoslovak Lustration

*Negative list of function* = protected positions (selection to these functions requires lustration certificate)

*Positive list of persons* = who, because of his or her past activity, is required to hand in the lustration certificate

- any functions requiring election, appointment to public offices, army, secret intelligence, police, Presidents' office, Czech TV, state companies, Universities, judiciary
- **!!! Not the Parliament**
- *Persons: StB, high fonctionnaires of Communist party, people's militia, committee of National Front, normalization committees, any governmental executive bodies*





# Czechoslovak Lustration

The mechanism:

- Candidates to **functions** are required to hand in lustration certificate
- Positive = exclusion from the list of candidates, or the termination of standing contract
- Time limit: 5 years: temporary protection of the new democratic regime

- ,



## Czechoslovak Constitutional Court on Lustration (Pl. US 1/92 of 26 November 1992)

A democratic state has not only the right but also the duty to assert and **protect the principles upon which it is founded**. Thus, it may not be inactive in respect to a situation in which the top positions at all levels of state administration... were filled ... with the now unacceptable criteria of a totalitarian system. Of course, a democratic state is, at the same time, entitled to make all efforts to **eliminate an unjustified preference enjoyed in the past by a favored group of citizens** ...where such preference was accorded exclusively on the basis of membership in a totalitarian political party...



## Czechoslovak Constitutional Court on Lustration (Pl. US 1/92 of 26 November 1992)

Thus, even in light of the state's above-indicated convention and treaty commitments, **the state cannot be denied the right to set down precisely defined requirements** for persons employed in selected categories at worksites, in positions, or in activities that **are significant for the protection of the democratic constitutional system, the security of the state, its economic and political interests, or the protection of state secrets**, or for those persons who lack the level of loyalty toward the state which is required, or who might, in the positions they are performing, have a considerable impact on public affairs



## Czechoslovak Constitutional Court on Lustration (Pl. US 1/92 of 26 November 1992)

Still, a couple of controversial provisions quashed down

- Competences of minister of interior to exclude some people from lustration
- To exclude unknown collaborators (written proof)
- Inserted requirement of a fair trial (access to a judicial review)



# Czech Constitutional Court on Lustration

Lustration II (Pl. ÚS 9/01 of 5 May 2001)

**Determination of the degree of development of democracy in a particular state is a social and political question, not a constitutional law question. Thus, the Constitutional Court is not able to review the claim of “culmination” or, on the contrary “non-culmination” of the democratic process by the means which it has at its disposal.**

**However, it can, in some agreement with the petitioners, confirm that the public interest resting in the state’s needs during the period of transition from totalitarianism to democracy have **declined** in intensity and urgency since 1992.**



## Czech Constitutional Court on Lustration

- A democratic state, AND NOT ONLY IN TRANSITIONAL PERIOD, can tie the entry into public services to specific prerequisites, particularly political loyalty
- Loyalty must be interpreted by two methods. It covers the level of **loyalty of each individual** active in public services, and level of **loyalty of the public services** as a whole
- Not only whether these are loyal, but whether they **appear as loyal** to the public. Doubts would undermine public confidence in the democratic regime
- **The CCC... considers the closer connection of persons with the totalitarian regime and its repressive components to still be a relevant circumstance which can cast doubt on political loyalty and damage the trustworthiness of the public services of a democratic state and also threaten such a state and its establishment**





# Lustration and vetting

## Criticism:

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



# Strategies of Lustration

Jan Kavan case – a witch hunt?





# Poland

The first country to transit from communism and last to enact lustration

First proposal already in 1992 – thick line after the past

Act of 11 April 1997: elimination of positively lustrated persons for 10 years

New, harsher amendment of 2007: quashed down eventually by Constitutional Tribunal



# ECtHR and Lustration

## Castells v Spain

The first case only in 2004, Sidabras a Džiautas v Lithuania

- Collaborants with KGB

- Excluded from public and private sector functions

- ECtHR: such a construction interferes with the protection of private life and establishes discrimination

- The legislation came too late



# ECtHR and Lustration

## Zdanoka v Latvia

- Free elections
- The candidacy to Parliament impossible due to participation on the communist party activities after 13 January 1991
- Legitimate as a protection of democracy, but needs to be temporary

## Turek v Slovakia

- The length of proceedings, the fair trial
- The lustrated person needs to have an access to the file, even if this is classified as top secret

## Matytek v Poland

- Lustration can be reviewed as a criminal measure under Article 6
- MP denies collaboration with secret services. Polish courts argue a “lustration lie” and forbid him to candidate for a function for 10 years



# ECtHR and Lustration

## Core principles

- 1. Lustration certificate can interfere in the private life
- 2. The private and public sector needs to be differentiated
- 3. Late legislation impacts how court reviews the proportionality of the measure
- 4. Access to elected function vs removal from a function
- 5. Right to a fair trial
- 6. Other procedural safeguards



# ECtHR and TJ generally

6

KATARÍNA ŠIPULOVÁ & HUBERT SMEKAL

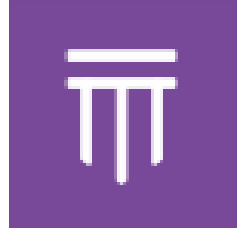
TABLE 1

OBLIGATIONS CONCERNING TRANSITIONAL JUSTICE (TJ) POLICIES SET BY ECtHR CASE LAW

	<i>No obligation</i>	<i>Negative obligation</i>	<i>Positive obligation</i>
Retributive TJ	X	Lustration; amnesties	Prosecutions and regime condemnation; archives of the past* (uncovering perpetrators of crimes)
Restorative TJ	Rehabilitation; restitution	X	Archives of past (rights of victims to know the truth)

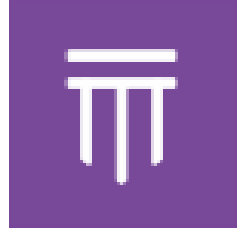
*Note:* \* We split the policy related to ‘archives of the past’ between restorative and retributive measures, as the opening of archives follows two different aims. Disclosing the truth about perpetrators of crimes falls under ‘retributive’ policies, while the right of the victims to know the truth under ‘restorative’.

*Source:* Authors.



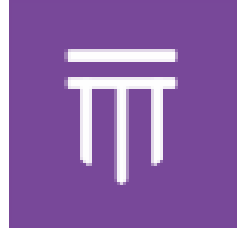
# Access to Secret Files and National Memory Institutes

- Why alternative justice?
  - Legal v political justice
  - Internal (domestic)
  - Retribution v restoration
  - Individual criminal liability v reconciliation



# Meaning of Truth in TJ

- Right of victims to know the truth
- Official acknowledgment: part of the regime reform
- Establishes new RoL
- Conditions prosecutions and other reparatory programmes
- Insight into question why violence happened
- Hannah Arendt: nature of totalitarian regimes and their domination over our lives
- *It is only through generating such understanding that the horrors of the past can effectively be prevented from occurring again. Knowledge and understanding are the most powerful deterrents against conflict and war (SL TRC)*



## Meaning of Truth in TJ

Commission of inquiry

Court proceedings

Truth commissions

Historical commissions

- goals, methodologies, mandates, tools





## Meaning of Truth in TJ

Court proceedings: legal approach, determine the culpability of perpetrators, aim: establishment of punishment.

TRCs: much broader inquiry, provide narrative of the abuses during certain historical period. Typically, they have mandate to establish an authoritative and historically accurate record of the past

Historical commission: address events of the past affecting specific ethnic, racial, other groups. They are not part of political transitions, might not even deal with current issues



## Tasks of TRCs

- Historical account of the past
- Overcome communal and official denial of the atrocity
- Identify victims
- Certify whether applicants qualify as victims to obtain reparations
- Identify the architects of the past violence
- Restore dignity to victims, promote psychological healing
- End and prevent violence
- Legitimate and promote the stability of the new regime
- Educate the population
- forge the basis for a democratic political order that respects and protects R
- Recommend ways to deter future violations and atrocities
- Determine eligibility of applicants for amnesty



## Tasks of TRCs

- Limitations
  - What is the truth / confirmation of beliefs about the past
  - How to find objective truth
  - Do we really want to establish the truth?
- How to reconcile the truth with the lack of prosecutions?
- *The truth is so commonly used that it seems to be a transparent notion, clear to all who are involved or interested in redressing past abuses, but 'truth', like 'justice' and 'reconciliation' is an elusive concept that defies rigid definitions (Parleviet 1998)*
- Cultures vary in how they approach and value truth telling



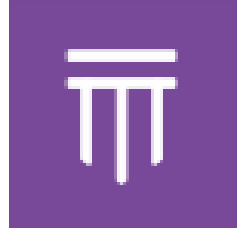
# Access to Secret Files and National Memory Institutes

- Truth and reconciliation committees
  - Temporary mandate
  - Financing? (GOV, PARL, UN, NGOs)
  - Independence
  - Investigation



# Access to Secret Files and National Memory Institutes

- East Germany (1990), Hungary (1994), Estonia (1995), the Czech Republic (1996), Bulgaria, Poland (1997), Romania (1999), Slovakia (2002), Lithuania (2006), and Latvia (2007).
- In combination with lustration shifts closer to retributive measures
- Access to individual files vs access to all files
  - Reason for restrictions?
  - Access for historians?



# De-communisation memory institutes

- Trustworthiness and reliability
- Aim of documentation they collect: control of society
- Incomplete
- Politicization
  - The only independent institute: Gauck's committee in GDR
  - Limited power of government
  - The file is not enough to lead to prosecution/punishment
  - Act allowing the access of individuals to their own files



## Access to Secret Files and National Memory Institutes

- Access is administered by specialized state agencies: ***national memory institutes***
- *To collect, research, and provide information on past crimes*
- More common for *ruptura pactada* form of transition
- Compared to TRC, they have more often a repressive character/function
- Biggest issue: millions of files in GER, ROM, CR – lost or shredded, rest unreliable, with communist secret agents deliberately fabricating the stories.





## East Germany

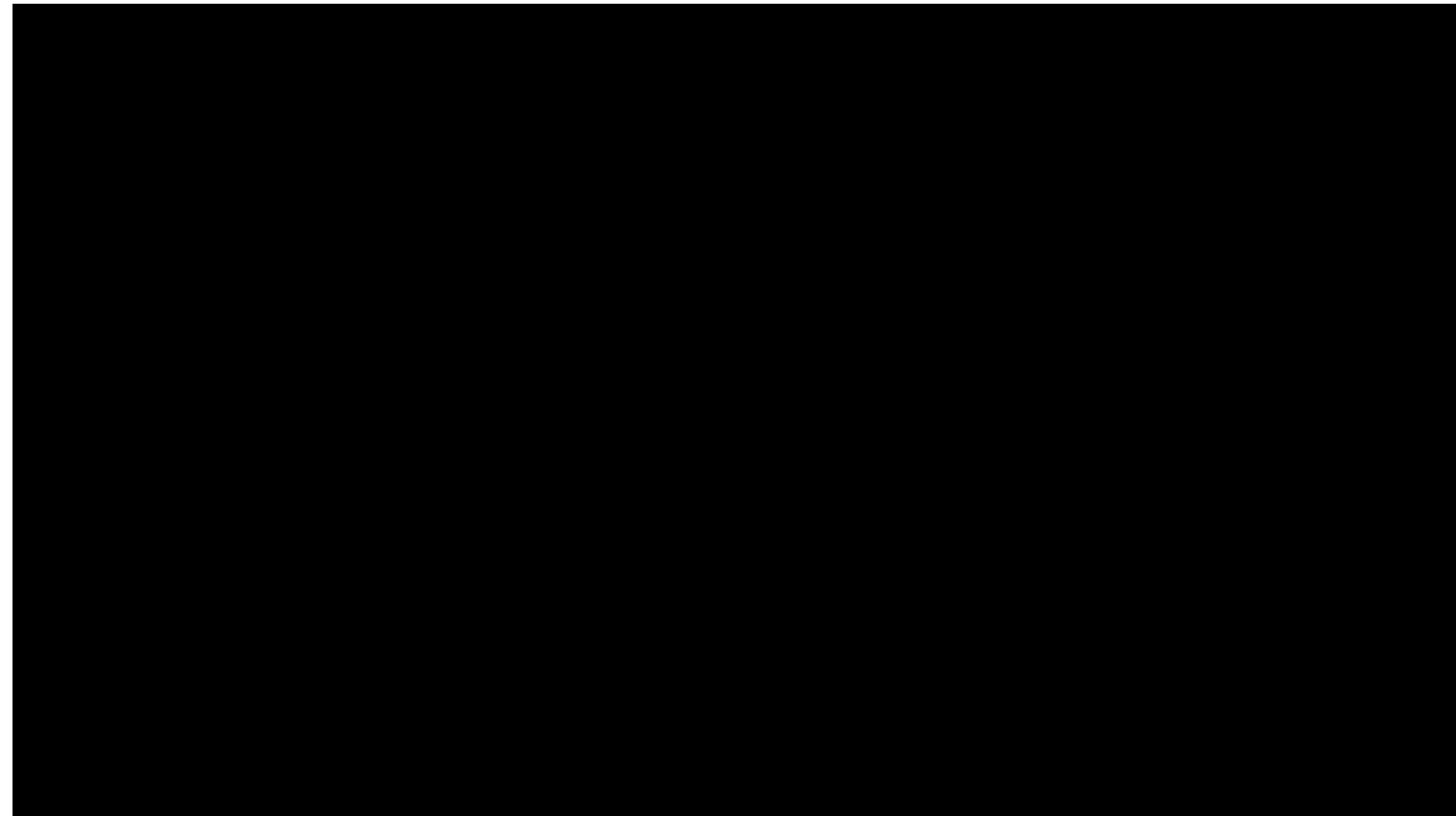
- Joachim Gauck, federal commissioner for Stasi files
- Knowledge and power of individual citizens
- Truth instead of vindication
- Right to access one's files, instigation of criminal prosecution, uncovering the collaborators
- Compared to the rest of CEE, quite reliable





## Das Leben der Anderen

- 1984, Stasi Gerd Wiesler is ordered to spy on the playwright Georg Dreyman, famous for his Communist views and international recognition





# Bulgaria

- Panev's Act
- Anti-communist legislation as a break against reformed communist elites
- 12/1992: lustration



# Hungary

- Ministry of Justice
- Documents pre-1956 events
- House of Terror







## Romania

- No lustration until 2007
- Most progressive part of TJ: access to documents
- National council for the study of Securitate archives
  - Questionable authenticity
  - Too many procedural issues



## Poland

- Instytut Pamięci Narodowej 1998
- Investigates Nazi and communist crimes
- Access of public to secret documents
- First publicly accessible files: 2000/2001
- Leak of information in 2005: journalist Bronislaw Wildstein



## Czechia

- Úřad dokumentace a výzkumu (Úřad pro dokumentaci a vyšetřování činnosti StB)
- More than 280 thousand individuals convicted under communist regime
  - 234 executions
  - 300 deaths in prisons
  - 176 shot at borders
  - 88 electric current (torture)
  - 300 thousand persecutions (work, study)



## Czechia

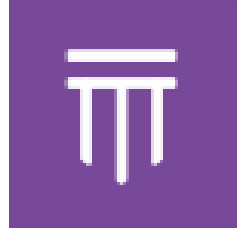
- Úřad dokumentace a výzkumu (Úřad pro dokumentaci a vyšetřování činnosti StB)
- Originally part of the Ministry of interior, investigates mostly members of secret police (StB)
- *„None of us here needs the criminal trials, especially not with people at the verge of their lives. What we all do need, however, is the history to document and publish.“*  
(general prosecutor Šetina)
- Created in 1995, tasked to address all petitions on politically motivated crimes and initiate criminal prosecutions of respective people



## Czechia

- In 2008, 192 prosecuted in 98 criminal cases, 30 sentences, 8 conditional sentences
- Documentation and criminal investigation, should lead to individual criminal accountability
- In 2002: public access to archives established
- In 2007: Ústav pro studium totalitních režimů
  - Studies period of 2 ww and communist regime
  - Completely independent, took over UDV, however, without the obligation to instigate criminal prosecutions





# 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 guaranty for minorities' rights)

Veto player theories



# How and when CCs emerge?

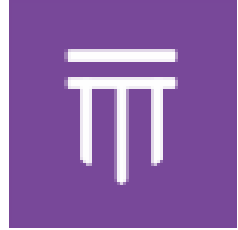
	Constitutional court	No constitutional court
Democracy	A	B
Non-democracy	C	D

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



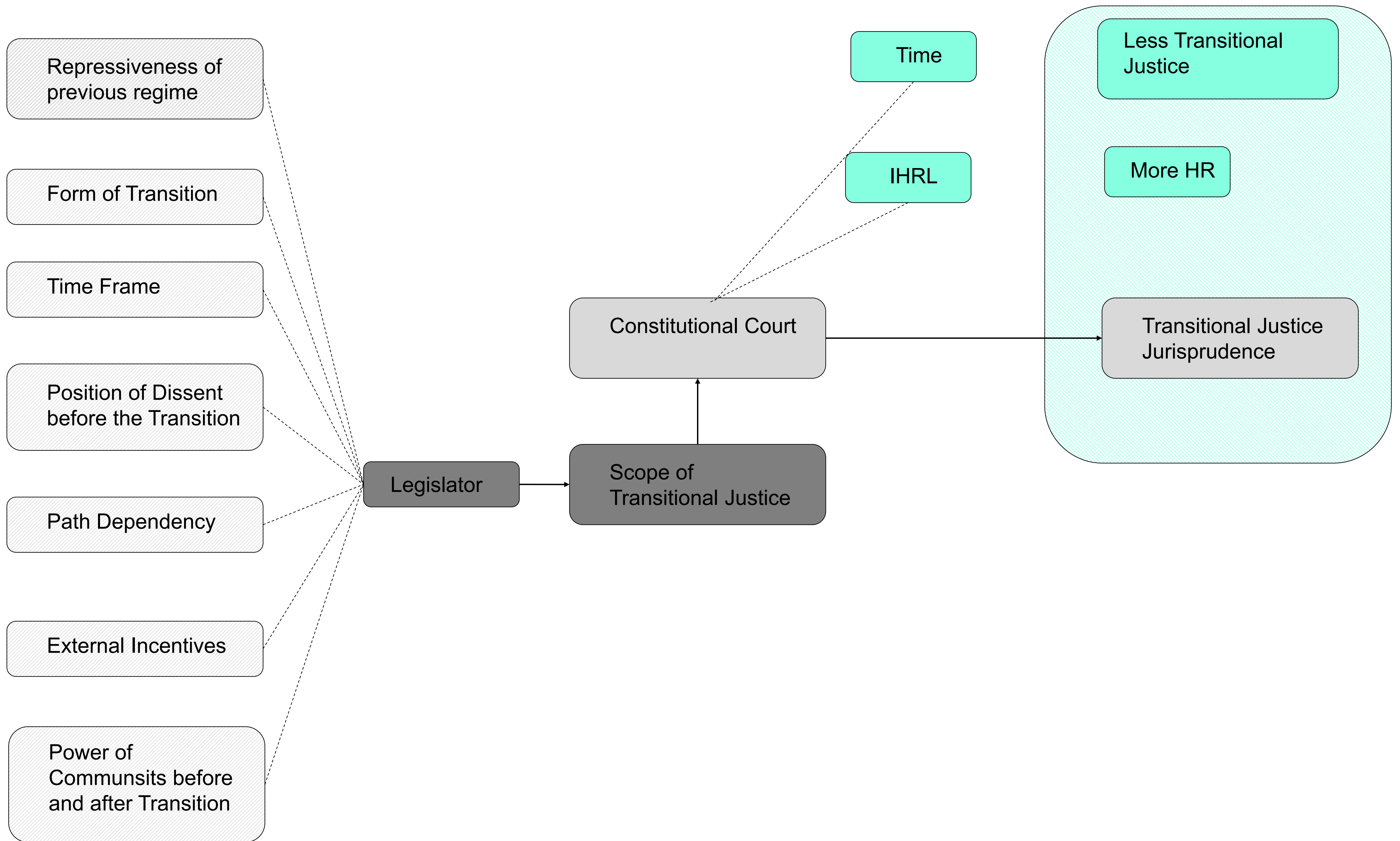
# How and when CCs emerge?

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

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

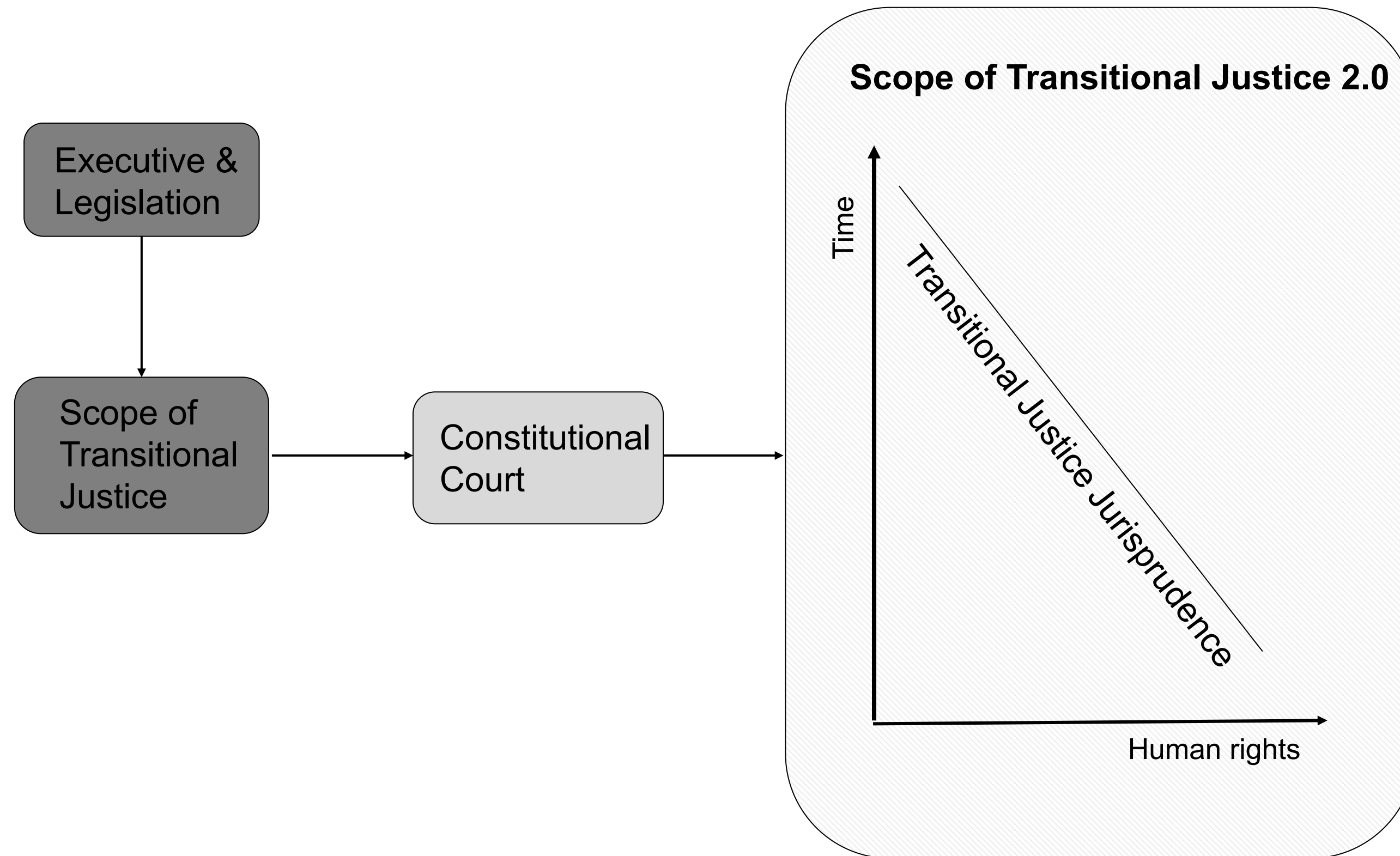
A to D: Ginsburg: phases

C to B: ?





# Constitutional courts in TJ processes



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Thank you for your  
attention