Dictatorship, Democracy, and Transitional Justice in Global Legal History – an Introduction

By *Ignacio Czeguhn* and *Jan Thiessen*

Reflecting on the past is a familiar task, and not only for legal historians. Nevertheless, the recent past of dictatorships is an extremely difficult topic in many respects. In the transition to democracy, several countries worldwide have passed legislation or other measures to ensure that fundamental rights and the rule of law will resist anti-democratic ideologies, anti-Semitism, racism, and war crimes. In these countries, however, the legal establishment and the law itself originated or developed under dictatorship. Thus, there are both obvious and hidden anti-democratic continuities affecting the law and the legal sector up until the present time. Therefore, the editors wanted to take a look at other countries in which similar political conditions had prevailed and democratic structures were subsequently established. In Europe, Italy, Spain, and Poland were suitable subjects for such investigations, as well as worldwide the South American states, South Africa, and Japan. Colleagues were invited to present perspectives on the transformation of political systems in their country based on specific topics. Those reflections were to be set in contrast to the recent situation in Germany.

In the beginning, Ignacio Czeguhn provides an initial inventory of the project on the continuities and discontinuities of legal careers in the Berlin judicial administration after the Nazi era. He gives an overview on the project's phases, from the initial proposal of a research project to investigate Germany's post-war justice system, over the detailed insights during the examination of judicial staff on age, gender, geographical origin and political ties and memberships, especially regarding NS-organizations, to a concluding internet presence project. Through early insights, further research questions emerged regarding the composition of staff and their selection process, stretching from the handling of former members of the NSDAP to returnees that had emigrated during the Nazi regime to escape persecution. He concludes based on personnel files that such memberships did not stand in the way of further employment in the Berlin judicial administration, especially in the cold war stricken 1950s, and that the persecution suffered by returnees during the Nazi era was considered, but was no guarantee for employment. Lastly, a website was created to document the work, through which the project is set to continue the investigation of new leads.

Vittoria Calabrò traces the transition from dictatorship to democracy in Italy that took place between 1943 and 1947. She points out that this issue has been carefully studied by some researchers in Italy, particularly in recent years. She investigates this

period using a biographical approach, including namely the Sicilian Gaspare Ambrosini, born in 1886. As a judge and law professor, he was one of the protagonists in 20th century Italy and, among other things, played an important role in shaping the new constitutional framework of the newborn Italian Republic.

Bronisław Sitek and Albert Pielak had to span a long period from sovietization to democratization of justice in Poland (1944 – 1997). Through historical-legal and formal-dogmatic methods, they scrutinize Poland's judiciary development chronologically, beginning with the period of forced introduction of the Soviet Model of Justice from 1944 – 1955. This time was shaped by the military imposition of this new system which led to full control of the communist party over the judiciary starting in 1949. Building a bridge to Ignacio Czeguhn and Jan Thiessen's research project, the authors inquire into the personnel selection of this system, finding a high politicization of judges and the issues it brought to the ruling of Polish courts. The following time of the so-called Polish Thaw from 1956 – 1981, bringing hope for a stabilized Polish judiciary but ending in a reinforcement of the communist system, was a political turning point that failed to heal the judiciary. Following this disappointment, Sitek and Pielak take a closer look at the effects of the 1980s Solidarnosc movement in Poland, which marks the beginning of the efforts to transition into a democratic judiciary. From 1982 – 1997 the judiciary system was democratized as a result of the fall of the iron curtain, finding its completion in the adoption of the new Constitution of the Republic of Poland in 1997. The examination of achievements in this regard, for example by the new role of the Supreme Court and the legal bar, shows that these elements greatly facilitated the transformation of the Polish System.

Miho Mitsunari provides insights on transitional justice concerning wartime sexual violence and war responsibility, with an exemplary focus on the "comfort women" issue in Japan. These "comfort women" were taken to former Japanese military installations and forced to provide sexual services to people of the military. She explains how this issue has been disregarded by Japan and deemed ineligible for reparations while still being a topic of "unfinished justice" during the "transition period", having been removed from history textbooks. Only in 1991, a former "comfort woman" named Kim Hak-sun publicly came forward with a lawsuit, demanding compensation, which led to ten cases going public in the 1990s. Reasons for the long silence were the immorality that was associated with prostitution, as well as the physical and psychological aftereffects these women faced and the pressure of society to hide this past. Following the stance of the international community that the Japanese government's actions are not sufficient, Mitsunari takes a look at the recommendations of UN committees and their impact before addressing the obstacles that compensation and reconciliation of the "comfort women" issue are still facing, such as the dismissal of responsibility. She emphasizes the importance of keeping the memory of the "comfort women" alive through historical research, so that moral responsibility may be taken in the future.

José Antonio Pérez Juan deals with the transition to Spanish democracy after the Franco dictatorship. He emphasizes that the political forces of the transition aimed to achieve reconciliation among the population, which was still aware of the civil war, and to use "grace" to achieve this. The general pardon granted by King Juan Carlos I in 1975 was followed the succeeding year by a first partial amnesty for crimes of a political nature and, on October 15, 1977, by an ordinance with a wide political scope and general character. All of them are still valid today. Pérez Juan's investigation focuses on the legal framework, analysis of the content of the amnesties, and their practical application.

Antonio Sánchez Aranda examines the military uprising against the government of the Second Republic which was supported by a minority of the army. After the failure of the military uprising, the immediate consequence was the division of the Spanish state into a republican zone and a self-proclaimed national zone. Sánchez Aranda explains that the Popular Front, a coalition of Republican and left-wing parties that won the parliamentary elections in February 1936, continued to govern on the Republican side. It attempted to maintain some unity of government and territorial control. The National Side was forced to improvise and establish a new government structure in the areas under its control. On September 21, 1936, after overcoming the reluctance and distrust of the military government, Franco himself was appointed generalissimo of all armies and a few days later head of government. This was the basis for the first national government, formed at the end of January 1938. The Francoist regime, which was to develop into an authoritarian model, did not hesitate to suppress dissidents or dissatisfied people. The paper analyzes from a legal-historical perspective the repressive jurisprudence structures of the Franco regime from its beginnings and in particular those that were introduced after the end of the military conflict on April 1, 1939. According to Sánchez Aranda, after the death of General Franco on November 21, 1975, the transition was characterized by a peculiarity: it was carried out within the state structures themselves. King Juan Carlos I, appointed head of state on November 22, 1975, was supposed to be the architect of a model political transition without bloodshed. He laid the foundations for a consensual political reform of the state, involving all political parties and trade unions on the basis of the so-called Moncloa Pacts.

In his article, based on an analysis of the processes of transition to democracy in Central and South American countries, Ramón M. Orza Linares makes a comparison with Spain and its transition to democracy from 1975 onwards. Orza sees the main difference in the different consideration of the head of state in the constitution. In South America, in contrast to the parliamentary democracy and constitutional monarchy in Spain, the majority opted for a presidential democracy. The attitude of the armed forces to the restoration of democracy in these countries is also examined. Finally, Orza looks at the development of two Central American countries with very different political processes, Nicaragua and Ecuador, in the first case, under the presidency of Daniel Ortega, and in the case of Ecuador, under President Nayib Bukele.

Gerhard Kemp outlines the importance of the South African transition from apartheid to democracy with a focus on the transitional years of negotiation in the 1990s, characterizing this time as a successful "negotiated constitutional revolution". His approach spans from the founding of South Africa as a nation state and British colony under white minority rule in 1910 to a Republic led by a democratically elected president with a justicial Bill of Rights in the 1990s, overcoming the system of apartheid. He points out the major changes happening after Frederik Willem de Klerk's speech in February of 1900, explaining how this event often regarded as turning point merely managed to capture the spirit that uproared in the 1980s, but emphasizing the crucial role of the developments that followed: The Interims Constitution, which led to the first democratic elections and Nelson Mandela as the first Black head of state, and the Transitional Executive Counsel TEC, which gradually gained power over the apartheid government. Another big aspect that is analyzed here is the Truth and Reconciliation Commission TRC as a product of political compromise, whose task was to deal with South African history and human rights violations of the past.

Claudia Vanoni gives an experience report on her work regarding the prosecution of antisemitic crimes in Germany. She starts by describing an antisemitically motivated case that shook Germany in 2018, leading to Attorney General Koppers' establishing a commission to effectively persecute anti-Semitism in Germany with Vanoni as commissioner. During this work, she explored the conditions under which anti-Semitism flourishes in society and found that antisemitic prejudices drastically increase in times of crisis. She helped to detect patterns of such crimes, the problems the prosecution faces, and ways to overcome them. A major problem the public prosecution has to deal with is that merely 20 percent of anti-Semitic crimes are reported, mostly due to fear of a revictimization, and that a great number of offenses are committed online, where the perpetrator oftentimes stays anonymous. Additionally, anti-Semitism is not a crime itself since freedom of speech acts as a highly protected hurdle for prosecution in Germany, making the opening of a case difficult. With more transparency of the procedure after a report has been filed, the commission hopes to gain trust in the prosecution system and achieve an awareness of the impact a report can have, triggering more reports. By developing juridical definitions, the procedure is further simplified. Throughout the project, the commission stood in an informational exchange with society and Jewish organizations to ensure the effectiveness of the approach. The new standards developed by the commission were published in a guide in 2021.

Samuel Salzborn uncovers the grounds of anti-Semitism in the modern world, showcasing its continuity and transformation since the Holocaust. He characterizes anti-Semitism as the most painful expression of the unwillingness and inability to process one's past, and today's violence brought against Jews as caused by the denial of memory and guilt of the familiar background and inheritance of many Germans. In the lack of confrontation in the post-war period and hiding of the past in the years after, Salzborn sees the reasons for the denial of the criminal past today, leading to an (partly unconscious) emerged hatred of Israel as a defense against guilt.

This guilt, however, is what needs to be remembered. Through nationalistic traditions such as shooting clubs, the customs of the anti-Semitic past are still present in the modern world and can act as ways of trivializing it. In this respect, anti-Semitism is passed on and at the same time constantly transforming.

Jan Thiessen takes an approach to the treatment of the Nazi past in contemporary German legal education, bringing it down to the catching phrase: "If one wants to change the way of legal thinking of future generations of lawyers, one has to change legal education". With a closer look at the German legal education system, he works out the role legal history plays in today's teaching, finding fault with the Nazi past being more of a subject in the later education but not being a mandatory class in law school. Thiessen wants to teach and examine reflections on the Nazi past as a subject through current law. In an attempt to gain insights into the younger generations' views, he discussed the knowledge of the Nazi past with his law students, finding views mirroring the background of the students, but no common ground of knowledge. Legal approaches follow the same idea of integrating the past into current law teaching: through the new section 5a of the German Judges' Code, the Nazi past and the East German dictatorship are now mandatory subjects of law school education. Nearly all parts of the current law originate from tradition older than the Nazi period but underwent a process of change during this time. Looking at the traditional legal method, it did not force professors, students, judges, and lawyers to integrate Nazi ideology into the legal system, but allowed it, as cases and principles have always been discussed under the primacy of ideology. In discussion of three examples from different legal subjects, Thiessen proves the point that students need specific knowledge about these roots and that the origins and impacts of the Nazi injustice can and should be taught and examined through current law.

Benjamin Lahusen deals with the question if one can learn from history by analyzing the German tradition of "Wiedergutmachung", an approach of reversing the looting of all kinds of assets during the Nazi regime and aiming for reparation. He begins by stating that learning from history is possible, whether through the immunizing effect history can have against a repeat, or as a model for early precaution. He elaborates on the handling of art looted in and by Germany and its juridical treatment, depicting the difficulties certain approaches of reparation had and finding fault with the way "learning from the past" was integrated into this process. Moving on to current developments in the restitution practice, the problems continue in the fields of data protection and the missing of precedents. However, there has also been much improvement in the work of the Commission and the issue is taken seriously. Having worked in the criticized Advisory Commission, which acts as an alternative dispute resolution mechanism as a result of the Washington Conference and thus as a court of justice for restitution issues, Lahusen shares insights on the problems firsthand. He concludes that German restitution efforts have learned from history, but that Germany still lacks an efficient organization that generates commitment and offers orientation.

Different countries tell us different (hi)stories about different eras. Further research should investigate those differencies but also look for similarities or entanglements between countries and eras. At least, there is one similarity. Whereever and whenever dictatorships exist, they tend to neglect human dignity and equality. Democracies are called to defend human rights and the rule of law.