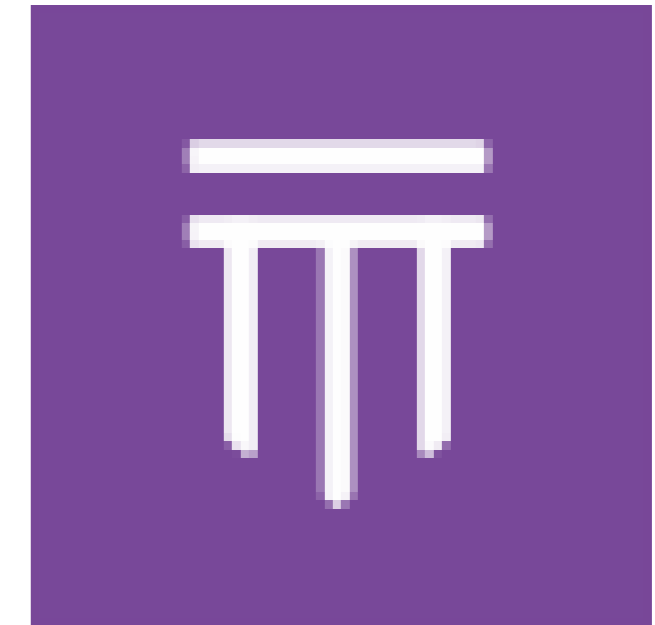


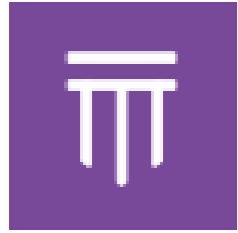
Brno, 1 November 2022

Transitional justice



JUSTIN
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Third Wave Transitions



Huntington

Linz

Share – Mainwaring

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



De-communization (Transitional Justice in CEE)



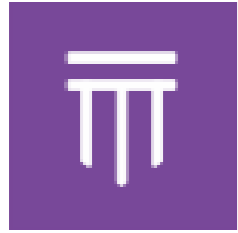
Source: Jack Ohman *The Oregonian* 1995



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
- Long time passed from the worse HR abuses



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

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



De-Communistisation

De-Communistisation = measures implemented by postcomm 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-Communitisation

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 vs Lustration

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



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



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



New regime's ability

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



Strategic implementation

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?



Mutli-factor approach

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



Supranational pressure

Crocker

Supranational influence



Factors influencing a type of TJ in CEE

AUTHOR	VARIABLE¹	FORMULA
Huntington	Form of transition	Harsh transition = harsh prosecutions and lustration
Moran; Nedelsky	Character of previous regime and strength of opposition	The more repressive regime, the more vindictive new elite
Welsh; Kornai – Rose-Ackerman²; Nalepa³	Democratic and political balance of power between the elites; partisan struggles	Introduction of repressive measures depends on a relative strength of elites
Stan	Partisan policy, time	Transitional justice decision is dependent on a combination of several variables
Davis, Crocker⁴	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*



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?

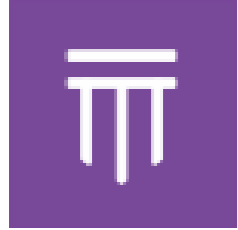
	Constitutional court	No constitutional court
Democracy	A	B
Non-democracy	C	D

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

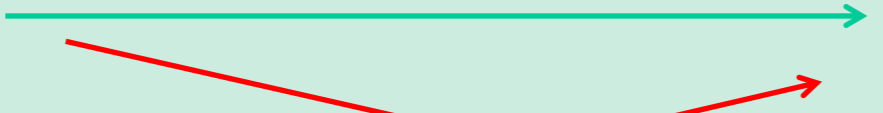
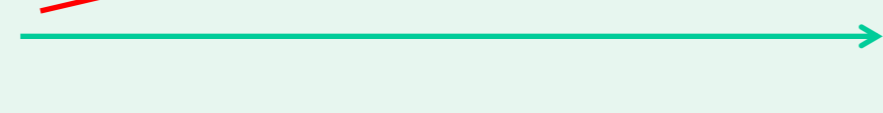
D to C: federalism, stabilization of regime, trust (Poland)

D to A: transition, change of regime

C to A: path dependency



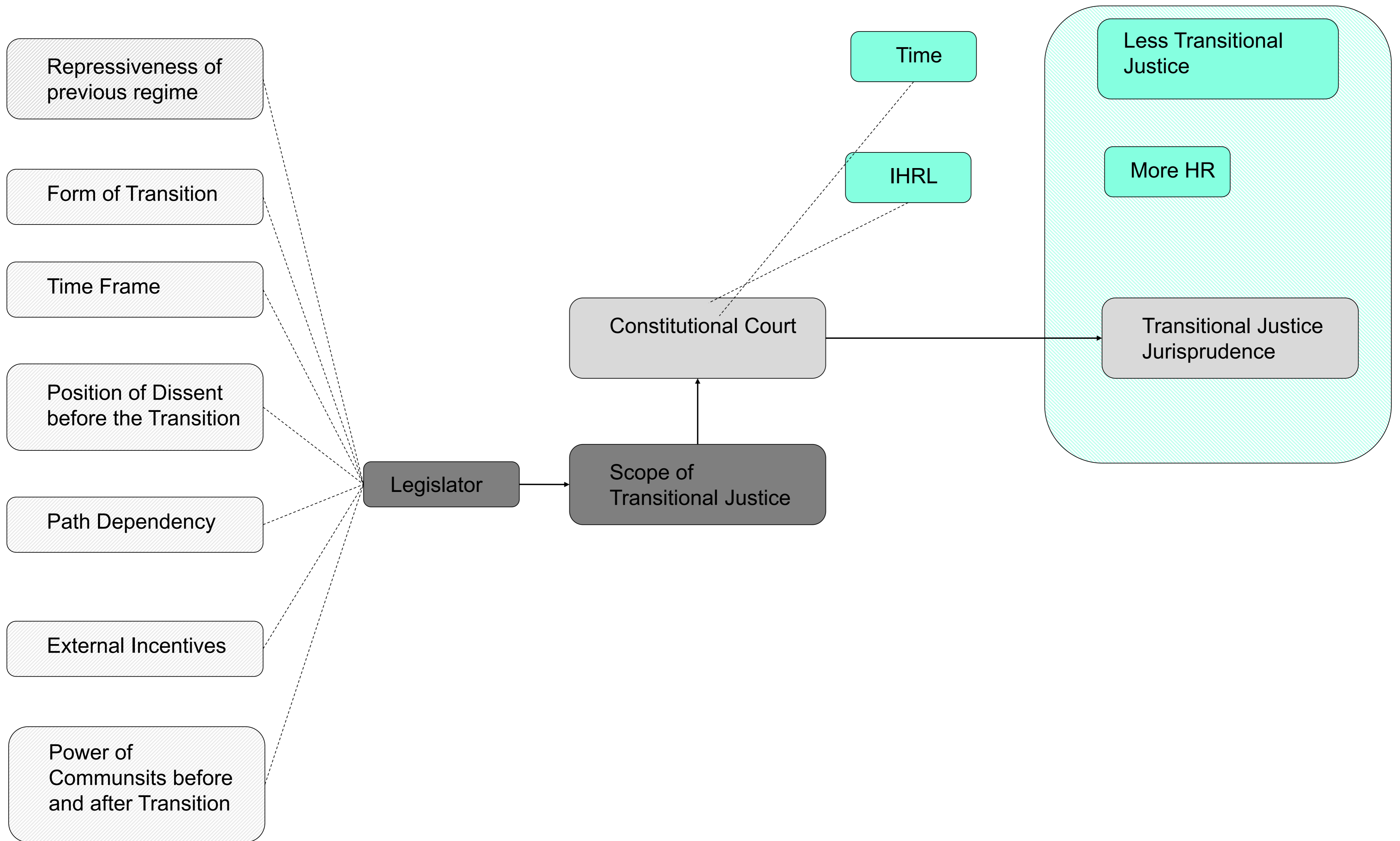
How and when CCs emerge?

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

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

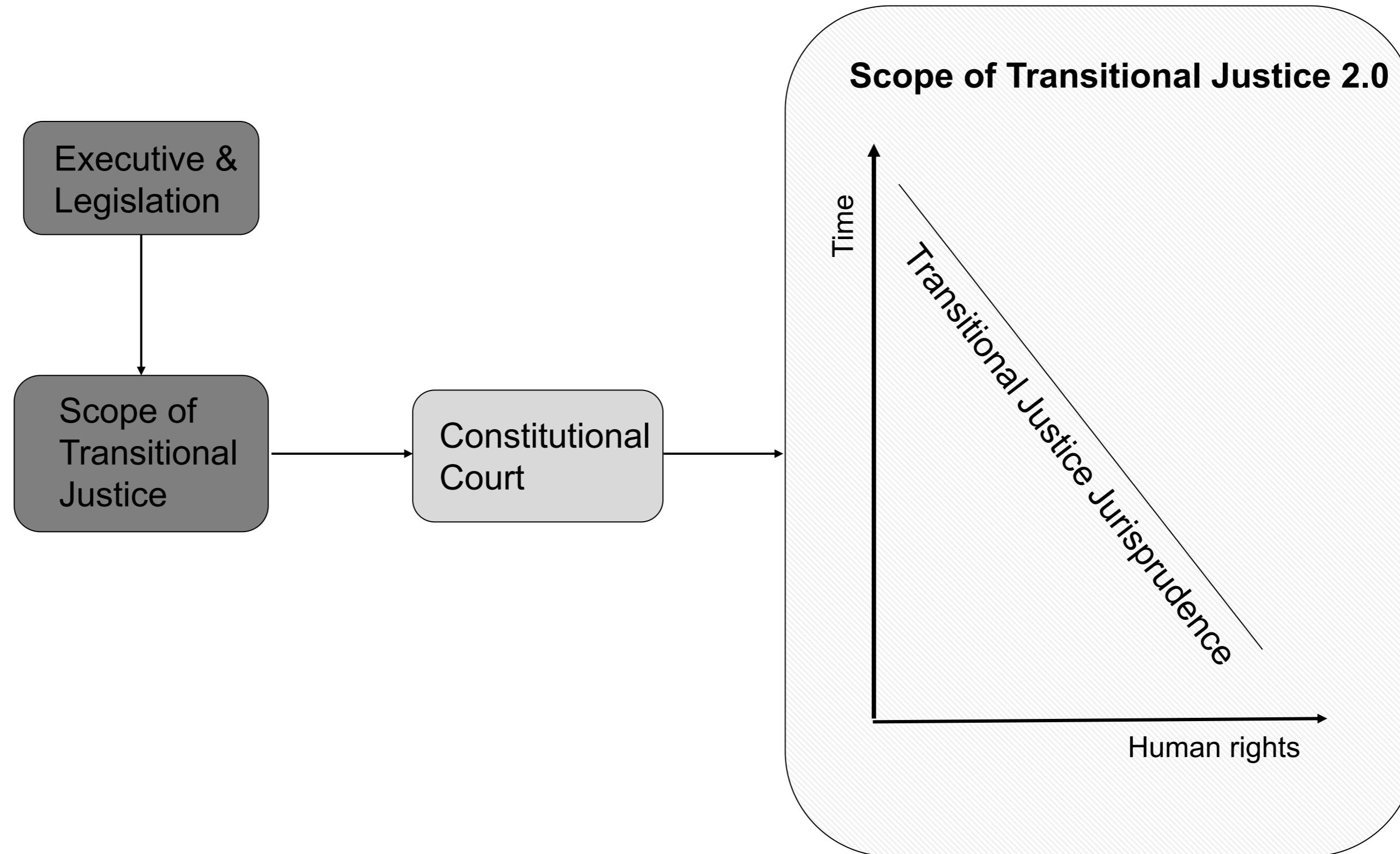
A to D: Ginsburg: phases

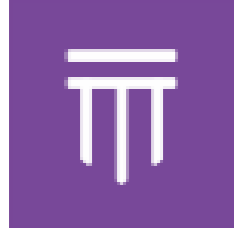
C to B: ?





Constitutional courts in TJ processes





Constitutional courts in TJ processes

106

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; amnestics	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.

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Thank you for your
attention