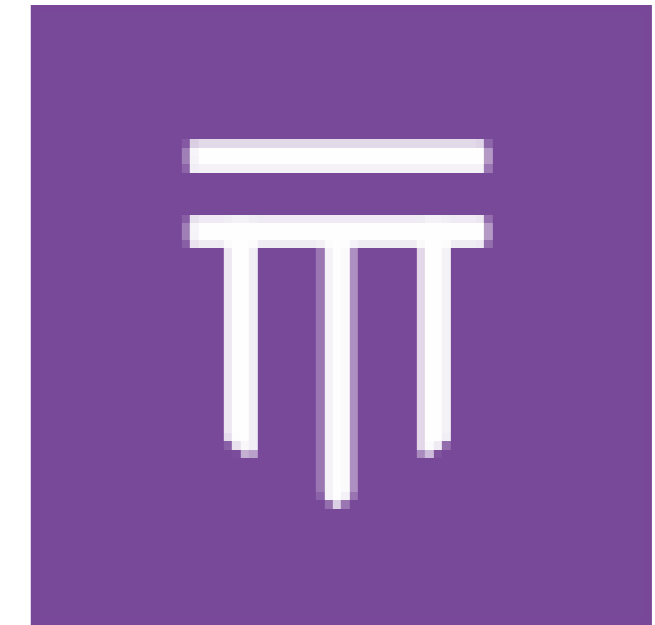


Brno, 1 December 2021

Transitional justice

&

European Union

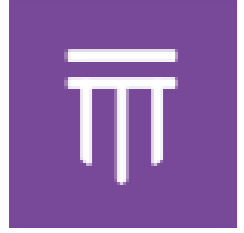


JUSTIN
Judicial Studies Institute
Masaryk University

Katarína Šipulová

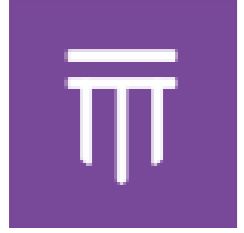


Transitional Justice and the European Union



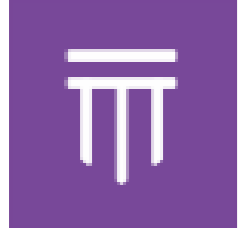
Transitional Justice and the European Union

- 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 basis, patchy, inconsistent



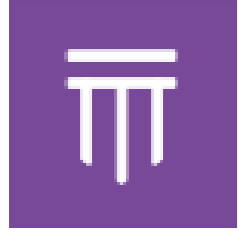
Transitional Justice and the European Union

- 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)



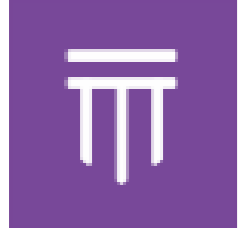
EU&TJ: Starting point

- 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



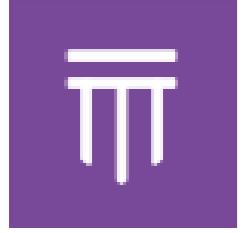
EU&TJ: Starting point

- 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 EU has normative preferences (convergence towards international law)
- Talks about using A83 TFEU as the legal basis for possible criminalisation of public condoning, denying or grossly trivializing crimes of totalitarian regimes



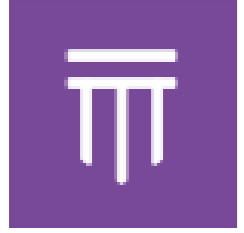
EU&TJ: Starting point

- 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



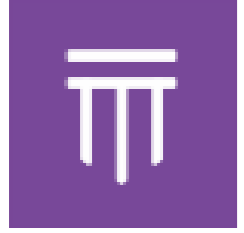
EU&TJ: Starting point

- 2010 Report on the memory of the crimes committed by totalitarian regimes in Europe
 - Painful lessons of a history marked by bloody conflict
 - All MS had taken measures to deal with the legacy of communist regimes' crimes
 - No one-size-fits-all model
 - The choice of MS may differ significantly
 - Crucial role of NGOs
- Establishment of the Platform of European Memory and Conscience
 - Legal basis for possible criminalization of public condoning, denying or grossly trivializing crimes of totalitarian regimes: A 83 TFEU



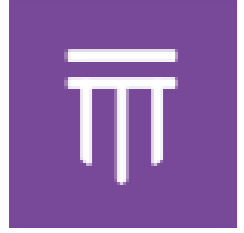
EU&TJ: Common Framework

- 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
 - presumes 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-centered approach



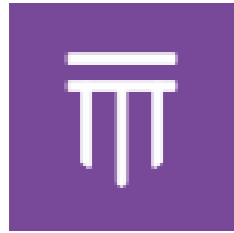
EU&TJ: Common Framework

- Criminal Justice and support of ICC
 - Conclusions on the Review Conference of the Rome Statute in 2010
 - EP resolution on EU support for the ICC
- Unwavering EU support towards ICC and fight of impunity for crimes of genocide, crimes against humanity, war crimes
- Regulation 235/2014 (EP and Council) establishing a financing instrument for democracy and human rights - committed the EU to support those political leaders in transitional areas who promote and are committed to democratic values
- Reflected also in European Neighborhood Policy and Common Foreign and Security Policy and aid programmes (PHARE, TACIT, MEDA, Development Fund, etc)



EU&TJ: Common Framework

- Plan to coordinate TJ policies more
- Stresses domestic character of TJ **and complementarity of EU engagement**
- The drivers are national authorities, but they are expected to respect international norms
- Criminal justice – majority of interference, a very strict approach towards cooperation with ICC
- Core: criminal justice and individual accountability

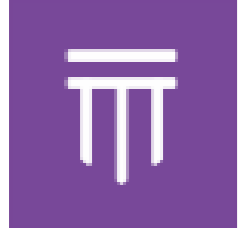


EU&TJ: Accession Conditionality

Table 4-4: Overview of the engagement of the EU institutions in various transitional justice mechanisms .(Source: author). The dark grey underlining shows topics and issues related only to CEE transitional justice (de-communisation), while the light grey underlining is for measures and issues related both to post-conflict and CEE transitions. White rows are for issues not covering CEE region. The black highlight of the cells captures the issue in which the institution was the most active.²⁸²

	EUROPEAN PARLIAMENT	COM-MISSIO N	EUR. COUNCIL	COUNCIL of EU	CJEU	Committees	TOTAL
Transitional justice	46	54	x	2	x	2	104
Politics of memory	9	6	x	1	x	x	16
International Criminal Court	524	304	105	153	19	11	1119
Other ICTs	41	21	x	44	6	x	112
Restorative justice	15	1	x	5	3	x	24
Crimes against humanity	317	1	2	3	10	x	333
TRCs	87	27	x	5	x	x	119
Authoritarian/totalitarian regimes	136	8	x	2	3	2	151
Nazi regime	293	27	12	7	17	3	359
Communist regime	64	27	2	10	8	5	116
History of Europe	42	3	x	4	x	1	50
Lustrations	5	15	x	x	x	x	20

²⁸² The data was collected from the EUR-lex and EU Legislative Observer online databases. The numbers of engagement should be compared only in columns, not the rows, as numbers of the legislation published by each institution differ significantly due to the character of their competencies.



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 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

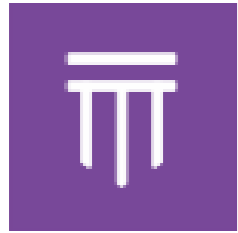
(ex Article 2 TEU)

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.

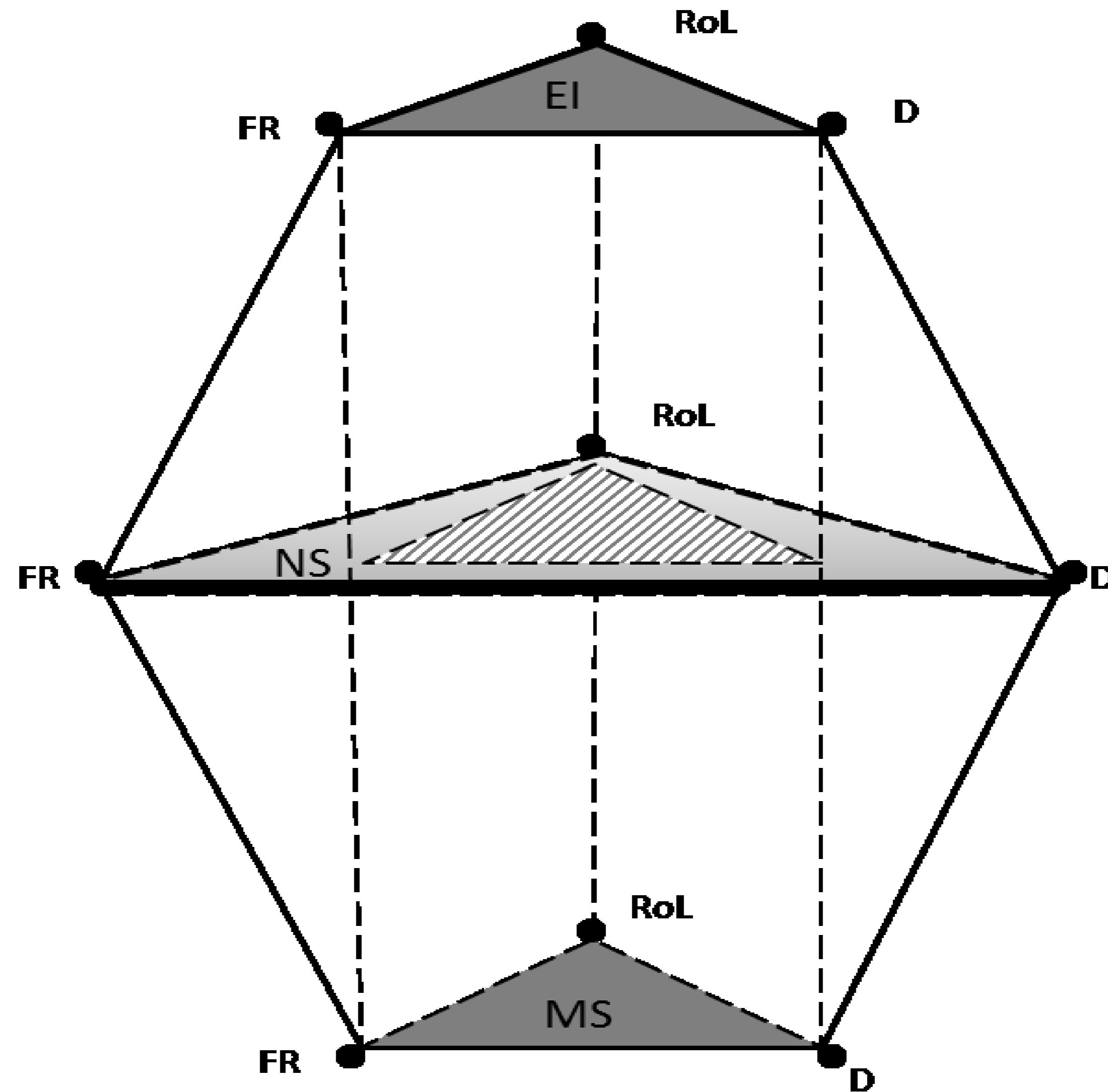


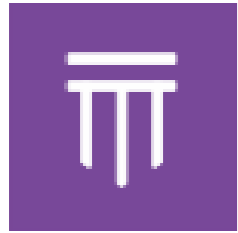
A2 Control

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

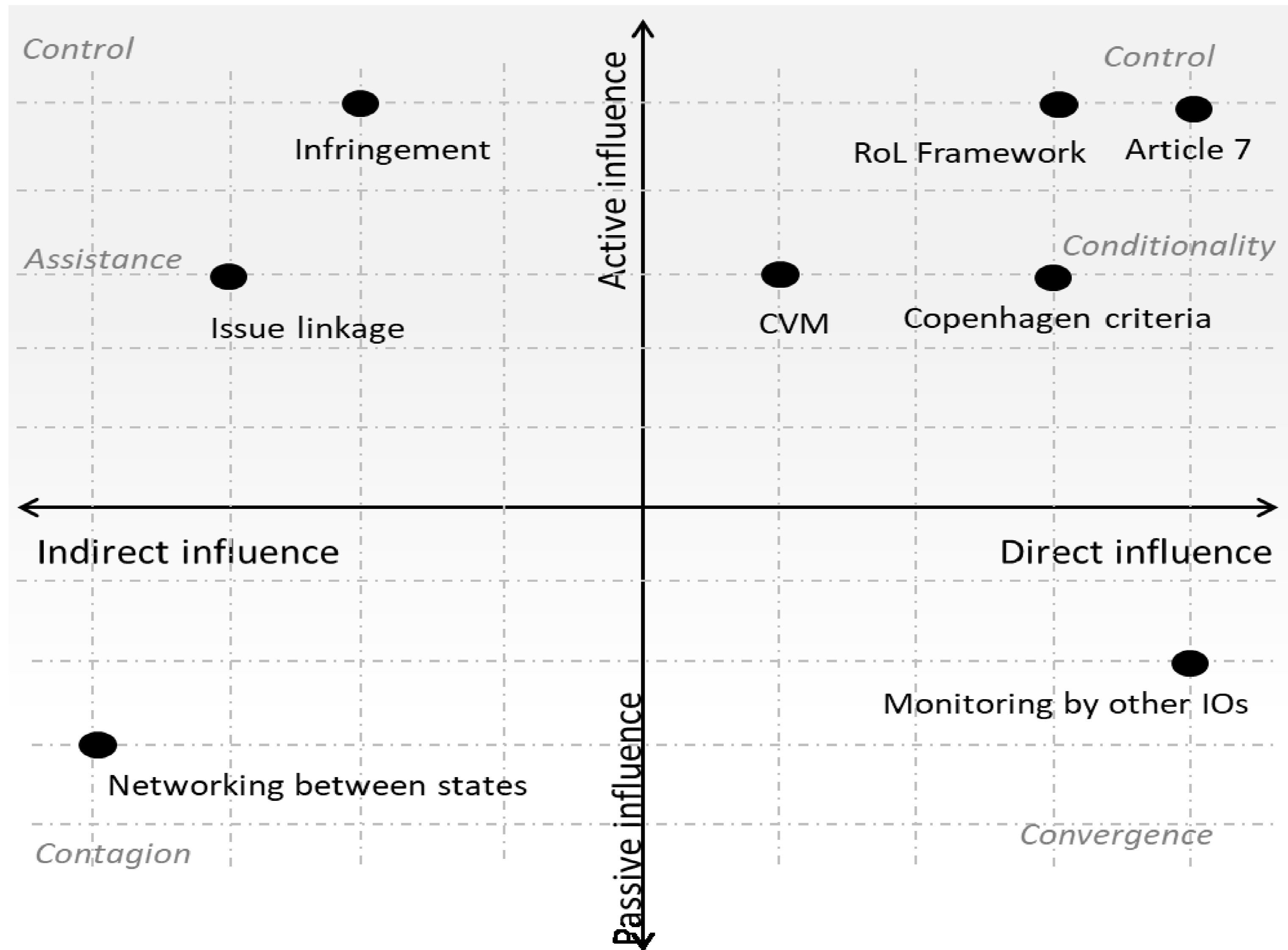


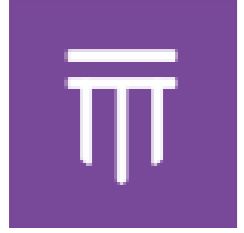
A2 triangular protection





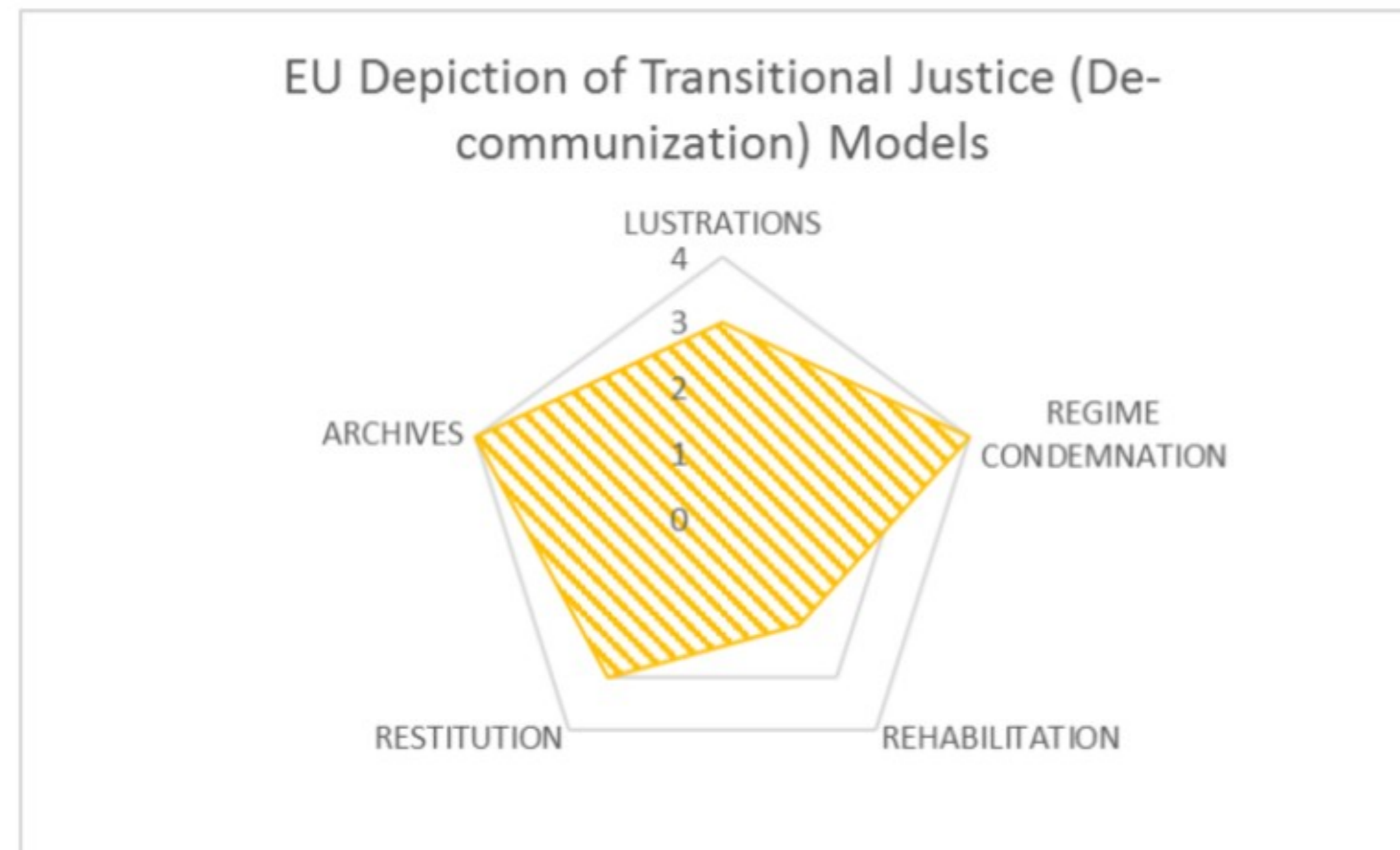
A2 Control





EU&TJ: Accession Conditionality

Figure 7-11: EU normative model of transitional justice policies (regarding communist crimes). Source: author.



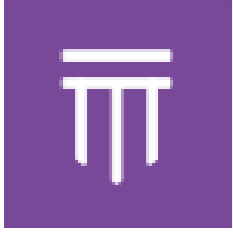


Figure 7-8: Changes in transitional justice policies: the Czech Republic. Source: author.

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Figure 7-9: Changes in transitional justice policies: Slovakia. Source: author.

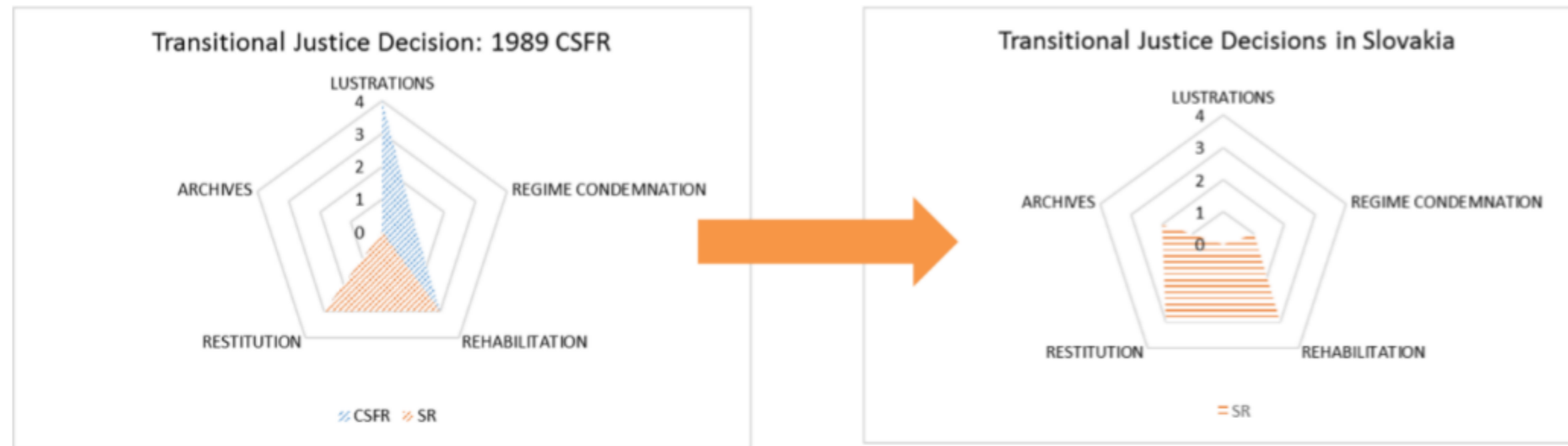
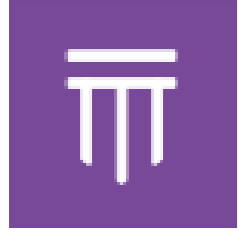


Figure 7-10: Changes in transitional justice policies: Poland. Source: author.





Why should we care?

- Does the lack of TJ contribute to democratic backsliding?
- Nalepa: selective enforcement of TJ can be linked to democratic erosion
 - extreme polarisation might turn a blind eye to antidemocratic transgression
 - if voters are uncertain whether the candidate is a closet autocrat or ideological incumbent, they reelect him because his first term actions are identical to those of an ideological incumbent
- delayed shield of transitional rule of law
- Bates – Nalepa: personnel TJ: non-criminal forms of TJ
 - essential role of purges for TJ
 - Complex dataset on how countries address authoritarian leaders, capture delayed TJ and reversals
 - TJ vetting of unknown collaborators is more conducive to democratic stability than purging of top known elites: revealing secret information prevents blackmail
 - Vetting and purges of known collaborators only leads to their removal

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Thank you for your
attention