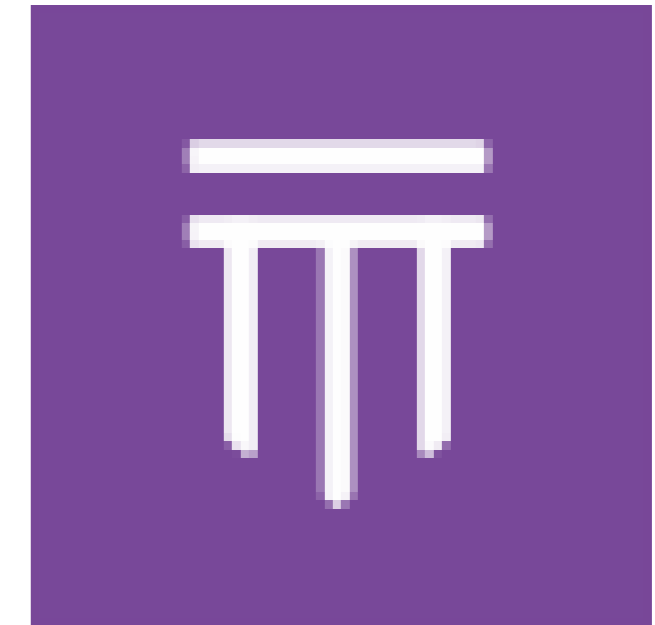


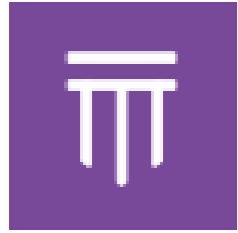
Brno, 18 September 2023

Transitional justice



JUSTIN
Judicial Studies Institute
Masaryk University

Katarína Šipulová



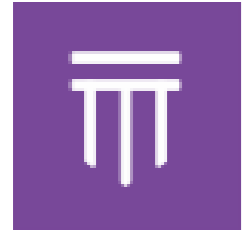
Outline

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



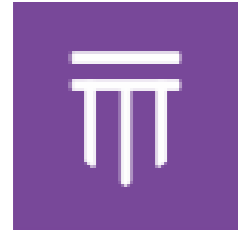
Course requirements

- Exam and requirements:
 - 1 position paper (2000 words long)
 - *Deadline: 6 December 2023, 18:00*
 - *Analytical*
 - *Grounded in theory*
 - *Feel free to state your position*
 - *Debate*
 - *Selection of groups 29.9.2023*
 - *Submission of reports 12 October 2023*
 - *Debate: 17 October 2023*
 - *Reports of Referees: 20 October 2023*
 - *Exam: written, open-ended questions*



What is a Transition?

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

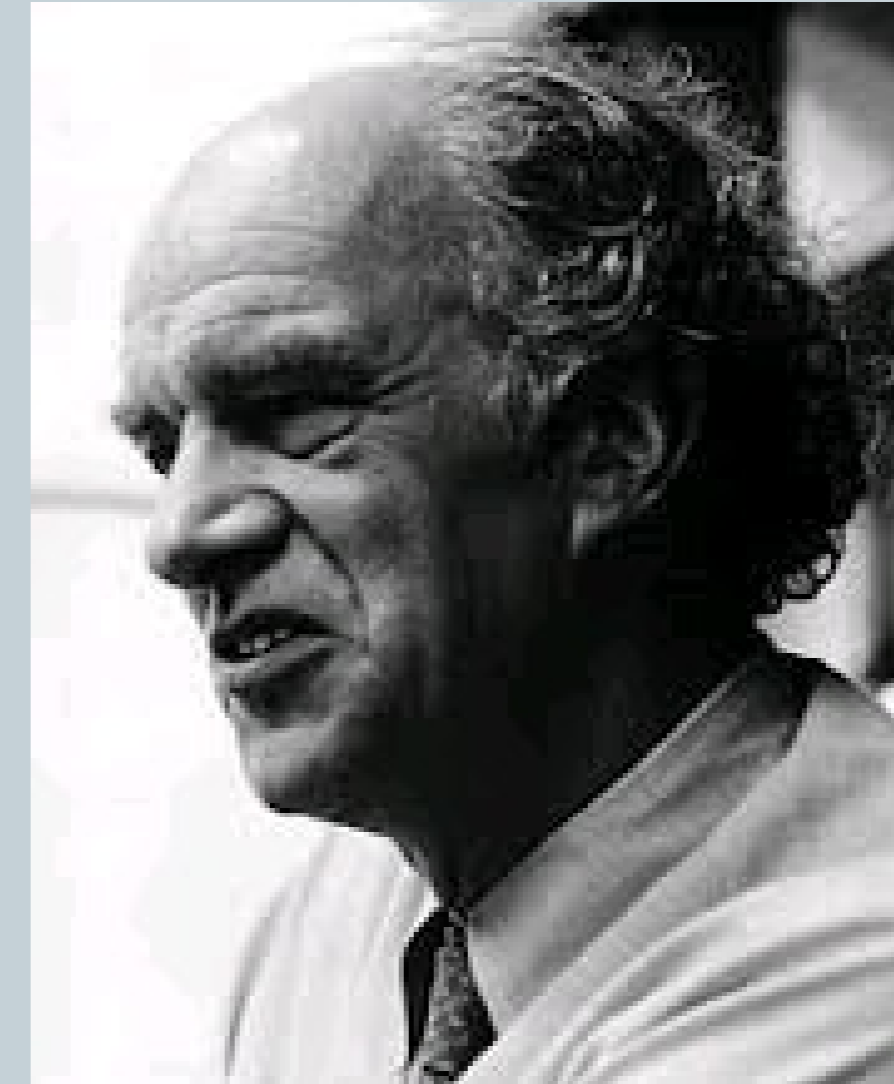


Theory of transition



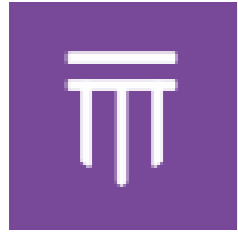
Dankwart Rustow

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



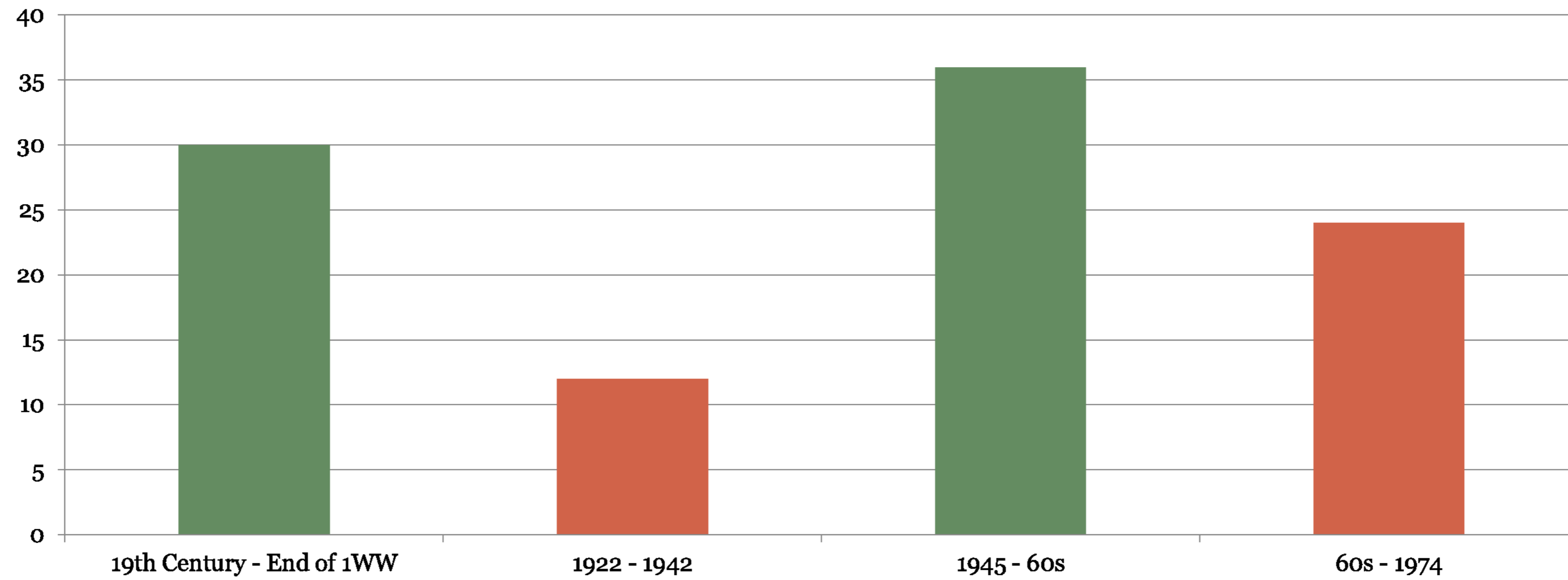
Przeworski

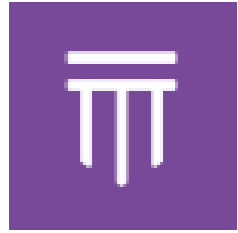
There is no unitary model
of transition or
consolidation



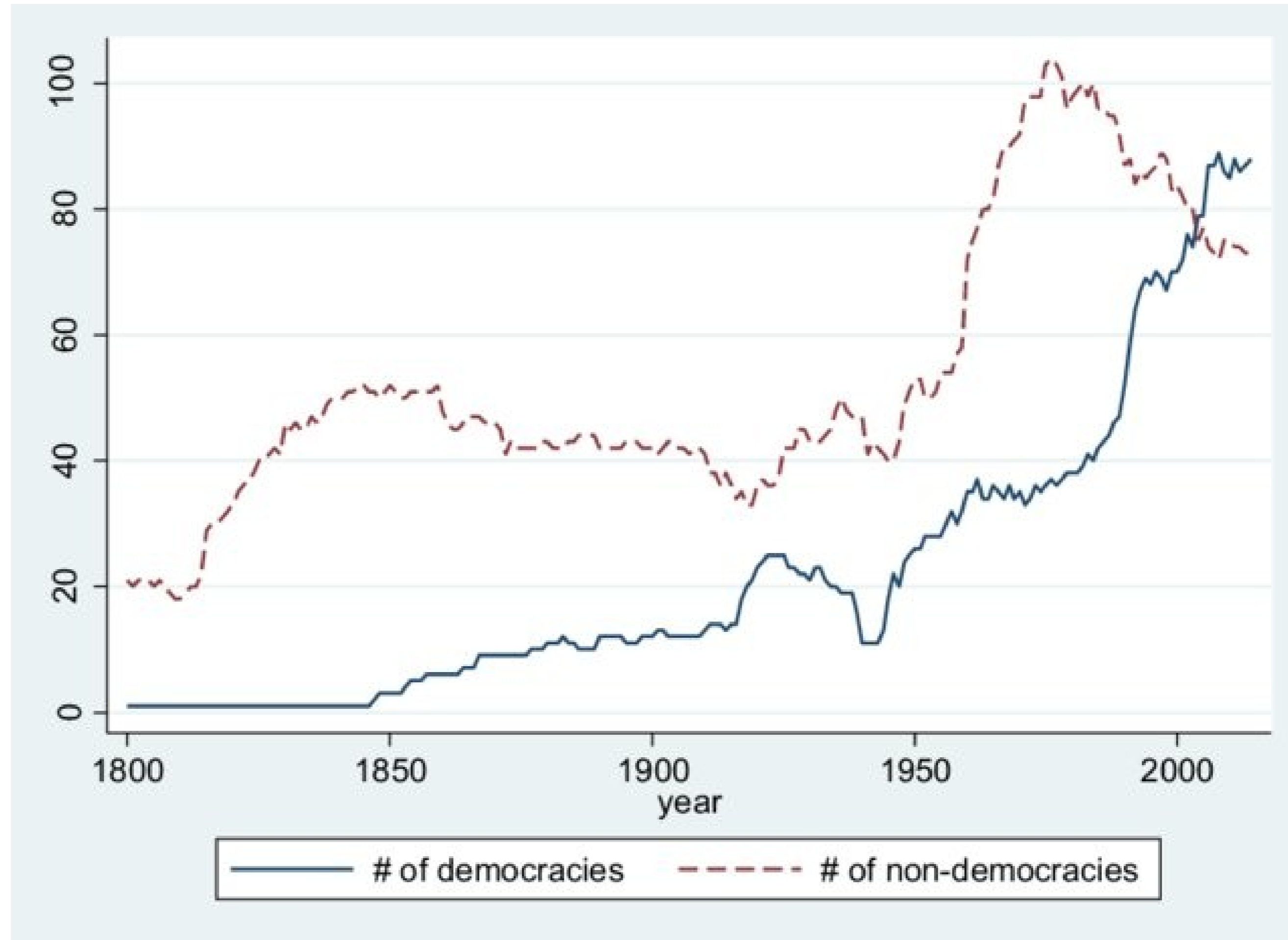
Democratization

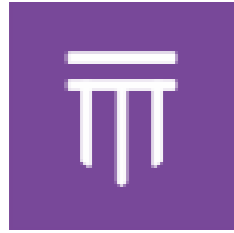
Number of Democracies





Democratization

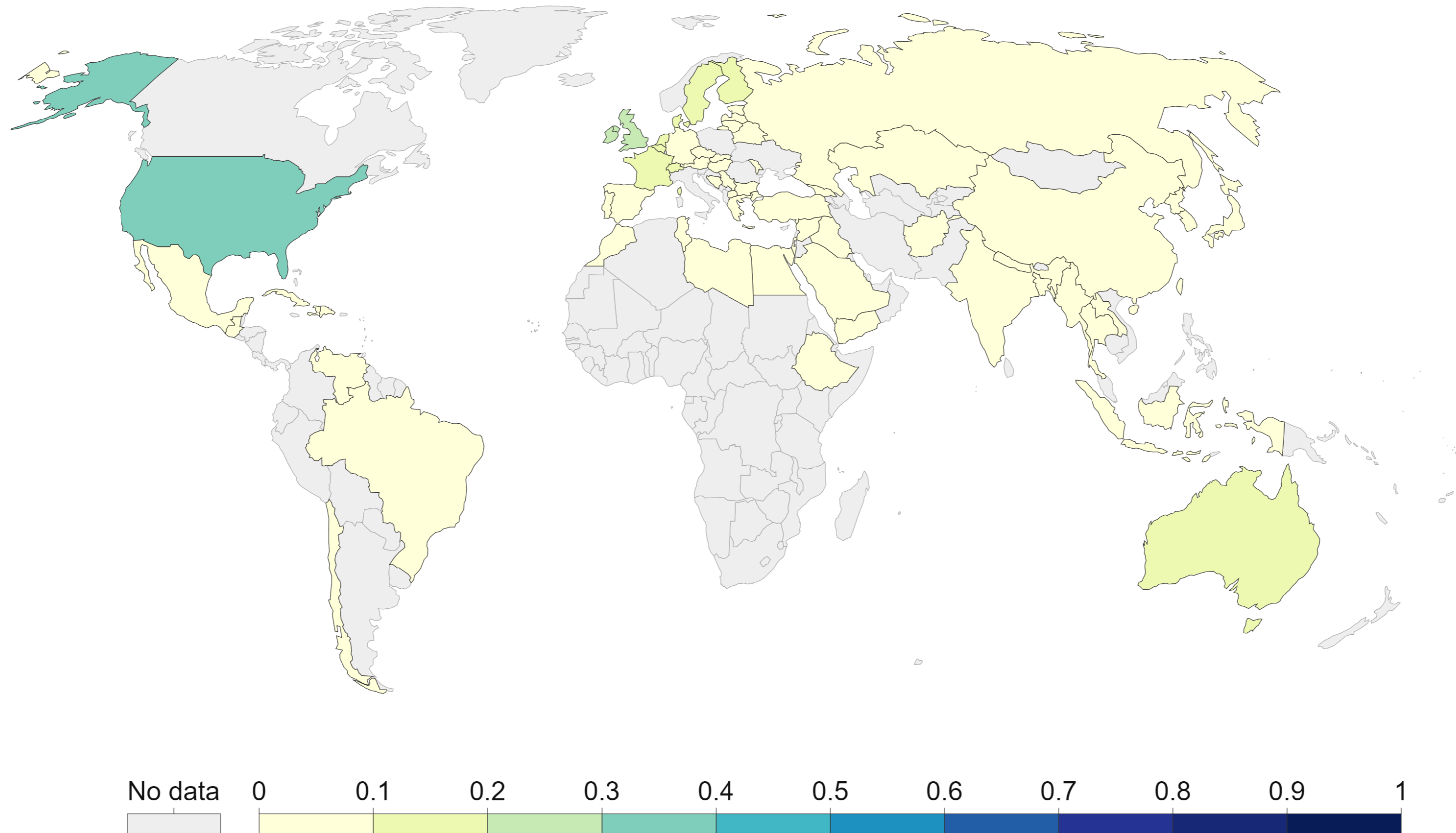




Electoral democracy, 1803

Based on the expert assessments and index by V-Dem. It captures to which extent political leaders are elected under comprehensive voting rights in free and fair elections, and freedoms of association and expression are guaranteed. It ranges from 0 to 1 (most democratic).

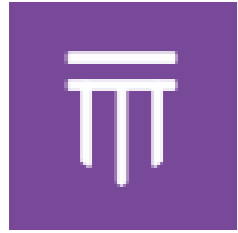
Our World
in Data



Source: OWID based on V-Dem (v12)

OurWorldInData.org/democracy • CC BY

<https://ourworldindata.org/democracy>



Third Wave Transitions

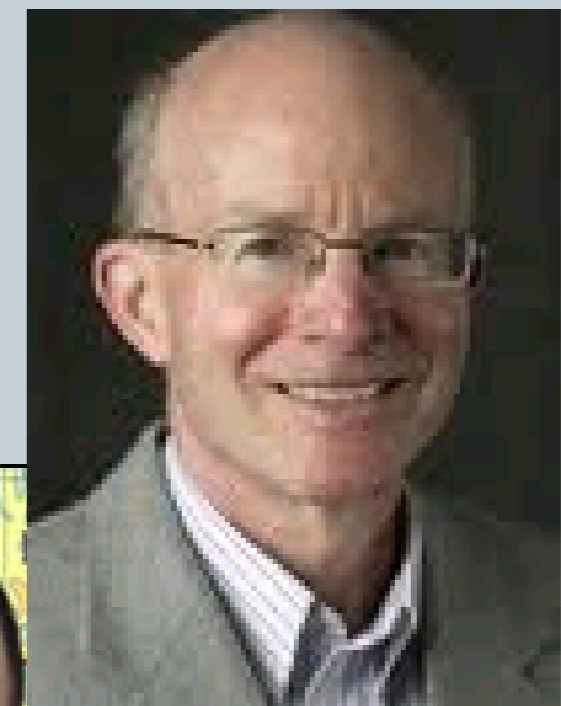


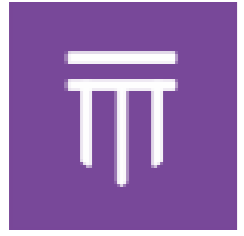
Huntington

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 cleveages*
- *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 roots





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



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

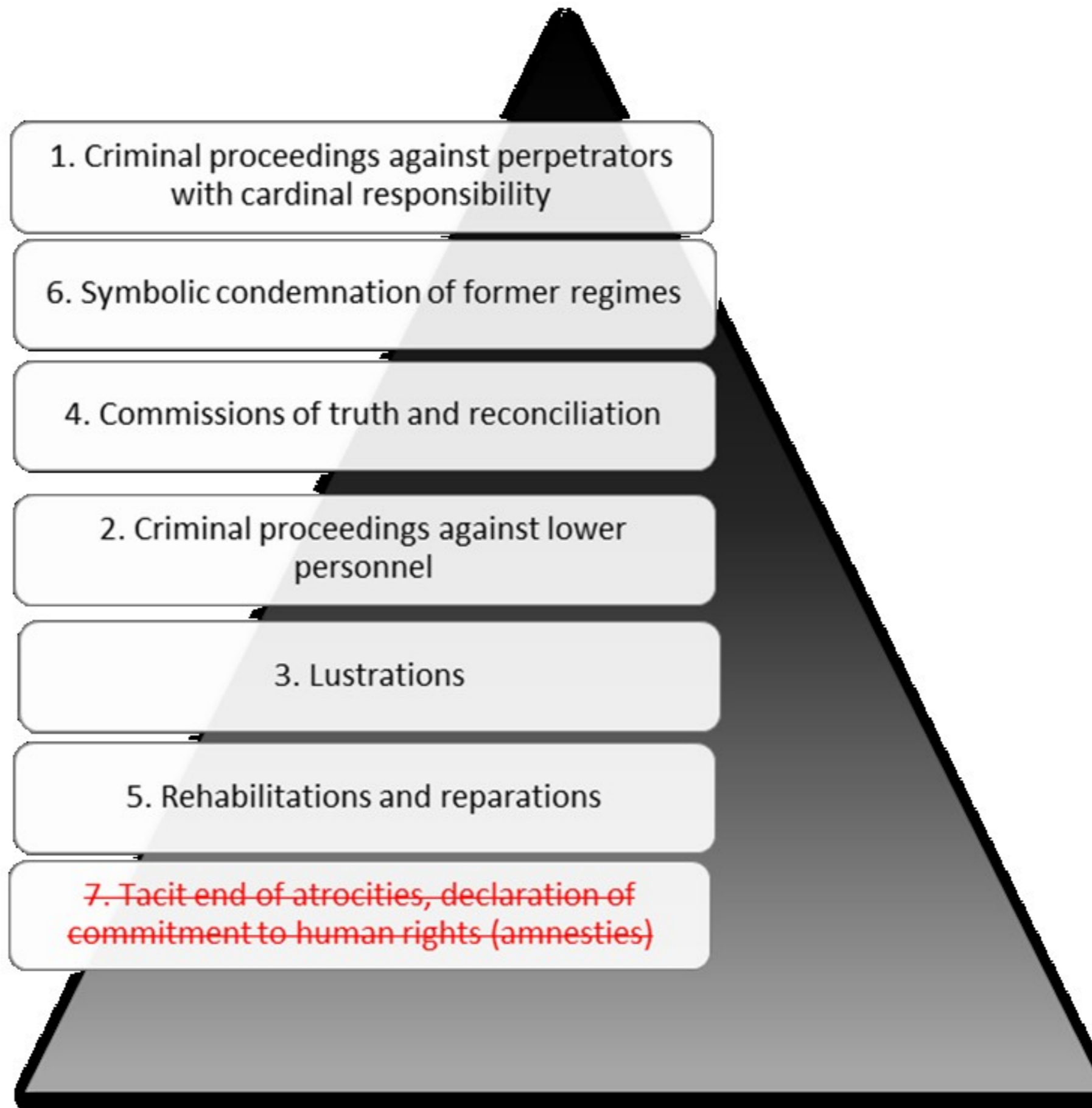
- **State – Non-state**
 - Governments
 - Opposition (dissent, new elites)
 - Judiciary (ordinary and constitutional courts)
 - NGOs
 - Civic society
 - Church



Transitional Justice Mechanism

Transitional Justice

Brian Grodsky (2009)





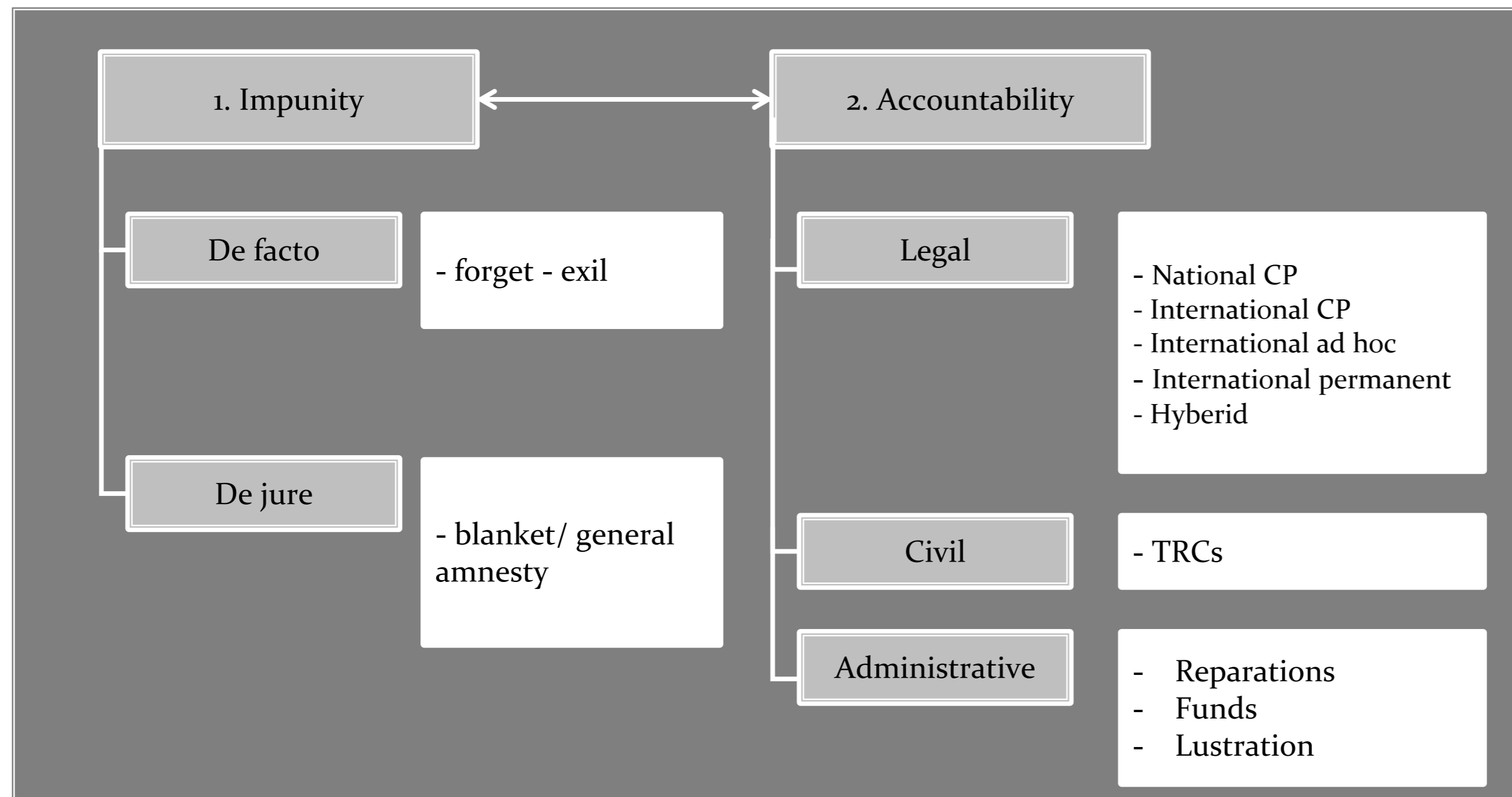
Trends in transitional justice

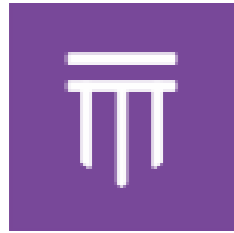
- Internationalisation (externalisation) of TJ
- Increasing number of actors
- Increasing range of mechanism
- Smaller space for manoeuvre for states



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 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