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Band 219

Dictatorship, Democracy, and Transitional Justice in Global Legal History

Edited by

Ignacio Czeguhn and Jan Thiessen

Duncker & Humblot · Berlin

IGNACIO CZEGUHN and JAN THIESSEN (Eds.)

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Preface

In 1993, Gene Sharp, Professor of Political Science, published his extended essay "From Dictatorship to Democracy" as "A Conceptual Framework for Liberation". His widely translated book could be read as a kind of manual to build up a better future from eras of violence and suppression.

The volume at hand takes a closer look at the history of such transitions. It gathers the presentations given at the symposium "From Dictatorship to Democracy" that was held at the Memorial and Educational Site House of the Wannsee Conference on September 13th and 14th, 2021, by invitation of the Research Project "The Berlin Administration of Justice after 1945". Renowned speakers from Italy, Japan, Poland, Spain, and Germany discussed various paths from dictatorship to democracy that have worldwide been taken in the second half of the 20th century. The volume is completed by an account from South Africa. Thus, the volume covers legal and historical developments on four continents. According to this wide scope, no less than four different languages are represented. Although most of the papers are written in, or translated into, English, the editors respected the wish of some authors to stick to their native language. In order to make the contributions more broadly accessible, the majority of the proceedings at the symposium are available at the website of the Research Project "The Berlin Administration of Justice after 1945" (https://www.im-nordsternhaus.de).

Both the symposium and the volume at hand have generously been funded by the Department for Justice and Consumer Protection of the Senate of Berlin. The Department, namely Martin Groß, Hendrik Maroldt, and Friederike Neike, has persistently supported our research since 2018, accompanied by Katja Möhle and Michael Laubach of "zukunft im zentrum", Berlin. Deborah Hartmann and her team warmly welcomed the participants of the symposium at the Memorial and Educational Site House of the Wannsee Conference. Lucy Wasensteiner and her team made it possible to continue the discussions of the symposium in the famous garden of the Liebermann Villa on Lake Wannsee on the evening of September 13th, 2021. We acknowledge gratefully the dedicated assistance by our teams both at Free University and Humboldt University, in particular by Edward Berg, Lennart Birkenthal, Sebastian Eller, Helen Klabe, Joachim Kummer, Anna Lanzrath, Susanne Karoline Paas, Lilly Paeßens, and Juri Strauß. Florian R. Simon of Duncker & Humblot immediately accepted the volume to be published within the series "Schriften zur Rechtsgeschichte". The publishing process at Duncker & Humblot

was backed by Theresa Pyritz and Larissa Szews. Last but not least, we express our deep gratitude to the authors of this volume.

Berlin, October 2023 *Ignacio Czeguhn* and *Jan Thiessen*

Table of Contents

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.

The Berlin Administration of Justice after 1945 – Factual and Personnel Continuities with the Nazi Justice System

Presentation of the Project and State of Research

By *Ignacio Czeguhn*

I. Introduction

On 17 May 2018, the former Federal Minister of Justice Katarina Barley gave a lecture entitled "Die Rosenburg – Das Projekt und seine Folgerungen für die Juristenausbildung" (The Rosenburg – The Project and its Implications for Legal Education) during a discussion event at the Department of Law of the Free University Berlin.[1] Core of the lecture was the subject of judicial injustice as part of Nazi injustice and the continuity of the careers of perpetrators and incriminated persons in German post-war justice. At the end of the speech, the Minister referred to the endeavor to reform legal education in order to familiarize future generations of lawyers with philosophical, historical and social foundations, which do not necessarily have to be the subject of university education but could be and could also become examination material.[2] My colleague Jan Thiessen will speak on this topic in more detail at the end of this event.

In 2018, the state of Berlin, under the initiative of Justice Senator Dirk Behrend and the Senate Department of Justice, promoted the project proposed by the Berlin legal historians Thiessen and Czeguhn, who organize this meeting with the title "The Berlin Administration of Justice after 1945 – Factual and Personnel Continuities with the Nazi Justice System". As early as 1987, Renate Künast had submitted an application to establish a research and documentation center that would also investigate personnel continuities and failed sanctions within the justice system after 1945. However, the fall of the Berlin Wall and other issues that, as a result, were given priority had initially prevented the project from becoming a reality. Thus, the project started in 2018 with four student assistants and further funds for literature and equipment.

[1] *Markus Heintzen*, Das Berufsethos von Juristen als Thema der Juristenausbildung, in: Gerd J. Nettersheim/Doron Kiesel (Hrsg.), Das Bundesministerium der Justiz und die NS-Vergangenheit, 2021, S. 275 – 290.

[2] See also https://www.antisemitismusbeauftragter.de/Webs/BAS/DE/bekaempfunganti semitismus/initiativen/juristenausbildung/juristenausbildung-node.html, last visit 03. 03. 2022.

II. First Steps in Statistics

First, all people listed in the business distribution plans of the Senate administration between 1949 and 1976 were recorded in an Excel spreadsheet. Then the names recorded were compared with the personnel files of the Senate Administration. An initial evaluation of the personnel files revealed the following statistical variables or historical peculiarities. 29 people began their work in the Berlin judiciary/administration between 1945 and 1949, at a time when sovereign power in Berlin was still directly in the hands of the Allied Command. All other examined people were taken over by the Senate Administration for Justice in the 1950s or 1960s. A first comparison with the results of the "Rosenburg file" indicates that the personnel of the Berlin Senate Justice Administration was slightly younger than that of the Federal Ministry of Justice.[3] This may be due to the fact that the comparable positions in the federal administration were somewhat more exposed than those at the state level. The occupational and educational background of the predominantly male (156 out of 178) group of people is, as expected, homogeneous. Almost all of them had a legal education, the next largest occupational group was that of stenographers or businessman, other occupational groups such as interpreters remained isolated cases. If they exercised a profession between 1933 and 1945 (a total of 44 out of 178), the majority (40 people) worked in the civil service. Only a few were lawyers or worked in the private sector during this time (private sector 22 out of 178). The geographical origin is more widely spread, with the place of birth in and around Berlin (62 persons) forming the main focus. A second focus is the area of the later Soviet occupation zone or German Democratic Republic (39 persons), especially Dresden (3 persons). However, it should be noted that some personnel files are incomplete and therefore the curriculum vitae of the employees, especially between 1933 and 1945, cannot always be reconstructed without gaps, relying on this basis alone. Of particular interest is the membership of staff in the NSDAP. Among the people evaluated, 19 (10.67%) had belonged to the NSDAP (cf. 53 per cent for BMJ = Bundesministerium der Justiz), 12 of them at management level, 14 in the higher civil service, none among other personnel. For two files, no information on the career group could be provided. A similar picture emerges for membership in affiliated associations of the party, which nevertheless, as expected, are present to a greater extent than NSDAP membership as such. Of the 178 people studied, 52 were members of at least one NS organization, with many holding several memberships.

[3] Concerning the Rosenburg project see https://www.bmj.de/SharedDocs/Publikationen/DE/Akte_Rosenburg_Geschichtsband_1.pdf?__blob=publicationFile&v=20, last visit 03.03.2022; *Manfred Görtemaker/Christoph Safferling*, Die Akte Rosenburg. Das Bundesministerium der Justiz und die NS-Zeit, München 2016.

III. First Case Studies

The figures determined for NSDAP membership are very clearly below the results of the "Rosenburg file". This leads to research questions for the further project. Was greater care taken in the selection of personnel in Berlin than in Bonn to ensure that former party members did not dominate positions in the administration of justice?

Or did Berlin have fewer applicants with Nazi pasts from the outset? Did the former party-affiliated lawyers prefer working in the Federal Ministry of Justice to working in the Berlin administration? Was the Berlin Senate Justice Administration in the function of a state justice ministry an authority without tradition because the Prussian Justice Ministry and the Reich Justice Ministry were "enriched" as part of the "equalization" of the Reich and the states?

Or did incriminated persons systematically conceal their past?

Answering these questions is more difficult due to the fact that, as far as can be seen, no records of rejected applicants have been preserved. However, it is noticeable that in a considerable number of cases the past of employed persons gave rise to accusations or indications of discrimination at the time of recruitment or during their term of office, which were investigated more or less meticulously. This does not only concern the burden of Nazi party membership, special court activities or the like.

Communist activities were repeatedly brought into discussion during the Cold War. Later employees of the Senate Administration and the judiciary left the German Democratic Republic from 1950 onwards and applied for employment in Berlin as "recognized refugees." As expected, the applicants tried to distinguish themselves from the German Democratic Republic regime, for example by emphasising their status as political refugees or – like Gerhard Voigt[4] (born 1911), Gerhard Sadler[5] (born 1922) and Kurt Zabel[6] (born 1901) – their opposition to the SED regime. In this context, the further question arises as to how possible GDR involvement in relation to the Nazi past was weighted in the personnel policy on the part of the Senate Administration for Justice.

The first evaluation of the files suggests that the demarcation from the GDR regime was more important than the demarcation from the Nazi past of the applicants and that the personnel policy also promoted continuity in this way. The Senate administration took great care to shield itself as far as possible from any feared infiltration by the GDR. Accordingly, applicants from the GDR were often not only checked regarding their Nazi past at the Berlin Document Center, but also at the "Sub-committee of Independent Lawyers of the Soviet Zone," founded in 1949, for their possible political ties to the GDR. Where such involvement was suspected, the political reliability and usefulness of the applicant or employee was quickly ques-

[4] Personnel file of G. Voigt: Az.: I-B/1. V. 17, p. II and p. 7.

[5] Personnel file of G. Sadler: Az.: I-B/3. S. 10, pp. I f. and pp. 7, 10.

[6] Personnel file of K. Zabel: Az.: I/B-1.3.11 ("Sonderheft"), pp. 1, 45 f., 58 f.

tioned. In the cases investigated, the geographical situation is evident, which possibly led to personnel from East Berlin or from the SBZ/GDR being pushed into administrative positions in the western sectors of Berlin to a greater extent or at least in a higher concentration than in the western occupation zones. The Cold War also had a noticeable impact with regard to Carl Creifelds[7] (born 1907), head of the criminal law department, who was particularly prominent because of the "Rechtswörterbuch," and his deputy department head Heinz-Günter Lell[8] (born 1904). Both were named in the GDR "Brown Book" and similar publications as "Nazi lawyers" in West Berlin. As is well known, Creifelds, although elected by the Judicial Selection Committee, was not appointed a judge at the Federal Supreme Court by Federal President Heinrich Lübke because of his work in the criminal law department of the Reich Ministry of Justice. In contrast, Heinz-Günter Lell was able to become Chief Public Prosecutor in Berlin from 1959.[9] Until 1939, Lell had brought Landesverrat (treason) cases to trial as a Reich prosecutor at the People's Court. Not only his immediate superior Creifelds, but also the further management level considered the known charges unobjectionable with regard to Lell's employment in the Berlin judiciary and judicial administration.[10]

The Senate administration made similar sweeping assessments of the Nazi past in other cases. On one hand this concerns Erich Weiß[11] (born 1902), judge at the Berlin Regional Court. Although he was not a party member, Erich Weiß worked as a district court councilor and public prosecutor at the district court in Breslau (1941–42) and was, among other things, a member of the criminal appeals chamber and, from 1942 to October 1943, a district court councilor at the district court in Gdansk and at the special court in Gdansk, until he was drafted into the military. After the war, he first was a judge at the Radeberg District Court (1946–50), then at the Dresden District Court (1950–52), where he was a member of the criminal division. After fleeing from the GDR and a short period at the Senate Administration for Finance, Weiß successfully applied for a position as a civil judge at the Berlin Regional Court in 1952, which he held until his retirement (1966). In addition, from 1953 onwards he worked as an assessor at the Restitution Offices, which were also staffed with incriminated lawyers.[12] The personnel file does not raise any problems concerning the time at the Special Court in Danzig, on the contrary: the Senate Administration was content with the fact that Erich Weiß was not a member of the NSDAP or its subsidiary organizations.[13] Nothing is known about his activities at the Special Court. However, since it

[7] Personnel file of C. Creifelds: Az.: I/B. C. 14.

[8] Personnel file of H.-G. Lell: Az.: I-B/1. L. 55.

[9] Ibid., p. I.

[10] Ibid., pp. 9 f.

[11] Personnel file of E. Weiß, Az.: I-B/1.W.58.

[12] See CV of E. Weiß, ibid., pp. I ff.

[13] Ibid., pp. 4 f.

is certain that judges at special courts were often involved in death sentences or other unjust sentences, further research in Polish archives is indicated here.

In individual cases, anti-Semitic persecution was made the subject of personnel decisions or at least noted in the files, as the cases of Kurt Prager[14] and Hans Altmann[15] show. In view of the evaluation to date, it cannot yet be reliably concluded that survivors and returnees tended to choose Berlin as their professional and private center of life rather than elsewhere. However, Curt Bergmann (born 1888),[16] who was disbarred as a lawyer and notary in Dresden in 1938, should be mentioned. Bergmann was able to escape further persecution by emigrating to England. After his return to Dresden, he, now President of the Senate at the Higher Regional Court, came under suspicion of being an English informant at the beginning of the Cold War. When he spoke out against the concept of the People's Judges, he was threatened with impeachment and prosecution, so Bergmann fled to the western part of Berlin.[17] After a short period of temporary work at the reparations offices, Bergmann was dismissed, ostensibly due to health restrictions.[18] Bergmann and, to a greater extent, his wife, unsuccessfully accused Federal President Theodor Heuss and Senator Kielinger that persecution and flight had not been taken into account in the decision-making process due to anti-Semitic reservations in the Senate administration – in other words, that anti-Semitism had continued to influence personnel decisions.[19] In fact, his permanent employment with the reparations offices had initially been explicitly advocated with the idea of reparations for the dismissal in 1938, before the health restrictions were brought to the fore.[20]

The way the Senate Administration has dealt with these very different pasts can be characterized as follows. The personnel files clearly show that the affiliation of applicants and/or employees to Nazi organizations was generally insignificant for the Senate Administration. It should be noted that the majority of the group of people examined here found employment in the Berlin judiciary/administration in the course of the 1950s, i.e. in a phase in which affiliation to Nazi organizations was considered insignificant in the face of the Cold War, even nationwide. It is therefore hardly surprising that it did not play a major role in the Berlin Senate administration either if the applicant or employee had a Nazi past. Thus, in addition to the self-disclosure, enquiries were often (although not always) made with the Berlin Document Center or the Allied High Commission about the applicants' past. However, if a membership was found, it was hardly ever critically examined by the senate administration. In almost all cases, membership of Nazi organizations was therefore rarely more

[14] Personnel file of K. Prager, Az.: I/B.1.P.22, pp. I f.

[15] Personnel file of H. Altmann, Az.: I/B-1.A.1, pp. I f.

[16] Personnel file of C. Bergmann, Az.: I p16 B 1710, p. I.

[17] Ibid., pp. 1 f.

[18] Ibid., pp. 41 ff.

[19] Ibid., pp. 44 f.

[20] Ibid., pp. 50 ff.

than a marginal note. NS party membership as such did not stand in the way of further employment in the Berlin administration if the person was professionally qualified. Those who, like the aforementioned Erich Weiß, were not NSDAP members did not have to fear any more in-depth investigations. Research into the practical activities of applicants and employees between 1933 and 1945 seems to have been virtually non-existent. Proximity to communism, on the other hand, could be an obstacle to employment or promotion, as long as the accusations were not recognizable as obviously malicious denunciations.[21] With regard to anti-Semitic persecutees, there are indications that the Senate administration was generally willing to take into account the persecution suffered in the sense of a certain reparation, but that this did not necessarily lead to employment in the judiciary or the administration of justice.

IV. The Work in the Federal Archives and the Landesarchiv

The aim of the second phase of the project was to find out additional information about the personalities in question as well as to corroborate existing information with further sources. This was to enable an assessment of the working methods and thoroughness of the Senate Administration for Justice in the years after 1945.

The core of the activity consisted of sifting through and evaluating the holdings of the state and federal archives. Initially there was also the Berlin State Administration Office, but no files relevant to the project were available here. The archive was closed from March to May 2020 as well as in November and December 2020 due to the hygiene measures for COVID-19 and work was completely interrupted.

The subject of the investigations in the State Archives were the "B holdings" there. Those of the West Berlin authorities and institutions from 1945 to 1990. In a few cases, the "A holdings" were also consulted, which comprise the entire holdings up to 1945.

First, all people investigated in the first phase of the project were searched in the databases of the State Archives. In the process, 65 files on 30 persons were found. 35 of these files could be clearly assigned to the people investigated. In the case of the remaining 30 files, a clear assignment was not possible, among other things because of different dates of birth or biographies. These could therefore not be considered. Due to the interruption of the investigations in November 2020, only 21 of the allocated files can be included in this report. The density of the files made it possible to closely follow up and complete some of the curricula vitae. Regarding denazification procedures, only a few results can be noted so far. Since access to the archive's internal list of denazification cases is not possible yet, only the results of the 7 cases examined can be given. However, these few cases already indicate that a more in-depth investigation of the processes could be informative. And this investigation

[21] A striking example is the aforementioned Kurt Zabel who allegedly was a member of the KPD.

is likely to be very revealing based on recently recovered copies of files. The files mentioned could no longer be found in the Senate's archives but were cited in a dissertation. Contacting the author of the dissertation revealed that she still had a copy archived. The files have now been scanned and listed in the project. They mainly concern the hearings of cases brought directly before the Senator of Justice, which were mainly about denazification and problem cases. The evaluation will take place in the next few months. The investigations in the state archives have shown that a more detailed evaluation of the denazification procedures can provide further information on how the Senate Administration for Justice dealt with previous National Socialist incriminations. In order to find and evaluate all the files in question, a further investigation would be useful and promising. The examination in the Federal Archives also served to compare the personnel files of the Senate Administration for Justice with the information stored in the Federal Archives. Furthermore, there was the search for further records or parallel record keeping. The examination of the personnel file was particularly aimed at searching for files that are not yet recorded in the digital index of the Federal Archives and the reconstruction of professional careers before entering the careers in the administration of justice. In particular, the basic data was examined such as date and place of birth, legal training and affiliation to National Socialist organizations, particularly with regard to whether the self-disclosures and/or the assessments of others in the files of the Senate Administration for Justice are consistent or contradictory with the Federal Archives.

An interesting case in this context that only came to light through the files stored in the Federal Archives is that of Dr. Herbert Widtfeldt.[22] The file in the archives of the Senate Justice was only accompanied by a special booklet for allowances. The personnel file of the Reich Ministry of Justice (fonds R3001) was therefore considerably more informative. Widtfeldt passed the legal examinations "with distinction" and "excellently" and was awarded a doctorate ("magna cum laude"). In his official evaluations, he was consistently described as "excellently qualified", "very hard-working" and as one of the best judges at the Regional Court.

In June 1938, he was appointed by Dr. Otto Palandt as a part-time member of the Reich Examination Office. Widtfeldt was a member of the NSRB, RDB, NSV, Luftschutzbund, Reichskolonialbund, Bund Deutscher Osten, Arbeitsdank and BNSDJ. He has been candidate to party member in the NSDAP since 01. 05. 1937. According to an assessment by the Gauleitung "reprimanded deficiencies in active commitment to the movement" and on 07. 10. 1939 objected to a promotion, his admission to the party had been rejected in January 1938. In September 1939 Widtfeldt appealed against this refusal to the Reich Treasurer for a decision, which had not yet been issued. In an assessment the Gauleitung of Saxony states confirms: "Oberlandesgerichtsrat Dr. Widtfeldt is a member of the NSV and was also a member of SAR 1 (SA Reserve 1) until he had to resign from it in 1934 because he was unfit for service. He belongs to the BNSDJ and to the RDB. He also reads the National Socialist daily

[22] Personal file of H. Widtfeldt, R 3001/80338.

press. He attends very few of the movement's events. He is free from pride of place, behaves in a comradely manner and participates generously in donations. There is no reason to doubt his political reliability. If Wildtfeld became a member of the party is not noticed in the files.

There were new findings on persons who could already be considered incriminated according to the files of the Senate Administration. According to the file, Max Vielau was a "loyal supporter of National Socialist goals," had published a volume of poetry about the people and the fatherland, but was later considered too risky for the office of judge in Berlin due to his "lack of tact in political matters" and was therefore transferred.[23] Nevertheless, his basic National Socialist attitude was not in doubt; he was regarded as "absolutely reliable politically." He was a member of the NSRB, NSV, RLB, NS-Altherrenbund as well as the RKB; loyal service and badges of honour were awarded. In this respect, various details were concealed from the Senate Administration. Walter Plümcke was a block leader in the NSRB for a short time and a squad leader during the semester break, as well as head of the NSRB's young lawyers' group and block leader of the NSV.[24] It was already known about Gerhard Pfennig that he was a member of the NSDAP and the NSRB. The files in the Federal Archives show that he was also a member of the SA, the NS-Volkswohlfahrt and the Reichsluftschutzbund. In addition, it was noted that he had left the judicial service in the meantime as of 1939.[25] Walter Paust was a defendant in proceedings before a court of honour for gross neglect of duty as a lawyer.[26] Gerhard Voigt was seconded on 10 February 1944 as a commissioned public prosecutor in Berlin, which was not noted in the Senate file.[27] Erwin Stolpe was dismissed on the basis of the "Law for the Restoration of the Professional Civil Service."[28] Details like these were to be expected in view of a large number of similar curricula vitae. However, they illustrate that many smaller and larger gaps in the form of dates and places of birth, legal training and memberships in Nazi organizations can be completed through the files in the Federal Archives.

A further examination of the holdings of the Federal Archives is so necessary, as the year 2020 has unfortunately impaired in-depth research to a very large extent. Further archive visits were planned for January 2021; corresponding dates were booked, but had to be cancelled at short notice by the Federal Archives due to the pandemic. The above-mentioned interruptions to the investigations in 2020 have meant that many files could not yet be viewed. At least 15 holdings stored in the Federal Archives confirmed in the comparison with the files of the Senate Department of

[23] Personal file of M. Vielau, R 3001/78950.

[24] Personal file of W. Plümcke, R 3001/70955.

[25] Personal file of G. Pfennig, R 3001/70704; R 9361-I/2643; R 3101/36828.

[26] Personal file of W. Paust, R 3001/70431; R 8-VI/93.

[27] Personal file of G. Voigt, R 3001/79087.

[28] Personal file of E. Stolpe, R 3001/77597.

Justice could therefore not yet be indexed. The examination of the first 31 personnel files gives reason and hope for further detailed and comprehensive results.

V. The Website Project

The limited research possibilities due to the pandemic and the time resources freed up as a result were used to create a website for the project and to develop its content. In cooperation with the CEDIS department of the Free University, Center for Digital Systems, the very motivated assistants drew up a plan for building a website. Here I would now like to show you some examples and present the future website, which is freely accessible to all.[29]

The website is divided into five sections:

News, the project presentation, the structure of the Senate administration after 1945, and CVs and continuities.

Under the point News we will present the latest findings of the project, new discoveries in archives, developments and latest results. Newspaper articles and press reports on the project are also included in this section.

The section The Project serves to present the research content and objectives. The course of the research work is also documented here.

In the subdivision Structure after 1945, the areas of responsibility of the Senate Administration are first recorded and explained. This deals in particular with personnel and organizational issues, the judiciary, organization and planning, as well as the court constitution. The factual responsibilities are then linked to personal names, and individual curricula vitae are initially presented in neutral terms. This information is then used for an evaluation, in which individual biographies are explained and presented in more detail at the end. The list of these biographies is then used to create the basic case for the section on continuities. Here, the focus is on concrete cases of employees of the Senate Administration who have a conspicuous, National Socialist curriculum vitae during the Third Reich. As an example, the biography of Dr. Hans Steuerwald is shown here, who was a Scharführer in the SA during the Third Reich and was certified as having National Socialist sentiments in his service.[30] After the war, he was subsequently President of the Law Examination Office in the Senate Administration.[31]

In the evaluations, individual statistics can also be called up to document conspicuous features and differences from other projects with the same content. But simple statistical tables also complement the worldwide web presence.

[29] https://www.im-nordsternhaus.de/, last visit 03. 03. 2022.

[30] See personnel file of H. Steuerwald, Az.: I-B/1 St 12, pp. Ib f. and Personnel File of the Reich Ministry of Justice, Az.: I p 25. I. 6/37, pp. 11 f.

[31] Personnel file of H. Steuerwald, Az.: I-B/1 St 12, p. 106a.

As explained, the internet presence project has been increasingly pursued in recent months. Subsequently, the visual presentation and content editing will soon be completed, so that the project will then be presented on the web and made accessible to the public.

After 2021, however, the future work will certainly have to lie in the archival work again. Much has literally been left lying around and must be continued. New leads will have to be followed up and possibly trips to other archives will have to be made to supplement biographies outside Berlin.

Continuità e discontinuità nel passaggio dalla dittatura alla democrazia: la vicenda del giurista Gaspare Ambrosini

Da *Vittoria Calabrò*

I. 1943 – 1947: quali cesure, quali persistenze? Riflessioni introduttive

La non facile transizione dalla dittatura alla democrazia, vissuta da molti paesi europei, e non solo, negli anni successivi alla fine della Seconda guerra mondiale, maturava in Italia nel periodo compreso tra il 1943 e il 1947: un arco temporale che, di recente, è stato oggetto di accurate indagini da parte di studiosi di diversa formazione che hanno approfondito i molteplici aspetti di quel passaggio caratterizzato da profonde cesure e altrettanto rilevanti persistenze.[1]

La caduta del regime fascista, il 25 luglio 1943, avrebbe aperto, com'è noto, un nuovo e importante capitolo nella storia costituzionale italiana. A partire da quella data, infatti, si avviava un periodo che vedeva la formazione di ben sei governi durante i quali si ponevano le basi per la ricostruzione del Paese stravolto dal ventennio fascista e dalla guerra: due ministeri guidati da un militare, il generale Pietro Badoglio, due dall'esponente del Partito socialista riformatore Ivanoe Bonomi (il quale, peraltro, era stato a capo di un breve governo anche prima dell'avvento del fascismo, tra il luglio del 1921 e il febbraio del 1922),[2] uno dal

[1] Sul punto si vedano, fra gli altri, *Resistenza e diritto pubblico*; a cura di F. Cortese, Firenze University Press, Firenze 2016; Dalla Monarchia alla Repubblica (1944 – 1948), a cura di A. A. Mola, Bastogi libri, Roma 2017; e i volumi frutto del progetto di ricerca 2 giugno. Nascita, storia e memorie della Repubblica, promosso dalla Società italiana per lo studio della storia contemporanea (Sissco) e sostenuto dalla Struttura di missione per gli anniversari nazionali: 1. Il «momento repubblicano» nella costruzione della democrazia, a cura di M. Ridolfi, Viella, Roma 2020; 2. Territori, culture politiche e dinamiche sociali, a cura di S. Adorno, Viella, Roma 2020; 3. Geografie del voto e istituzioni, a cura di T. Forcellese, Viella, Roma 2020; 4. L'Italia del 1946 vista dall'Europa, a cura di P. Dogliani e V. Galimi, Viella, Roma 2020; 5. Immaginari, linguaggi e rituali, a cura di M. Ridolfi e M. Ravveduto, Viella, Roma 2020; 6. I numeri del referendum istituzionale, a cura di M. Ridolfi e P. Totaro, Viella, Roma 2020.

[2] Su quel ministero si veda *C. Ghisalberti*, Storia costituzionale d'Italia 1848/1994, Editori Laterza, Roma-Bari 2002, p. 341; *R. Martucci*, Storia costituzionale italiana. Dallo Statuto Albertino alla Repubblica (1848 – 2001), Carocci, Roma 2002, pp. 140 – 142. Sulla composizione di quel governo si rinvia a *M. Missori*, Governi, alte cariche dello Stato, alti magistrati e

rappresentante del Partito d'azione Ferruccio Parri (che, con il nome di battaglia «Maurizio», aveva preso parte attiva alla guerra partigiana del biennio 1943–1945), e quello retto dal democristiano Alcide De Gasperi, insediatosi il 10 dicembre 1945.[3]

La prima, importante discontinuità tra fascismo e post-fascismo può essere individuata, a mio giudizio, nel crescente peso assunto dai partiti politici a partire dal luglio del 1943.

Dopo l'emanazione, il 6 novembre 1926, del R.D. n. 1848 con cui veniva approvato il Testo Unico delle Leggi di Pubblica Sicurezza che affidava ai prefetti il potere di sciogliere, confiscandone gli eventuali beni, qualunque associazione che svolgesse attività contrarie «all'ordine nazionale dello Stato»,[4] tutti i partiti, i gruppi e le organizzazioni politiche diverse dal Partito nazionale fascista diventavano, di fatto, fuorilegge: un provvedimento che avrebbe portato all'arresto di numerosi attivisti e simpatizzanti di quei sodalizi e costretto gli oppositori a vivere in clandestinità o, addirittura, a lasciare il Paese per sfuggire alle ricerche delle forze dell'ordine.

Caduto il regime, chi aveva partecipato alla lotta cospirativa si univa a quanti ritornavano dall'esilio riannodando le fila delle formazioni politiche disciolte anni prima. Nel periodo immediatamente successivo all'8 settembre 1943, data in cui veniva reso noto l'armistizio che sanciva la fine delle ostilità tra il Regno d'Italia e gli anglo-americani ma non la fine della guerra, i principali partiti antifascisti (Democrazia cristiana, Partito comunista, Partito socialista di unità proletaria, Partito d'azione, Partito liberale e Democrazia del lavoro) fondavano il Comitato di Liberazione Nazionale (CNL) che avrebbe svolto un ruolo di primo piano nella lotta partigiana e nella liberazione dell'Italia dal nazifascismo. Ma non solo. A partire dal gennaio del 1944, importante sarebbe stato, come testimoniano nello specifico i numerosi e recenti studi sul tema, anche il contributo offerto dal CNL nei processi di formazione dei governi e nella ridefinizione dell'assetto istituzionale del Paese.[5]

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prefetti del Regno d'Italia, Ministero per i beni culturali e ambientali – Ufficio centrale per i beni archivistici, Roma 1989, pp. 143–145.

[3] Sul punto cfr. *C. Ghisalberti*, Storia costituzionale d'Italia, cit., pp. 389–410; *Martucci*, Storia costituzionale italiana, cit., pp. 253–269.

[4] Si veda il disposto congiunto degli artt. 215 («Salvo quanto è disposto nell'articolo precedente, il Prefetto ha facoltà di decretare lo scioglimento delle associazioni, enti o istituti costituiti od operanti nel Regno che svolgano comunque attività contraria all'ordine nazionale dello Stato. Nel decreto può essere ordinata la confisca dei beni sociali. Avverso il provvedimento del Prefetto si può ricorrere al Ministro per l'interno. Contro il provvedimento del Ministro non è ammesso ricorso nemmeno per motivi di legittimità») e 218 («Sotto il nome di associazioni s'intendono i partiti, i gruppi e le organizzazioni politiche in genere, anche temporanee») del Testo Unico delle Leggi di Pubblica Sicurezza, che veniva pubblicato sulla Gazzetta Ufficiale del Regno d'Italia (= GU), n. 257, 8 novembre 1926, pp. 4822–4842, in particolare p. 4841.

[5] Cfr., a questo proposito, quanto scrive *S. Colarizi*, Storia politica della Repubblica. Partiti, movimenti e istituzioni. 1943–2006, Editori Laterza, Roma-Bari 2007, p. 14: «Nel vuoto

In questo quadro si colloca la nascita, il 22 aprile 1944, del II ministero guidato da Badoglio non più espressione, come il precedente, della volontà del re Vittorio Emanuele III che, riappropriandosi delle prerogative riconosciutegli dallo Statuto albertino, aveva agito in ideale continuità con il periodo liberale, sperando di recidere qualunque legame tra il regime e la dinastia dei Savoia. Il II governo Badoglio era, invece, frutto dell'accordo tra i partiti rappresentati nel CLN ed era nato a seguito dell'accettazione da parte del sovrano della proposta di ritirarsi dalla vita politica attiva e di nominare il figlio ed erede al trono, Umberto, luogotenente del Regno.[6] Tale proposta, formulata dal liberale Enrico De Nicola, era stata accolta con favore da tutte le forze antifasciste che avevano più volte richiesto l'abdicazione del re, accusato di non essersi opposto all'operato di Mussolini.[7] A partire dall'aprile del 1944 si avviava, dunque, la stagione dei governi di unità nazionale, in funzione antifascista e antinazista, la cui responsabilità era condivisa da tutte le forze politiche che si riconoscevano nel CLN. La luogotenenza, tuttavia, in vigore a partire dal 5 giugno 1944, giorno successivo alla liberazione di Roma dall'occupazione nazista, non era prevista dallo Statuto albertino: la sua istituzione rappresentava, quindi, un forte segnale di discontinuità rispetto al passato in quanto, come scrive Carlo Ghisalberti, essa era il frutto della «generale consapevolezza dell'ormai necessario allontanamento definitivo del re dal trono».[8] Una consapevolezza che si accompagnava alla sempre più diffusa convinzione che fosse necessario un mutamento della forma istituzionale e, di conseguenza, la sostituzione dell'istituto monarchico con la forma repubblicana. Decisione, quest'ultima, che, secondo quanto previsto dall'art. 1 del Decreto-Legge Luogotenenziale n. 151 adottato il 25 giugno 1944 dal I governo Bonomi (formatosi a distanza di qualche giorno dalla liberazione di Roma)[9], doveva essere effettuata da un'Assemblea

che il re e il suo governo hanno lasciato dietro di sé al momento della fuga verso Brindisi, i partiti antifascisti si assumono la responsabilità di indicare alla popolazione sgomenta e ai soldati sbandati la strada del riscatto dall'alleanza con il nazismo siglata da Mussolini e avallata dalla monarchia sabauda. Contro i tedeschi invasori, contro il fascismo rinato a Salò, contro il re che ha rinunciato a combattere, gli antifascisti rivendicano il compito di guidare una nazione tutta da ricostruire».

[6] Sulla composizione del I governo Badoglio, in carica dal 25 luglio 1943 al 17 aprile 1944, si veda https://www.governo.it/it/i-governi-dal-1943-ad-oggi/ordinamento-provvisorio-25-luglio-1943-23-maggio-1948-assemblea-8, ultima consultazione 09.08.2022. Sul II governo Badoglio (22 aprile 1944 – 8 giugno 1944) cfr., invece, https://www.governo.it/it/i-governi-dal-1943-ad-oggi/ordinamento-provvisorio-25-luglio-1943-23-maggio-1948-assemblea-7, ultima consultazione 09.08.2022.

[7] Sul punto cfr., fra gli altri, quanto si legge in *A. Giacone*, Enrico De Nicola e la transizione istituzionale tra Monarchia e Repubblica (1944 – 1946), in: Laboratoire italien. Politque et societé, 12, 2012 (La vie intellectuelle entre fascisme et République 1940 – 1948), pp. 279 – 296, consultabile anche online all'indirizzo https://journals.openedition.org/laboratoireitalien/667, ultima consultazione 09.08.2022.

[8] Così *C. Ghisalberti*, Storia costituzionale d'Italia, cit., p. 396.

[9] Sulla composizione del I governo Bonomi (18 giugno 1944 – 10 dicembre 1944) si veda https://www.governo.it/it/i-governi-dal-1943-ad-oggi/ordinamento-provvisorio-25-luglio-1943-23-maggio-1948-assemblea-6, ultima consultazione 09.08.2022.

costituente eletta, a guerra finita, a suffragio universale e diretto. A tale Assemblea, secondo quanto previsto dallo stesso articolo, veniva affidato anche il compito di redigere una nuova carta costituzionale in sostituzione dello Statuto albertino, snaturato dalle leggi fascistissime ma pur sempre in vigore.[10]

Un decreto successivo, però, varato il 16 marzo 1946 durante il I governo presieduto da De Gasperi, sottraeva all'Assemblea costituente la scelta sulla forma istituzionale, rimettendola al popolo tramite un referendum.[11] Chiamati alle urne il 2 giugno 1946, gli italiani si rendevano protagonisti della più rilevante cesura di quel periodo: il 54,27% dei votanti si esprimeva, infatti, a favore della repubblica.[12] A «salvare» l'istituto monarchico, compromesso da vent'anni di regime, non era servito neanche l'estremo tentativo di Vittorio Emanuele III che, il 9 maggio 1946, aveva abdicato a favore del figlio Umberto.

Alla discontinuità istituzionale avviatasi il 2 giugno, quando gli italiani optavano per la Repubblica ed eleggevano l'Assemblea costituente che avrebbe redatto la nuova costituzione entrata in vigore il 1 gennaio 1948, corrispondeva, invece, una sostanziale continuità legislativa e, soprattutto, burocratico-amministrativa.[13]

Emblematico, in ambito legislativo, è, ad esempio, il caso del Codice civile. Entrato in vigore il 21 aprile 1942 dopo una lunga elaborazione avviatasi nel 1924,[14] esso sarebbe sopravvissuto alla caduta del regime in quanto opera, prevalentemente, di tecnici del diritto ed espressione della più alta scienza civilistica del tempo, figlia della cultura giuridica liberale.

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[10] «Dopo la liberazione del territorio nazionale, le forme istituzionali saranno scelte dal popolo italiano che a tal fine eleggerà, a suffragio universale diretto e segreto, una Assemblea Costituente per deliberare la nuova costituzione dello Stato»: il provvedimento in questione si legge in GU, n. 39, 8 luglio 1944, pp. 243–244. La citazione è a p. 243.

[11] Si veda, a questo proposito, l'art. 1 del Decreto Legislativo Luogotenenziale n. 98 del 16 marzo 1946: «Contemporaneamente alle elezioni per l'Assemblea Costituente il popolo sarà chiamato a decidere mediante referendum sulla forma istituzionale dello Stato (Repubblica o Monarchia)». Il provvedimento veniva pubblicato su GU, n. 69, 23 marzo 1946, pp. 598–599. La citazione è a p. 598.

[12] I dati sono tratti da *Eligendo*, l'Archivio storico elettorale a cura del Dipartimento per gli Affari Interni e Territoriali del Ministero dell'Interno, banca dati che contiene i risultati di tutte le elezioni dal 1946 a oggi: https://elezionistorico.interno.gov.it/index.php?tpel=F&dtel=02/06/1946&tpa=I&tpe=A&lev0=0&levsut0=0&es0=S&ms=S, ultima consultazione 09.08.2022.

[13] Scrive a questo proposito *G. Melis*, Storia dell'amministrazione italiana. Nuova edizione, il Mulino, Bologna 2020, p. 401: «Sebbene il dopoguerra si caratterizzasse per una forte ripresa degli studi e delle discussioni sulla questione amministrativa, nella pratica dominò una sostanziale continuità con i periodi precedenti. Una serie di provvedimenti urgenti mirò, soltanto, a correggere le "deviazioni" del periodo fascista».

[14] Il testo del Codice veniva pubblicato su GU, n. 79, 4 aprile 1942 – Anno XX, pp. 1–284. Sull'iter di formazione di quel testo si vedano, fra gli altri, i contributi contenuti in: I cinquant'anni del codice civile, 2 voll., Giuffrè, Milano 1993; *C. Ghisalberti*, La codificazione del diritto in Italia 1865–1942, Editori Laterza, Roma-Bari 2000, pp. 235–279.

Estraneo, quindi, all'ideologia e alla dottrina del regime, quel testo utilizzava una sola volta la parola *fascista*, all'art. 147. Rubricato *Doveri verso i figli*, esso sanciva che i coniugi dovevano educare e istruire la prole in modo conforme «ai principî della morale e al sentimento nazionale fascista».[15] Espunte, a partire dal 1944, le poche norme espressione di concezioni politico-sociali ormai superate, abrogata la carta del lavoro ad esso premessa, quel Codice veniva, quindi, ripulito da quelle che il civilista Pietro Rescigno avrebbe definito «incrostazioni verbali».[16] Modificato dalla novella introdotta nel 1975 che lo avrebbe reso più rispondente al dettato costituzionale ed emendato da ulteriori, successivi interventi, esso risulta, nel suo impianto originario, ancora oggi in vigore.

Una tendenziale continuità si registrava anche con riferimento alle strutture amministrative, nonostante in una circolare del maggio del 1945 il presidente del consiglio Bonomi ricordasse l'urgenza di una riforma dell'amministrazione necessaria a renderla più funzionale alle nuove esigenze dello stato democratico.[17] Un *continuum* nella gestione degli apparati che veniva favorito sia dalla «sbandierata» neutralità della burocrazia statale che, a partire dagli anni Trenta, aveva fatto fatica a trovare una propria identità, stretta tra il potere politico e quelle che sono state definite le «burocrazie politicizzate» degli enti pubblici, sia dalla difficoltà di operare un radicale ricambio dei dirigenti e degli impiegati. Ricambio che era stato avviato attraverso l'attività di epurazione della pubblica amministrazione disciplinata da una serie di provvedimenti varati tra il dicembre del 1943 e il febbraio del 1948. Una legislazione farraginosa e ambigua, applicata fin dall'inizio in modo parziale, che avrebbe incontrato resistenze anche nello stesso schieramento politico antifascista.[18]

Se la Costituzione delineava, sotto il profilo politico-istituzionale, una netta discontinuità con il fascismo, l'ordinamento della pubblica amministrazione avrebbe presentato, invece, caratteri di forte continuità con il passato: facevano eccezione le norme che assegnavano al legislatore ordinario la competenza del comparto amministrativo (competenza che, a partire dal 1925, era stata attribuita all'esecutivo) e la separazione tra governo e apparati burocratici.[19] Altra importante innovazione era prevista in materia di autonomie locali dal momento che, insieme a

[15] «Il matrimonio impone ad ambedue i coniugi l'obbligo di mantenere, educare e istruire la prole. L'educazione e l'istruzione devono essere conformi ai principî della morale e al sentimento nazionale fascista» (art. 147): la citazione è tratta da GU, n. 79, cit., p. 24.

[16] Così *P. Rescigno*, Rilettura del codice civile, in: I cinquant'anni del codice, cit., I, p. 11. Sul punto, da ultimo, si veda anche *G. Cazzetta*, Codice civile e identità giuridica nazionale. Percorsi per una storia delle codificazioni moderne, II edizione ampliata, Giappichelli, Torino 2018, p. 67.

[17] Cfr. quanto riferisce *Melis*, Storia dell'amministrazione, cit., p. 401.

[18] Ivi, pp. 410–419.

[19] Il riferimento è a quanto previsto dagli artt. 95 e 97 della Costituzione. Cfr. a questo proposito quanto scrive *G. Astuto*, L'amministrazione italiana. Dal centralismo napoleonico al federalismo amministrativo, Carocci editore, Roma 2009, p. 270.

comuni e province, già presenti nell'ordinamento liberale e, pur con importanti modifiche, anche in quello fascista, i padri e le madri costituenti avevano introdotto anche le regioni, «enti autonomi con propri poteri e funzioni secondo i principî fissati dalla Costituzione».[20]

E tra quanti avevano teorizzato compiti e funzioni di questi nuovi enti autonomi figurava anche Gaspare Ambrosini, la cui vicenda umana e politica è caratterizzata e, in parte, condizionata dalla commistione di cesure e continuità, permanenze e mutamenti che abbiamo brevemente descritto.

II. Tra carriera accademica e impegno politico: la vicenda di Gaspare Ambrosini

Ambrosini nasceva il 24 ottobre 1886 a Favara, comune sito sul pendio del Monte Caltafaraci, a 10 km da Girgenti, l'attuale Agrigento.[21] Dopo aver completato il percorso di studi tra il paese natale e la città della Valle dei Templi, si trasferiva a Napoli per iscriversi alla facoltà di giurisprudenza dove avrebbe frequentato, tra le altre, anche le lezioni di *Statistica* tenute dal siciliano Napoleone Colajanni, repubblicano-socialista, eletto ininterrottamente alla Camera dei deputati tra il 1890 e il 1921.[22] Nel 1908 Ambrosini conseguiva la laurea e l'anno successivo, risultato vincitore del relativo concorso, faceva il suo ingresso in

[20] È quanto sanciva l'art. 115 della Costituzione approvata il 27 dicembre 1947. La citazione è tratta da https://www.nascitacostituzione.it/03p2/05t5/115/index.htm. Quell'art. veniva abrogato dall'art. 9, comma 2, della legge costituzionale 18 ottobre 2001, n. 3. Il suo contenuto confluiva nel nuovo art. 114 che, al comma 2, recita: «I Comuni, le Province, le Città metropolitane e le Regioni sono enti autonomi con propri statuti, poteri e funzioni secondo i princìpi fissati dalla Costituzione» (La Costituzione italiana. Il testo integrale, con Introduzione di G. Zagrebelsky, Gruppo editoriale l'Espresso SPA, Roma 2008, p. 41).

[21] Per notizie bio-bibliografiche si vedano, fra gli altri, *F. S. Oliveri*, Gaspare Ambrosini: etica e autonomie regionali. Profilo politico di un giurista, I. L. A. Palma, Palermo 1991; La figura e l'opera di Gaspare Ambrosini. Atti del convegno, Agrigento-Favara, 9 – 10 giugno 2000, a cura di F. Teresi, Quattrosoli, Palermo 2001; *A. La Russa*, Gaspare Ambrosini: l'uomo, il politico, il costituzionalista, L'Epos, Palermo 2007; *R. Bifulco*, *Ambrosini*, *Gaspare*, in: Dizionario biografico dei giuristi italiani (XII – XX secolo), diretto da I. Birocchi/E. Cortese/A. Mattone/M. N. Minetti, 2 voll., il Mulino, Bologna 2013, I, pp. 51 – 52.

[22] Sulla figura del deputato siciliano si vedano *J-Y. Fretigné*, Biographie intellectuelle d'un protagoniste de l'Italie libérale; Napoleone Colajanni (1847 – 1921): essai sur la culture politique d'un sociologue et député sicilien à l'âge du positivisme (1860 – 1903), École française de Rome, Rome 2002; *M. Zinzi*, Napoleone Colajanni, la questione meridionale nell'Italia postunitaria, Il Pensiero Edizioni, Catanzaro 2017; *E. G. Faraci*, Napoleone Colajanni: un intellettuale europeo, la politica e le istituzioni, Rubbettino, Soveria Mannelli 2018; *G. Vicari*, Il nostro grande Napoleone Colajanni, 1921 – 2021: la figura e l'opera a 100 anni dalla sua morte. Lo scienziato sociale tra l'Ottocento e il Novecento, La moderna, Enna 2021. Sul punto, da ultimo, cfr.: Napoleone Colajanni e il Meridione dai Borboni al Regno d'Italia al nuovo Millennio, a cura di A. Colajanni, V. Rizzo e F. M. Adonia, Officina della Stampa, Catania 2023.

magistratura e veniva assegnato a Torino. E proprio nella ex capitale del Regno si dedicava, sotto la guida di «due impareggiabili maestri di dottrina e di vita», gli ecclesiasticisti Francesco Ruffini e Francesco Scaduto,[23] anche alla ricerca, pubblicando i suoi primi lavori: nel 1909 vedeva la luce la monografia *Diritto ecclesiastico francese odierno (1880–1908)*, testo in cui l'autore, «giovane e valente»,[24] si dimostrava di «intelligenza limpida, pronta, acuta»,[25] e, tra il 1910 e il 1914, i due volumi dal titolo *Trasformazioni delle persone giuridiche.*[26] Il 1 novembre 1911, a soli venticinque anni, veniva chiamato quale professore straordinario di *Diritto ecclesiastico* presso l'Università di Messina, dove insegnava fino al 1915, anno dell'ingresso dell'Italia in guerra, e dove nel biennio 1913–1915 ricopriva, quale incaricato, anche la cattedra di *Storia del diritto italiano.*[27] Il 16 dicembre 1915 veniva nominato ordinario.[28] La carriera accademica di Ambrosini continuava dopo la fine del conflitto al quale aveva preso parte come ufficiale di artiglieria volontario: fino all'anno accademico 1936–37 prestava servizio quale docente di *Diritto costituzionale* presso l'Ateneo di Palermo dove insegnava anche *Diritto pubblico comparato*, *Scienza politica*, *Legislazione del lavoro e sindacale*, *Diritto corporativo* e *Storia e politica coloniale*,[29] discipline, queste ultime, introdotte dal regime tra la fine degli anni Venti e l'inizio degli anni Trenta al fine di rendere l'insegnamento universitario sempre più rispondente all'ideologia fascista;[30] dall'anno accademico 1937–38 si trasferiva alla Sapienza di Roma dove

[23] Così li definisce *G. Negri*, Ricordo di Gaspare Ambrosini, in: Ambrosini e Sturzo. La nascita delle regioni, a cura di N. Antonetti e U. De Siervo, con Presentazione di G. De Rosa, il Mulino, Bologna 1998, pp. 183–193, in particolare p. 183.

[24] Il volume veniva recensito da Giacomo Molle sulle pagine dell'Archivio Storico Italiano, serie V, 47, 1911, n. 262, pp. 472–475. La citazione è a p. 472.

[25] È quanto si legge nella Relazione della Commissione giudicatrice del concorso a due assegni per viaggi d'istruzione all'estero nel giugno 1909 per la Facoltà di giurisprudenza, datata Roma, 8 aprile 1909 e pubblicata sul Bollettino ufficiale del Ministero della istruzione pubblica, anno 1909, II semestre, Tipografia Operaia Romana Cooperativa, Roma 1910, pp. 2384–2392, in particolare p. 2389.

[26] I 2 volumi (Diritto Romano, Canonico e degli ex Stati Italiani e Diritto Moderno) venivano pubblicati per i tipi dell'Unione Tipografico-Editrice di Torino.

[27] Sul punto cfr. Il corpo docente della facoltà giuridica messinese (1827–1990), a cura di L. Vinti Corbani, con Prefazione di A. Metro, Centro di Documentazione per la Storia dell'Università, Messina 1993, pp. 14, 94, 128.

[28] Cfr. quanto si legge in R. Università degli Studi di Palermo. Annuario Accademico anno 1934–35 – XIII, Tipografia Michele Montaina, Palermo 1935, p. 40.

[29] Si vedano, a questo proposito, gli *Annuari* della R. Università degli Studi di Palermo, consultabili online all'indirizzo https://www.unipa.it/amministrazione/direzionegenerale/sba/u.o.archiviostoricodiateneo/raccolte-digitali/annuari-accademici/, ultima consultazione 09.08.2022.

[30] Sulle modifiche all'ordinamento universitario introdotte dopo l'emanazione della legge Gentile del 1923 cfr. *E. Pelleriti*, «Italy in transition». La vicenda degli Allied Military Professors negli Atenei siciliani fra emergenza e defascistizzazione, Bonanno editore, Acireale-Roma 2013, pp. 41–61.

avrebbe ricoperto inizialmente la cattedra di *Diritto coloniale* e, dopo la caduta del fascismo, quella di *Diritto amministrativo.*

Ricercatore attento e versatile, avrebbe concentrato i suoi studi su numerosi filoni di indagine tra cui, in particolare, la rappresentanza politica e i sistemi elettorali e la formazione di nuove organizzazioni statali.

Al primo tema si dedicava fin dal 1919 quando, dopo l'allargamento del suffragio ai cittadini maschi ventunenni disposto il 16 dicembre 1918 dal governo di Vittorio Emanuele Orlando, venivano introdotti, su impulso del presidente del consiglio Francesco Saverio Nitti, il sistema proporzionale e lo scrutinio di lista.[31] Varato con l'intento di rilanciare il sistema parlamentare consolidandone le basi, quel provvedimento avrebbe avuto delle importanti ripercussioni sul piano della rappresentanza politica, dal momento che le elezioni svoltesi il 16 novembre 1919 sancivano la vittoria di socialisti e cattolici, con conseguente pesante flessione delle forze governative (liberali, democratici e riformisti), per la prima volta in minoranza con soli 252 seggi su 508.[32]

Il portato di quel cambiamento, con l'analisi dei nuovi scenari politici ad esso collegati, veniva indagato da Ambrosini sia nella prolusione al corso di *Diritto costituzionale* dal titolo *La crisi del regime parlamentare e la rappresentanza proporzionale*, tenuta nel dicembre del 1920 all'Università di Palermo che, soprattutto, nei volumi *Partiti politici e gruppi parlamentari dopo la proporzionale* e *La riforma elettorale*, pubblicati rispettivamente a Firenze nel 1921 e a Palermo nel 1923[33]: un'indagine accurata, da cui emergeva una concezione nuova, e pluralista, del partito politico, in netta contrapposizione con quella dei liberali che, invece, non avevano gradito l'introduzione del sistema proporzionale, reo, tra l'altro, a loro giudizio, di aver «annullato» il rapporto personale tra elettori ed eletti.[34] Ambrosini riteneva che solo i partiti di massa favoriti dall'introduzione del proporzionale, portatori di complesse e non particolaristiche visioni della società, potessero rappresentare la sintesi tra pluralismo e necessità di unità politica.[35]

Riflessioni, queste ultime, che mutavano dopo l'avvento del fascismo quando Ambrosini sottolineava il rilievo politico e giuridico assunto dal Partito nazionale

[31] Il riferimento è alla legge 15 agosto 1919, n. 1401. Sul punto mi sia consentito rinviare a *V. Calabrò*, Breve storia dei sistemi elettorali in Italia, in: Donne, politica e istituzioni. Percorsi, esperienze e idee, a cura di M. A. Cocchiara, Aracne, Roma 2009, pp. 285 – 301, in particolare pp. 293 – 295.

[32] Sul punto cfr. *C. Ghisalberti*, Storia costituzionale d'Italia, cit., p. 335.

[33] Approfondimento sul tema in *Negri*, Ricordo di Gaspare Ambrosini, cit., pp. 184 – 185. Sul punto si veda anche *G. P. Trifone*, Un confronto sulla proporzionale: Francesco Ruffini e Gaspare Ambrosini, in: Iura and Legal System, B7, 2014, pp. 94 – 108.

[34] Sul punto si vedano le riflessioni di *A. Blando*, Gaspare Ambrosini. Dal fascismo all'invenzione dell'autonomia siciliana, in: inTrasformazione. Rivista di Storia delle Idee, 7, 2018, n. 2, pp. 108 – 135. Cfr. anche *F. Lanchester*, Rappresentanza e sistemi elettorali in Gaspare Ambrosini, in: Nomos. Le attualità nel diritto, 1, 2000, pp. 7 – 21.

[35] *Blando*, Gaspare Ambrosini, cit., p. 110.

fascista all'interno dello Stato, finendo per elaborare, come scrive Antonino Blando, il «sistema a partito unico».[36] Considerazioni che si possono rinvenire in due saggi pubblicati tra il 1931 e il 1934 che, forse non a caso, venivano editi uno nella miscellanea dal titolo *Il partito nella dottrina e nella realtà politica*, curata da Oddone Fantini, direttore del periodico *Università fascista*, e l'altro sulla rivista *Civiltà fascista* e successivamente stampato, con il titolo *Il Partito Fascista e lo Stato*, nella collana dell'Istituto nazionale di cultura fascista. Nella seconda serie dei *Quaderni* di quell'Istituto, veniva accolto, nel 1930, lo studio intitolato *Il Consiglio nazionale delle corporazioni*, in cui il giurista di Favara, dopo aver illustrato i presupposti alla base di quell'istituzione e come si era giunti all'emanazione della legge del 3 aprile 1926, n. 563 (che disciplinava i rapporti di lavoro e introduceva il sistema delle corporazioni), si soffermava sui caratteri generali di quell'organo, descrivendone le funzioni e, in particolare, i rapporti con parlamento, governo e gran consiglio del fascismo.[37] La serie decima di quei *Quaderni* ospitava, nel 1940, anche *L'Albania nella Comunità Imperiale di Roma*, comunità che veniva definita come un «nuovo *corpus misticum* formato di diverse parti, le quali però, pur concorrendo tutte al raggiungimento delle stesse mete comuni e pur traendone ognuna il proprio vantaggio, non si trovano sullo stesso piano».[38]

Un sostegno al regime e alla sua politica?[39] È quanto sembrerebbe emergere non tanto dal giuramento di fedeltà al fascismo prestato nel 1931 insieme alla quasi totalità degli altri professori universitari[40] (tra i pochi che avevano rifiutato di giurare figurava anche il giurista Ruffini di cui Ambrosini era stato allievo),[41] quanto piuttosto da alcune delle riflessioni contenute nel volume *L'Italia nel Mediterraneo*, pubblicato a Firenze nel 1927: in quel testo l'autore svolgeva, come

[36] Ivi, p. 108.

[37] Cfr. *G. Ambrosini*, Il Consiglio nazionale delle corporazioni, Libreria del littorio, Roma 1930.

[38] *G. Ambrosini*, L'Albania nella comunità imperiale di Roma, Istituto Nazionale di Cultura Fascista, Roma 1940, p. 63. Nelle serie terza, sesta e settima di quei Quaderni venivano pubblicati altri saggi del giurista siciliano, e rispettivamente: *G. Ambrosini*, Washington uomo di Stato, Treves-Treccani-Tumminelli, Milano-Roma 1932; ID., Il Regime degli Stretti, Istituto Nazionale di Cultura Fascista, Roma 1936; ID., I problemi del Mediterraneo, Istituto Nazionale di Cultura Fascista, Roma 1937.

[39] Sul delicato tema dell'adesione al fascismo dei giuristi italiani si vedano, fra gli altri, le riflessioni di *A. Mattone*, Il mondo giuridico italiano fra fascistizzazione e consenso: uno sguardo generale, in: Giuristi al bivio. Le Facoltà di Giurisprudenza tra regime fascista ed età repubblicana, a cura di M. Cavina, CLUEB, Bologna 2014, pp. 1–36; e *I. Birocchi*, Il giurista intellettuale e il regime, in: I giuristi e il fascino del regime (1918–1925), a cura di I. Birocchi e L. Lo Schiavo, Roma TrE-Press, Roma 2015, pp. 9–61.

[40] Il giuramento di fedeltà al regime richiesto ai professori di ruolo e incaricati era previsto dall'art. 18 del Regio decreto legge 28 agosto 1931, n. 1227 *(Disposizioni sull'istruzione superiore*), pubblicato su GU, n. 233, 8 ottobre 1931, pp. 4914–4924, in particolare pp. 4916–4917.

[41] Cfr., a questo proposito, *G. Boatti*, Preferirei di no: le storie dei dodici professori che si opposero a Mussolini, Einaudi, Torino 2010.

si legge nella *Prefazione*, un «esame generale della questione mediterranea […] indicando i diritti che ci competono incontrovertibilmente in base ai trattati internazionali».[42] Egli prendeva spunto da quello che definiva «l'ingiusto trattamento che gli Alleati ci fecero nei trattati di pace, violando gli impegni contratti prima e dopo la guerra» per supportare le pretese coloniali italiane.[43] Auspicava, pertanto, nuovi accordi con Francia, Inghilterra e Spagna per risolvere le questioni pendenti in modo duraturo e vantaggioso per tutti, concludendo: «Che se poi non trovassimo reciprocità di intenti, è fatale che troveremo lo stesso, non potendo subordinare i destini d'Italia al beneplacito di altri Stati, le vie per la realizzazione del nostro programma mediterraneo».[44]

Considerazioni che sembrano andare ben oltre la «posizione di neutralità» nei confronti del fascismo che gli è stata da più parti riconosciuta.[45]

A partire dagli anni Trenta, Ambrosini si dedicava anche ad un altro filone di ricerca: quello relativo alla formazione di nuove organizzazioni statali e, in particolare, degli stati regionali, *tertium genus*, a suo giudizio, fra lo stato unitario e quello federale.[46] Tema che affrontava in chiave comparativa, occupandosi delle realtà spagnola, austriaca, tedesca e sovietica.[47] L'interesse per il regionalismo risaliva a qualche anno prima quando aveva guardato con attenzione alla proposta che don Luigi Sturzo aveva presentato il 23 ottobre 1921 in occasione del III congresso nazionale del Partito popolare italiano di cui lo stesso sacerdote, anche lui siciliano, era stato il fondatore. Una regione che, secondo le parole di Sturzo, doveva avere le caratteristiche di «ente *elettivo-rappresentativo, autonomo-autarchico, amministrativo-legislativo*, sommando in se stessa tutti gli interessi collettivi locali dentro i limiti del proprio territorio».[48]

Quel tema sarebbe stato al centro di quella che Guglielmo Negri, uno degli allievi di Ambrosini, ha definito la «stagione più impegnativa e matura» del

[42] *G. Ambrosini*, L'Italia nel Mediterraneo, Franco Campitelli, Foligno 1927, p. VII.

[43] Ivi, p. VIII.

[44] Ivi, p. XIII.

[45] Cfr. quanto si legge in *Bifulco*, Ambrosini, Gaspare, cit., p. 51. *G. B. Varnier*, Giuristi italiani tra il retaggio del Risorgimento, la grande guerra e il fascismo. I profili biografici dei protagonisti, in: Storia e Politica, 11, 2009, n. 2, pp. 250–265, scrive, ad esempio, che Ambrosini «attraversò il fascismo limitando le compromissioni» (p. 256). Sul punto si veda anche *M. J. Palaez*, Tres hermanos que fuerono grandes juristas, servidores del fascismo, luego integrados en la democrazia republicana, in: Contribuciones a las Ciencias Sociales, octubre 2008 https://www.eumed.net/rev/cccss/02/mjp2.htm, ultima consultazione 09. 08. 2022.

[46] Si veda, nello specifico, *G. Ambrosini*, Un tipo intermedio di Stato tra l'unitario e il federale caratterizzato dall'autonomia regionale, in: Rivista di diritto pubblico, 2, 1933, pp. 94–100.

[47] *G. Ambrosini*, Autonomia regionale e federalismo: Austria, Spagna, Germania, U.R.S.S., Edizioni italiane, Roma 1944.

[48] La citazione è tratta da *E. Rotelli*, Profilo del regionalismo sturziano, in: Studi storici, 11, 1970, n. 1, pp. 113–132, in particolare p. 124.

pensiero del giurista siciliano: quella all'Assemblea costituente.[49] Stagione che segnava anche l'avvio della sua carriera politica, se si esclude la candidatura, per il collegio di Girgenti, presentata in occasione delle elezioni politiche del 1921 nella lista del Partito socialriformista guidato da Enrico La Loggia: in quell'occasione Ambrosini aveva ottenuto poco più di duemila voti, non sufficienti per conquistare un seggio in Parlamento. Operazione che, invece, gli riusciva il 2 giugno 1946 quando veniva eletto, tra le fila della Democrazia cristiana, nel collegio di Palermo, entrando, così, per la prima volta nell'aula di Montecitorio.[50]

Il 19 luglio 1946 veniva chiamato dal presidente dell'Assemblea costituente, il socialista Giuseppe Saragat, a far parte della commissione formata da 75 deputati incaricata di elaborare il progetto di Costituzione[51]: in particolare, Ambrosini veniva assegnato alla seconda Sottocommissione, che si sarebbe occupata di predisporre le norme in materia di organizzazione costituzionale dello Stato, e al Comitato di redazione, incaricato di armonizzare e coordinare il testo di quel progetto durante i lavori delle tre Sottocommissioni.

Autore di molteplici interventi (sul diritto di sciopero, sull'elezione dei senatori, sul potere giudiziario, solo per citarne alcuni), spettava a lui l'incarico di presentare ai colleghi della seconda Sottocommissione la relazione sulle autonomie regionali in cui illustrava lo schema di progetto del nuovo ordinamento che riprendeva, nel suo impianto generale, quello immaginato da Sturzo venticinque anni prima.[52] All'introduzione dell'istituto regionale, avversato dai comunisti, fautori di una visione accentrata dello Stato, avrebbe giovato l'istituzione, prima della promulgazione della stessa carta costituzionale, dello Statuto regionale della Regione Siciliana, approvato il 15 maggio 1946: nel corso dei suoi lavori, la Commissione incaricata di elaborare il progetto di Statuto per la Sicilia si era ispirata ai lavori sulle autonomie di Ambrosini.[53]

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[49] Così *Negri*, Ricordo di Gaspare Ambrosini, cit., p. 187. Sul contributo di Ambrosini alla Costituente si vedano, fra gli altri, *F. Teresi*, Gaspare Ambrosini alla Costituente padre delle regioni, in: Nuove autonomie, 2, 1996, pp. 199 ss.; *U De Siervo*, Sturzo e Ambrosini nella progettazione delle regioni, in: Ambrosini e Sturzo. La nascita delle regioni, cit., pp. 67–104; *V. Atripaldi*, Gaspare Ambrosini: «un politico con preparazione tecnica», in: Nomos. Le attualità nel diritto, 3, 2017, consultabile online all'indirizzo https://www.nomos-leattualitaneldiritto.it/wp-content/uploads/2018/01/Atripaldi-relazione.pdf, ultima consultazione 09.08.2022.

[50] Sul punto cfr. quanto riportato sulla scheda relativa a Dati personali e incarichi nella Costituente, consultabile online http://legislature.camera.it/chiosco.asp?cp=1&position=Assemblea%20Costituente/I%20Costituenti&content=altre_sezioni/assemblea_costituente/composizione/costituenti/framedeputato.asp?Deputato=1d6420, ultima consultazione 09.08.2022.

[51] Cfr. Assemblea Costituente (= AC), seduta del 19 luglio 1946, p. 129.

[52] La discussione sulle regioni si avviava il 27 luglio 1946: cfr. AC, Seconda Sottocommissione, seduta del 27 luglio 1947, pp. 5–18. La relazione di Ambrosini si può consultare all'indirizzo http://legislature.camera.it/_dati/costituente/lavori/relaz_proposte/II_Sottocommissione/30nc.pdf., ultima consultazione 09.08.2022.

[53] Sulle vicende che portavano alla redazione di quel testo si vedano, tra gli altri, *A. Romano*, Lo Statuto regionale siciliano di autonomia speciale nel contesto dell'evoluzione po-

III. L'esperienza alla Corte costituzionale

Concluso, il 31 gennaio 1948, il mandato alla Costituente, Ambrosini partecipava alla campagna elettorale per la formazione del I Parlamento repubblicano. Il 18 aprile 1948 veniva eletto, sempre per il collegio di Palermo e sempre tra le fila della Democrazia cristiana, alla Camera dei deputati.

Durante quella I legislatura presiedeva la II commissione rapporti con l'estero: un incarico prestigioso nel periodo sicuramente più complesso della politica estera italiana, quello della riabilitazione del paese e del suo graduale reinserimento nello scacchiere internazionale. Partecipava, in qualità di relatore di maggioranza, all'acceso dibattito che, il 21 luglio 1949, portava alla ratifica e all'esecuzione del trattato istitutivo della NATO, firmato a Washington il 4 aprile dello stesso anno[54] e, soprattutto, interveniva sul delicato tema della sorte delle ex colonie italiane riconoscendo come ormai definitivamente «tramontata […] l'antica concezione coloniale di espansione, di potenza e di sfruttamento dei territori e delle popolazioni native»[55]: una posizione profondamente diversa da quella che, vent'anni prima, animava le riflessioni contenute nel volume sull'Italia nel Mediterraneo.

Il suo impegno a livello internazionale continuava anche quando veniva chiamato a presiedere, dal febbraio al giugno 1953, la Commissione speciale per esaminare il disegno di legge relativo alla ratifica ed esecuzione del trattato istitutivo della Comunità Europea di Difesa firmato a Parigi il 27 maggio 1952 dai 6

litico-istituzionale dello Stato italiano, in: Iura Vasconiae, 7, 2010, pp. 387–404; *E. Pelleriti*, L'idea di autonomia siciliana nelle carte di Guarino Amella (1943–1946), in: Atti della Accademia Peloritana dei Pericolanti. Classe di Scienze Giuridiche, Economiche e Politiche, ESI, Napoli 2010, pp. 155–178; EAD., The idea of Sicilian Autonomy in the writings of Gaurino Amella (1943–1946), in: Assemblee rappresentative, autonomie territoriali, culture politiche. Representative Assemblies, territorial autonomies, politicas cultures, a cura di A. Nieddu e F. Soddu, Società Editrice Sarda, Sassari 2011, pp. 587–598; *D. Novarese*, Per una storia della Regione Siciliana. La stagione separatista e il progetto autonomistico, in: Donne, politica e istituzioni. Percorsi, esperienze e idee, cit., pp. 423–429; EAD., «Prima regione in Italia». Dai progetti allo statuto regionale siciliano, in: Autonomia, forme di governo e democrazia nell'età moderna e contemporanea. Scritti in onore di Ettore Rotelli, a cura di E. Colombo, P. Aimo e F. Rugge, Pavia University Press, Pavia 2014, pp. 235–248; EAD., «Sicily in transition». Le complesse vicende della redazione dello statuto regionale siciliano fra separatismo e autonomia, in: Autonomie speciali e regionalismo in Italia, a cura di L. Blanco, il Mulino, Bologna 2020, pp. 43–58. Da ultimo si vedano anche i contributi di *G. Astuto*, La Sicilia e lo Statuto Speciale da Nazione a Regione; *M. Carone*, Tra federalismo e decentramento autarchico: il «sistema intermedio» di Gaspare Ambrosini; *D. Novarese*, L'indipendentismo siciliano alla Costituente: Andrea Finocchiaro Aprile e il dibattito sulle autonomie locali in Studium Ricerca (sezione online di Storia*)*, 118 (2022), n. 2, rispettivamente pp. 87–193, 196–215 e 362–383.

[54] La discussione sulla ratifica di quel trattato si avviava alla Camera il 14 luglio 1949 per concludersi durante la seduta del 21 luglio dello stesso anno quando i deputati, con 323 voti favorevoli e 160 contrari, lo approvavano: cfr. Atti Parlamentari (= AP), Camera dei Deputati (= CD), I legislatura, seduta del 21 luglio 1949, p. 10746.

[55] Così Ambrosini in AP, CD, I legislatura, seduta del 26 maggio 1949, p. 8922.

paesi (Italia, Francia, Belgio, Olanda, Lussemburgo, Repubblica Federale Tedesca) già parte della Comunità Europea del Carbone e dell'Acciaio.[56] Un trattato che, com'è noto, non sarebbe mai entrato in vigore per la bocciatura, nell'agosto del 1954, da parte dell'Assemblea nazionale francese.[57]

A distanza di due anni della sconfitta elettorale del 7 giugno 1953, quando non veniva riconfermato alla Camera, aveva inizio la sua stagione alla Consulta, il più importante organo di garanzia costituzionale previsto dalla carta del 1948.[58] Un ritorno alla magistratura, dopo la breve parentesi degli inizi, che era stato anticipato dall'esperienza all'Alta Corte della Regione siciliana che, ai sensi dell'art. 25 dello Statuto approvato il 15 maggio 1946, aveva il compito di giudicare sulla costituzionalità delle leggi varate dall'Assemblea Regionale.[59]

Ambrosini veniva eletto giudice costituzionale, primo fra i cinque che, ai sensi del comma 1 dell'art. 135 dovevano essere designati dal Parlamento in seduta comune, al IV scrutinio, con 522 voti, il 15 novembre 1955, due anni dopo l'entrata in vigore della legge che disciplinava le norme sull'istituzione e il funzionamento della Corte costituzionale. Due anni durante i quali, a causa della *conventio ad excludendum*, i partiti di maggioranza e di opposizione si erano scontrati in un lungo ed estenuante braccio di ferro «registrato» dall'andamento degli stessi scrutini, il primo dei quali si era svolto il 31 ottobre1953.[60]

Il 20 ottobre 1962 il giurista siciliano veniva chiamato a ricoprire la carica di presidente della Corte e il 22 gennaio dell'anno successivo, alla presenza del presidente della repubblica Antonio Segni, pronunciava un discorso che può essere considerato una sorta di bilancio sui primi sette anni di attività della Consulta.[61]

Egli esordiva ricordando come l'esigenza di un sistema di controllo della legittimità costituzionale era stata avvertita anche dai padri della costituzione

[56] Sulla composizione di quella Commissione si veda https://storia.camera.it/organi/commissione-speciale-l-esame-del-disegno-legge-n-3077-ratifica-ed-esecuzione-degli-accordi#nav, ultima consultazione 09. 08. 2022.

[57] Sulle vicende relative alla nascita di quel trattato e alla mancata ratifica da parte della Francia si rinvia a *S. Guerrieri*, Un Parlamento oltre le nazioni. L'Assemblea Comune della CECA e le sfide dell'integrazione europea (1952 – 1958), il Mulino, Bologna 2016, pp. 93 – 125.

[58] Si veda, a questo proposito, quanto disposto dagli artt. 134 – 137: La Costituzione italiana, cit., pp. 49 – 50.

[59] Ambrosini era stato designato componente dell'Alta Corte dall'Assemblea Regionale il 29 luglio 1953, in sostituzione dello scomparso Giovanni Selvaggi. Sul punto si rinvia a quanto si legge in *F. Bonini*, Storia della Corte costituzionale, La Nuova Italia Scientifica, Roma 1996, p. 90.

[60] A proposito del lungo e complesso iter che avrebbe portato all'entrata in vigore della Corte costituzionale, Francesco Bonini parla di «una difficile istituzionalizzazione». Sul punto cfr. *Bonini*, Storia della Corte costituzionale, cit., pp. 67 – 115. Sulle vicende relative alla scelta dei giudici si veda ivi, pp. 91 – 110.

[61] *G. Ambrosini*, La Corte costituzionale nei primi sette anni della sua attività, Istituto Poligrafico dello Stato, Roma 1963.

americana, e in particolare da Alexander Hamilton, il quale ne aveva scritto nel *The Federalist*, la raccolta di articoli redatti da John Jay, James Madison e dallo stesso Hamilton e pubblicati tra il marzo e il giugno del 1788 al fine di difendere la costituzione federale, discuterne le principali innovazioni che tanto scalpore avevano suscitato nei suoi oppositori e promuoverne la ratifica da parte dell'Assemblea dello Stato di New York. Può essere utile ricordare che la prima edizione italiana di quel testo, pubblicata a Pisa nel 1955, era accompagnata da un'introduzione dello stesso Ambrosini.[62]

Dopo aver illustrato le complesse vicende che avevano portato all'istituzione della Corte e la varietà delle controversie dalla stessa prese in esame, il presidente Ambrosini svolgeva una breve analisi di «alcuni principî affermati dalla Corte che, per la loro vasta portata, possono considerarsi più caratteristici e fondamentali»[63]: tra questi, ad esempio, l'interpretazione autentica delle leggi e l'unità della giurisdizione costituzionale.

Sottolineando l'importanza dell'attività della Consulta, che definiva «suprema interprete e garante della Costituzione»,[64] egli concludeva il suo intervento affermando che «la vita ed il regolare funzionamento dell'ordinamento costituzionale non possono scompagnarsi dalla vita e dalla efficienza della Corte costituzionale per la garanzia di quei principî di rispetto della persona umana, di libertà, di democrazia e di giustizia, che stanno a base della Costituzione, e la cui integrale attuazione è indispensabile per l'ordinato vivere dei cittadini ed il pacifico progresso civile e sociale della Nazione».[65]

Sul contributo fornito dalla Corte all'attuazione della costituzione il giurista siciliano ritornava anche in occasione del discorso con cui, il 13 dicembre 1967, vent'anni dopo l'approvazione della carta costituzionale e dodici dopo l'istituzione della Consulta, lasciava quell'ufficio.[66]

L'anno successivo Ambrosini veniva chiamato dai presidenti di Camera e Senato per coordinare i lavori per gli *Studi per il ventesimo anniversario dell'Assemblea costituente:* un'opera in 6 volumi che veniva pubblicata nel 1969 a Firenze, per i tipi di Vallecchi, alla quale contribuiva con due saggi: nel primo svolgeva una sintesi dell'esperienza costituzionale «italiana» che, prendendo le mosse dal

[62] Cfr. Il Federalista (commento alla Costituzione degli Stati Uniti): raccolta di saggi in difesa della Costituzione degli Stati Uniti d'America approvata il 17 settembre 1787 dalla Convenzione federale, con Introduzione di G. Ambrosini e appendici di G. Negri e M. D'Addio, Nistri Lischi, Pisa 1955.

[63] *Ambrosini*, La Corte costituzionale, cit., p. 18.

[64] Ivi, p. 41.

[65] Ivi, p. 42.

[66] Cfr. *G. Ambrosini*, L'apporto della Corte costituzionale all'applicazione della Costituzione, Palazzo della Consulta, Roma, 13 dicembre 1967: il documento è consultabile online sul sito della Corte https://www.cortecostituzionale.it/documenti/download/pdf/19671213_pres_ambrosini_sito.pdf, ultima consultazione 09. 08. 2022.

periodo medievale, ricostruiva le vicende del parlamento di Sicilia fino ad arrivare alla costituzione repubblicana; nell'altro, invece, recuperando alcune delle considerazioni svolte nei discorsi pronunciati nel gennaio del 1963 e nel dicembre 1967, si soffermava a indagare l'importante contributo offerto dalla Consulta nell'attuazione dell'ordinamento costituzionale.[67]

IV. Per concludere …

Ambrosini si spegnava a Roma il 17 agosto 1985 a quasi novantanove anni: figlio del suo tempo, aveva attraversato il XX secolo, protagonista dei principali eventi e delle contraddizioni di quegli anni, dell'Italia che aveva assistito alla crisi del sistema liberale, conosciuto il consolidamento e il declino del regime fascista e, infine, optato per la forma repubblicana.

Osservatore attento, aveva seguito con interesse l'evoluzione/involuzione politica della società italiana dopo la fine della Grande guerra.

Fascista convinto o fascista opportunista? Come molti altri, aveva vissuto l'esperienza della dittatura, superando indenne il ventennio, collaborando con gli esponenti di tutte le forze politiche per dotare il paese di solide istituzioni democratiche che, da presidente della Corte costituzionale, si impegnava a consolidare e difendere.

Può essere considerato, a mio giudizio, simbolo ed emblema delle cesure e delle persistenze che, nell'Italia del secondo dopoguerra, avrebbero accompagnato il delicato passaggio dalla dittatura alla democrazia.

[67] Cfr. *G. Ambrosini*, Profilo storico del costituzionalismo italiano dai liberi Comuni e dal Parlamento di Sicilia alla Costituzione repubblicana del 1948, in: Studi per il ventesimo anniversario dell'Assemblea costituente, 6 voll., Vallecchi Editore, Firenze 1969, vol. I (La Costituente e la democrazia italiana), pp. 407–457; ID., La Corte costituzionale (L'apporto decisivo della sua giurisprudenza per la chiarificazione e lo svolgimento dell'ordinamento costituzionale), ivi, vol. VI (Autonomie e garanzie costituzionali), pp. 9–32.

From Sovietization to Democratization of Justice in Poland (1944 – 1997)

By *Bronisław Sitek* and *Albert Pielak*

I. Introduction

The justice system in Poland after the Second World War underwent thorough systemic transformations caused by the military introduction of the new communist political system. Poland was established within this political framework, in which the communist assumptions were introduced into the justice system. This period runs from 1944 to 1989. The road from Sovietization to the democratization of the justice system includes three main stages.

The first part covers the years 1944 – 1955 – the period of the introduction by force of a new political system in Poland, modeled on the solutions of the Soviet system. The judiciary was completely subordinated to political needs.

The second period covers the years 1956 – 1981, so the time from the so-called the Polish Thaw initiated by the 20th Congress of the Communist Party of the Soviet Union (CPSU) in Moscow (Russia). The effect of these events was a strong public hope for changes aimed at the normalization of the organization and functioning of the judiciary in Poland. However, this period is characterized by the stabilization of the communist justice system in Poland. The beginning of the efforts to democratize the judiciary in Poland was the establishment of Solidarność movement in 1980 and the articulation of the multifaceted needs of democratic changes on its forum. Ultimately, a symbolic act of defending the communist order was the introduction of martial law in Poland in 1981 and the banning of Solidarność Movement.

The third period covers the years from 1982 to 1997, and thus the time of the evolutionary democratization of the judiciary in Poland. These are events which included the political transformation in Poland as well as Central and Eastern Europe. It is worth noting that in the Polish model, the institutions characteristic for the rule of law in the judiciary[1] began to function even before the complete system transformation in 1989. The year 1997 symbolically ends these changes with the adoption of the new Constitution of the Republic of Poland in Poland.

[1] For example, the Constitutional Tribunal or the Supreme Administrative Court.

The authors used mainly the historical-legal and formal-dogmatic methods. It is worth noting, however, that the times of the communist rule in Poland are characterized by a large discrepancy between law in books and law in action. Therefore, it was necessary to make comments on the sociological and psychological determinants of the law of the Polish People's Republic. This approach is close to the method of legal realism.

Due to the wide time frames and because of multiplicity of detailed issues, the authors made an appropriate selection and hierarchy of content. The authors focused on the most important phenomena, but also tried to indicate at least some specific problems. The conclusions attempt to present generalized reflections, which may be helpful in interpreting the Polish model of democratization of the justice system.

II. Part I: Period 1944 – 1956, Introduction of the Soviet Model of Justice

1. Introductory Issues

The subject of this part of studies is the process of the sovietization of the Polish justice system in 1944 – 1956. Such a determination of the time interval is justified by historical facts. The year 1944 was the time when the Soviet Army entered the territory of the present Republic of Poland – it means they crossed the Curzon line agreed, by the leaders of the three power countries: Russia, United States of America, and Great Britain, during the Tehran Conference as the border between Poland and Russia. On 22nd July 1944, the so-called The Lublin Committee, a provisional government, a puppet body of executive power, completely dependent on the Soviet authorities, issued the first ideological document called the Manifesto of the Polish Committee of National Liberation. Thus, the period of Sovietization, or Stalinist terror, began in Poland, and its greatest intensity lasted until 1956, when the period of the Polish Thaw began, which started with the 20th Congress of the Communist Party of the Soviet Union. It was then that Khrushchev publicly criticized the cult of personality in the political system of the Union of Soviet Socialist Republics.

At the very beginning, it is necessary to clarify the meaning of the term "Sovietization". This concept covered a number of procedures implemented in Poland as well as in other Central and Eastern European countries, which, as a result of the agreements with Yalta and then with Potsdam, became the sphere of influence of the USSR. Sovietization is primarily the military imposition of a new system in Poland, including the army, police, public administration, and the judiciary. It was also a time of intense Marxist indoctrination of the whole society. Following the Soviet solutions, a security system was developed with very broad powers to surveillance every sphere of life. Often, political opponents were physically eliminated, control of social and youth organizations was taken, the struggle against the Catholic Church was in-

itiated and, in fact, civil rights and liberties were not respected. There was also no freedom of speech during that period.

The effect of sovietization was to create a unified society in terms of world outlook. The individual, in such a society, was to be directed according to the will of the party. The Russian dissident – Alexander Zinoviev began to describe a member of such a target society as *homo sovieticus.* This concept was explained by the famous Polish philosopher Józef Tischner in the second half of the 20th century.

Soon enough, the new communist authorities in Poland, with the great support of numerous Russian advisers present in Poland, subjugated the police, army, and public administration. Using the salami tactic (Hungarian: *Szalámitaktika*), the representatives of democratic parties were gradually eliminated, accusing them with fascist and anti-Soviet views. Police, army, and public administration became essential components of the new totalitarian system.[2]

In this view of the political changes which took place in Poland after World War II, a fundamental question arises about the functioning and role of the judiciary in creating the new totalitarian state?

2. Characteristics of the Functioning of the Judiciary

Prima facie, it would seem that the justice system in Poland looked quite good after defeating Nazi Germany. This erroneous belief can be based on the fact that during the German occupation in the General Government[3], so on a small part of the pre-war territory of Poland, Polish courts operated under German control with quite well educated pre-war legal staff, especially judges. Such courts did not function in the areas incorporated directly into the Third Reich, for example: in the Warta or in Silesia. The scope of jurisdiction of Polish courts was limited mainly to civil and criminal cases which did not fall within the competence of German courts. After the war, these judges found employment in courts organized by the communist authorities within the newly shaped state borders.

The Soviet authorities, along with the Polish communists who favored them, tried to maintain the appearance of legalism. This was reflected in the preservation of a large part of the pre-war legislation. Only the April Constitution of 23rd April 1935, which legitimized the political system of the Sanation (Sanacja) in interwar Poland, was rejected. In this way, the illusion of introducing the new regime through

[2] *S. Phillips*, The Cold War: Conflict in Europa and Asia, Heinemann 2001, p. 33.

[3] The General Government was created on the basis of the ideas from World War I when Germany wanted to create a puppet state of the Kingdom of Poland within Central Europe. See: *C. Madajczyk*, Generalna Gubernia w planach hitlerowskich, Warszawa 1961.

democratic changes, not revolution was given. However, new tasks were placed before the judiciary.[4]

In the above-mentioned Manifesto, it was stated that the task of independent Polish courts will be to ensure the speedy administration of justice. This seemingly calm phrase was in fact a reference to the summary courts introduced in the USSR under NKVD (The People's Commissariat for Internal Affairs) order No. 00447 of 30th July 1937.[5] The purpose of these courts was the rapid, mostly physical, elimination of "anti-communist elements." The indication in the Manifesto of the need to ensure the speed of court proceedings was a clear encouragement for the judges to join the process of supporting the building of the communist system and the fight against the political opposition.[6]

For the sake of appearances, the pre-war legislation, including the 1932 criminal code, was preserved. However, it was supplemented or rather amended by decrees issued quite frequently in that period, which will be discussed below. The model for the new legal solutions introduced in the decrees was, of course, the legal and judicial system of the Soviet Union. The further in time, the more the law and the judiciary became dependent on political power.[7] The law quickly lost its normativity and became an instrument of violence in the hands of the authorities. The law was illegible for citizens, and judges and prosecutors were granted the right to interpret it freely. Moreover, the fundamental principle of *lex retro non agit* was notoriously violated. Intimidating citizens has become the basic function of state organs, including the judiciary.[8]

Due to the need of protection the interests of the new government and to combat the anti-communist opposition in Poland, the simplification of adjudication of judgments has been introduced. An example of this was the ad hoc procedure conducted

[4] *A. Lityński*, Sowietyzacja wymiaru sprawiedliwości w Polsce w latach 1944–1950, Roczniki Administracji i Prawa 20 (2020), vol. 3, p. 104.

[5] NKVD order No. 00447 on the operation of repressing former kulaks, criminals, and other anti-Soviet elements. See *A. Lityński*, Dokumenty nieludzkiego terroru w związku z ukazaniem się zbioru: Z dziejów terroru w państwie radzieckim 1917–1953. Wybór źródeł. Wstęp, tłumaczenie i opracowanie Jakub Wojtkowiak, Poznań 2012, Roczniki Administracji i Prawa 14 (2014), pp. 334 (323–337).

[6] *A. Lityński*, Sovietization, op. cit., p. 104. What can be significant here is the reply from the Chairman of the Polish Committee of National Liberation, Edward Osóbka-Morawski, addressed to Leon Chajn, who was entrusted with the organization and management of the justice system in post-war Poland. Leon Chajn asked whether the pre-war legislation was still in force. In response, the Chairman of the Polish Committee of National Liberation said that the action program in this regard was included in the Manifesto. I quoted after *A. Lityński*, Sovietization, op. cit., p. 105, fn. 15.

[7] *P. Kładoczny*, Kilka uwag na temat dekretu z 30 października 1944 r. o ochronie państwa, "Studia Iuridica", vol. 35: 1998, pp. 137–158.

[8] *A. Bosiacki*, Prawo stalinowskie i jego recepcja w Polsce 1944–1956 – zarys problematyki, in: W. Kulesza/A. Rzepiński (eds.), Przestępstwa sędziów i prokuratorów w Polsce lat 1944–1956, Warszawa 2000, pp. 42–43.

by a prosecutor, in fact an officer of the public security organs. The *ad hoc* procedure was completely politicized. The accused did not have the opportunity to appeal, and the proceedings themselves were usually conducted without a prior investigation.[9] Therefore, it was not possible to speak of the independence of the judge or the right of the accused to a fair sentence.

3. Characteristics of the Organization of the Judiciary

Initially, it means in the years 1944 – 1946, the trials under the decree of 31st August 1944 were settled in special criminal courts in which judges and prosecutors delegated from common courts. From October 1946 to 1949, these cases were heard by district courts, and from 1949 to 1951 – courts of appeal.[10] In 1951, these cases returned to the jurisdiction of voivodship courts. Originally delegated judges to special criminal courts were selected in terms of cooperation with the authorities.

In January 1946, the Military District Courts were established, which operated until 1955 in 17 voivodship cities. The jurisdiction of these courts covered not only soldiers, officers of the Citizens' Militia and officers of the Security Office, but also civilians who were accused of committing the crime under article 85 – 88 of the Criminal Code of the Polish Army. It should be said that three-quarters of the death sentences out of a total of approx. 5,000 judgments issued in the years 1944 – 1989 were passed before military courts. In addition, many sentences for alleged anti-state activities were imprisoned for many years, including life imprisonment. The number of death sentences and the severity of the punishments imposed indicate the use of revolutionary methods similar to those used in the times of terror in the USSR in the 1930s (during the Great Purge).

In the years 1944 – 1956, the function of the investigative body was taken by the Ministry of Public Security. It was an employee of this ministry who decided on the arrest and the length of time the detainee remained in custody. The prosecution was only an advisory body reporting directly to the investigating officers. It was at the meeting of the political bureau of the Central Committee of the Polish Workers' Party and then of the Polish United Workers' Party, that decisions were made on specific court trials, on the appointment of prosecutors, on the moment of initiating a trial, and on the power of pardon. The communist party had full control over the common judiciary in 1949.[11]

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[9] *A. Lityński*, Na drodze ku nowej procedurze karnej: o postępowaniu przygotowawczym w latach 1943 – 1950, in: W. Kulesza/A. Rzepiński (eds.), Przestępstwa sędziów i prokuratorów w Polsce lat 1944 – 1956, Warszawa 2000, p. 56.

[10] *A. Kornbluth*, "Jest wielu Kainów pośród nas". Polski wymiar sprawiedliwości a Zagłada, 1944 – 1956. Zagłada Żydów. Studia i Materiały 9 (2013), p. 158 (157 – 172).

[11] *M. Zaborski*, Ustrój sądów wojskowych w Polsce w latach 1944–1955, Lublin 2005, p. 15 and the following.

Most of the cases were conducted in violation of basic procedural steps. The accused most often did not have the opportunity to benefit from professional legal assistance, they did not have access to the case files, and the verdict was *de facto* decided at a meeting of the Party's Central Committee.

4. Personnel Selection

As it has already been mentioned, until the turn of the 1940s and 1950s judges and prosecutors educated still in the interwar period worked in the courts. They were often graduates of renowned pre-war Polish universities, including the Jagiellonian University, the University of Warsaw, the University of Lviv or even the Catholic University of Lublin. Often, Soviet officers with Polish-sounding surnames or with Polish roots were added to the judge panel. Military discipline and the structure of military subordination facilitated the passing of judgments favorable to political decisions.

The original model of selecting judges, which was using pre-war lawyers, was done in 1948. The new authorities were not satisfied with the functioning of judges due to their lack of full political availability. Hence, a decree was issued on 2nd January 1946 on the exceptional admission to hold positions of judges, prosecutors, and notaries and to be entered on the list of attorneys.[12] Already in the first article of that decree, it was decided that the performance of prosecutorial judges' duties may be entrusted to people who have not completed university law studies, have not completed a judicial apprenticeship, and have not passed the judicial examination.[13] Candidates for judges did not have to present a matriculation examination. Peasant or working-class origin was preferred. As a result of the decree, the Minister of Justice established six law schools in various parts of Poland. The course for candidates for judges lasted from six to fifteen months and was aimed not only at the practical preparation of students for the profession of judge or prosecutor, but above all, the appropriate ideological formation of future legal staff.[14] In total, 1,130 students graduated from these courses.[15]

These schools, however, did not have the status of a higher education institution, therefore, on 1st June1948, the Teodor Duracz Central Law School was established which on 1st April 1950 was transformed into the Higher Law School. This school existed until 1953 and 421 people graduated from it. The principles of selecting candidates for this school were similar to those of the previous schools. In the years

[12] Dz. U. (Journal of Laws) no. 4 item 33.

[13] *A. Lityński*, Sowietyzacja, op. cit., p. 113.

[14] *M. Zaborski*, Szkolenie "sędziów nowego typu" w Polsce Ludowej, cz. 1, Palestra 1998, vol. 1–4.

[15] *F. Westerman*, Inżynierowie dusz, trans. S. Paszkiet, Warszawa 2007, p. 34; *Z. Ziemba*, Przygotowanie i rozwój kadr sądownictwa Polski Ludowej, in: XXV lat wymiaru sprawiedliwości PRL, Warszawa 1969, p. 143.

1948 – 1954, the legal staff was also educated at the Officers' School of Law, which was then transformed into the Military and Legal Faculty at the Feliks Dzerzhinsky Military Political Academy.[16] Of course, educating new staff at a rapid pace, available to the communist authorities, and without proper legal training, was modeled on the solutions previously used in Soviet Russia.

Acquiring new human recourses was associated with the removal of old judges. A new phenomenon was the affiliation of judges to a political party. Almost half of the judges, especially those without legal training, were members of the Communist or satellite parties. The highest level of politicization of judges was in provincial courts and in the Supreme Court. In this perspective, it was difficult to talk about the independence of the judges of that time, even though the communist propaganda proclaimed something completely different. It can be repeated after A. Lityński that the communist system was the most mendacious political system.[17]

5. Ruling in the Courts

a) Characteristics of Ruling

The severity of the new provisions of the criminal law, introduced by decrees, was manifested primarily in the fairly frequent sentencing of the death penalty, often combined with the confiscation of the convicted person's property. The regulations applied in Soviet Russia were the model for the new solutions. Hence, forced labor camps were introduced in Poland and court judgments were issued retroactively.

Despite archival research conducted for a long time, it is impossible to establish the exact number of people sentenced to death in the years 1944 – 1956. A register of such judgments was kept by the Ministry of Public Security, but it is known that this register is not complete. The greatest number of death sentences was issued in the period from 1944 to 1948, it is nearly 70% of the total number of 5,000 of all death sentences issued during the Polish People's Republic, it means until 1989.[18] About 70 percent of these sentences have been carried out.

An additional ailment of those sentenced to death was keeping them in the uncertainty of the execution of the sentence or in a narrow cell without windows with a constantly burning light. Sometimes convicts were allowed to write a farewell letter to their family, but many of them ended up in the prison archives. The motive behind the military judges deciding the death penalty was not always the degree of gravity of the offense, but the position that the accused occupied in a political or anti-govern-

[16] *A. Lityński*, Sowietyzacja, op. cit., p. 114; *M. Zaborski*, Oficerska Szkoła Prawnicza, "Palestra" 1998, vol. 5 – 6, p. 131 – 141; *A. Machnikowska*, Wymiar sprawiedliwości w Polsce w latach 1944 – 1950, Gdańsk 2008.

[17] *A. Lityński*, Sowietyzacja, op. cit., p. 115.

[18] O karach śmierci w latach 1944 – 1956, in: https://www.polska1918-89.pl/pdf/o-karach-smierci-w-latach-1944-1956,5994.pdf, last visit 14. 08. 2021.

ment organization. As a rule, the death penalty was imposed on commanders of partisan units or anti-communist social organizations. There were judges who handed down about 300 death sentences, 180 of which were carried out.[19] Death sentences were also issued by Soviet judges in Polish uniforms.[20]

The trials were sometimes propagandistic in nature, which was a transfer of solutions used in Russian courts in the 1930s. The purpose of this was to intimidate the public. Attempts were made to publicly discredit the accused, accusing him or her of collaborating with the Nazis, foreign intelligence, or murdering representatives of public authorities. It was done according to the principle "lie, lie and there will always be something of it", very often used by Goebbels, Lenin, and Stalin.

The accused were often physically and mentally tortured, and the mere admission of the suspect's guilt was the basis for the conviction. The falsification of evidence against the accused was on the agenda. Gestapo's (the Secret State Police) forms and stamps were used for this. Sometimes the Nazis in Polish prisons were forced to give false testimony.[21]

b) Legal Grounds for Issuing a Criminal Conviction

Court's ruling, especially in criminal cases, was theoretically based on the pre-war penal code of 1932. However, the legal system was fairly quickly supplemented with new normative solutions issued in the form of decrees, which was already mentioned. On the basis of the first decree of 31st August 1944, the death penalty was imposed on people collaborating with the German occupation authorities. This cooperation could consist in murdering civilians, prisoners of war, and their mistreatment or persecution. Moreover, the punishment could have happened to those who showed the Nazi authorities place of stay of the wanted person.[22] However, this seemingly correct directive was used to condemn the political opponents of communism to death, especially members of the Home Army, the largest armed organization in all territories occupied by the Germans, accusing them of collaborating with the occupation authorities.

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[19] Ibidem.

[20] *K. Szwagrzyk*, Prawnicy czasu bezprawia. Sędziowie i prokuratorzy wojskowi w Polsce 1944–1989, Kraków 2005; *Ł. Bojko*, Kilka uwag o sądach tajnych stalinowskiej Polski, in: Studia nad Autorytaryzmem i Totalitaryzmem, 37(2015), pp. 35–50.

[21] *R. Stokowiecki*, Specyfika sądownictwa w Polsce w latach 1944–1956 (część 2); *J. Poksiński*, "TUN". Tatar-Utnik-Nowicki, Warszawa 1992, pp. 43–44; *A. Werblan*, Stalinizm w Polsce, Warszawa 2001, p. 72.

[22] Decree of the Polish Committee of National Liberation of 31st August 1944 on the penalty for fascist-Nazi criminals guilty of murdering and tormenting civilians and prisoners, and for traitors of the Polish Nation. Journal of Laws of 1944, No. 4, item 16. In addition to the death penalty, additional penalties were envisaged, such as: loss of public and civil rights of honor, confiscation of all property, and even confiscation of property of the accused's spouse and his children, with the exception of property from their own assets.

On the basis of the decree of August 1944, approximately 3,000 members of the Union for Armed Struggle-Home Army were sentenced to death in Poland for activities hostile to the socialist homeland during the war. Most of these sentences were carried out, including those against the famous general of the Polish underground Nile Fieldorf. The problem, however, was that during the war, when the Home Army fought against the German occupiers, the Polish People's Republic did not yet exist. Thus, it was obvious to the communist authorities that the law could operate retroactively, and the courts could break the basic principles of the rule of law and human rights.

An important issue was the resolution of the effectiveness of judgments issued by German and Polish courts operating during World War II in the territory of the General Government. According to the article 1 of the decree of 6th June1945 on the binding force of court decisions issued during the German occupation in the territory of the Republic of Poland, it was decided that judgments and other decisions issued by German courts during the occupation were invalid and deprived of legal effects. In turn, the article 11 of the decree stated that the proceedings before Polish courts during the occupation in the territory of the former General Government and the decisions issued by these courts were valid. This legal act also regulates a number of other issues, including effectiveness of initiated proceedings, value of collected evidence. However, this issue is not of great importance in our discussion, but it is an important supplement to the image of the ruling system in the period from 1944 to 1956.

Further rules of imposing penalties and the size of penalties were included in the Criminal Code of the Polish Army of 23rd September 1944.[23] In the article 5 of the Code, the subjective scope of the act was defined. It was decided that it concerns soldiers, persons obliged to military service, prisoners of war and other people. In the last case, civilians were brought before military courts. In the article 34 provided for, inter alia, the death penalty, which could have been carried out by shooting. The death penalty was provided for in the articles 85 and 86 for acts classified as crimes against the state. Such acts included an attempt to deprive the Polish State of its independence or an attempt to forcibly remove any body of supreme authority. These wording, not very precise, became an excellent legal basis for classifying any act which would raise concerns on the part of the new authorities as a crime against the state and the death penalty imposed on the accused.

The decree on the protection of the state of 30th October 1944[24] was issued during the war, hence it regulated acts related to the war, including undertaking sabotage activities, activities aimed at overthrowing the democratic Polish State, obstructing the implementation of land reform, collecting, and storing weapons. These activities were punishable by imprisonment or the death penalty.

[23] Dz. U. (Journal of Laws) 1944 no. 6 item 27.

[24] Dz. U. (Journal of Laws) 1944 no. 10 item 50.

Another legal act was the decree of 16th November 1945 on crimes particularly dangerous in the period of state reconstruction, modified by the decree of 13th June 1946, introducing provisions of substantive criminal law related to the category of offenses defined as particularly dangerous crimes. These acts include, among others: sabotage, collecting and storing firearms, cooperation with foreign intelligence, misleading the Polish authorities by providing forged documents of importance to the security of the state or counterfeiting money. In total, the death penalty could be imposed in as many as 13 cases. These acts were punishable by imprisonment or the death penalty. Fighting this type of crime, and with all severity, was particularly important for the construction of the system of totalitarian power. From this perspective, the death penalty has ceased to be an exceptional punishment, but it has become a fairly commonly served punishment.

The decree of 22nd January 1946 on the responsibility for the September defeat and the fascization of state life was extremely interesting.[25] The communist authorities, fearing the reaction consisting in attempts to restore the system of pre-war Poland, identified such actions with fascist actions. An equal sign was made between the Sanation and fascism. For such actions, one could be sentenced to death or long imprisonment.

Finally, on 22nd July 1952, the Constitution of the Polish People's Republic was adopted.[26] This basic law was written according to Soviet models and even to Stalin's handwritten instructions. The solutions adopted in it did not bring anything new, but only sanctioned and strengthened the hitherto gains of the "people's power" also in the area of the justice system. Nevertheless, attention should be paid to the article 48 of the Constitution, in which the socialist legislator decided that *the courts guard the system of the People's Republic of Poland, protect the gains of the Polish working people, and protect the rule of law of the people.* Undoubtedly, such formulation of goals for the judiciary involved a far-reaching politicization of the courts.[27] According to S. Włodyka, the article 46 of the Constitution is of key importance. It shows that the administration of justice is to be administered by courts. According to this author, there are only one doubt as to the nature of this provision, namely whether it was a directly applicable standard or a legislative recommendation. S. Włodyka believes that the second explanation is correct, because in the light of the article 46 of the Constitution of the People's Republic of Poland, the competence of the court arises from the statute, and these acts are created by the political authority.[28]

[25] Dz. U. (Journal of Laws) 1946 no. 5 item 46.

[26] Dz. U. (Journal of Laws) 1952 no. 33 item 232.

[27] *Z. Resich*, Pojęcie sprawiedliwości w świetle ostatniej nowelizacji Konstytucji PRL, Nowe Prawo 3 (1977), p. 311 (303–313).

[28] *S. Włodyka*, Konstytucyjna zasada sądowego wymiaru sprawiedliwości w PRL, Państwo i Prawo 19 (1964), z. 11, p. 664. (654–668).

6. Summary

As it is rightly noted by P. Kładłoczny, the law and justice for the communist system, introduced in Poland by the strength of the Soviet army and the Potsdam Agreement, played an important role in creating a new political order in Poland.[29] The communist authorities in Poland, adopting the Soviet models, quickly carried out the process of sovietization of the judiciary. By creating the appearance of the continuity of the legal system and organization of the judiciary in Poland, they, *de facto*, created new legal foundations for the introduction of judicial terror in the years 1944 – 1956. For this purpose, the staff was replaced, allowing people to court ruling not only without legal education, but even without high school diploma.

During this period, most judges were party members. In this perspective, it was not possible to speak of judicial independence, fair trials, and the implementation of the human right to a fair trial.

III. Part II: Period 1956 – 1981, Stabilization of the Soviet Model of Justice

1. Introductory Issues

October 1956 was a period of political turning point in the People's Republic of Poland, which resulted in a change in the leadership of the Polish United Workers' Party. According to the overwhelming opinion of historians, this is a time mark, the basis of which was the transition from a totalitarian regime to an authoritarian regime in Poland.[30] While this thesis seems a bit exaggerated[31], it is necessary to point out some reforms in the field of the judiciary which were undertaken, but which, however, did not meet the social expectations placed on them.

It should be noted that the political system of the People's Republic of Poland, like the USSR, did not develop any other change of the political leader of the state (the

[29] *P. Kładoczny*, Kształcenie prawników w Polsce w latach 1944 – 1989, Studia Iuridica 35 (1998): 89 – 114.

[30] *R. Backer*, Totalitaryzm w Polsce lat 1948 – 1956, Czasy Nowożytne, vol VI/1999, pp. 7 – 16; *K. Kersten*, Rok 1956 – przełom? Kontynuacja? Punkt zwrotny? Polska 1944/45 – 1989, Studia i materiały, vol III/1997, p. 18.

[31] For example, J. Kofman believes that "roughly until 1988 – 1989, there was a system in Poland characterized by a decisive predominance of the elements of totalitarianism contained in it". *J. Kofman*, Totalitarianism and the People's Republic of Poland, Civitas. Studies of the philosophy of politics, 14/2012, p. 55. L. Mażewski, who described the years 1956 – 1989 as "post-totalitarian authoritarianism of the People's Republic of Poland", made an in-depth analysis of the paradigm shift in communism in the People's Republic of Poland, which should be regarded as an intermediate position. See *L. Mażewski*, Post-totalitarian authoritarianism of the People's Republic of Poland. The years 1956 – 1989. Political system analysis, Warsaw 2010, pp. 1 – 233.

First Secretary of the Party), other than his death or overthrow. The phenomenon of "gerontocracy" as manifested by the lack of circulation of the elite has often been mentioned. Political changes most often took place in the period when the inefficiency of the centrally planned economy was revealed, which was not able to meet the basic living needs of citizens in the system of unity of state power, along with the leading role of the Party.[32]

During the so-called the "Polish Thaw", numerous measures were taken to soften the totalitarian face of the authorities,[33] but in no case did they mean the democratization of the political and judicial system of the People's Republic of Poland. Despite the release of approx. 35 thousand people unjustly deprived of their liberty, including Cardinal Stefan Wyszyński, the judiciary continued to be under the control of the only political party – Polish United Workers' Party,[34] which was not directly expressed in any legal act. It should be noted that the Polish United Workers' Party stood above the sovereignty,[35] constituting in the nomenclature of that time "the vanguard of the working class".[36]

The party stood above the constitutional system of state organs,[37] and had the impact and the influence on the constitutional principle of the judiciary and its understanding.[38] By rejecting the principle established in Western democracies of the Montesquieu's tripartite division of powers, the principle of the uniformity of state power was introduced.[39] The sovereign in the People's Republic of Poland was not, as the sham Constitution of 1952 proclaimed, "working people of towns and villages", but the party. The limitation of state autonomy in favor of party monopoly, which, according to M. Foucault, is the essence of totalitarianism, was still far-reaching.

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[32] See: *A. Łopatka*, Kierownicza rola partii marksistowsko-leninowskiej w procesie budownictwa socjalistycznego, Poznań 1962.

[33] For example, the following were carried out: the reinstatement of the expelled professors at universities, the removal of the name of Stalin from the official name of the Palace of Culture and Science in Warsaw, the recognition of monuments and the name of the Warsaw Uprising Square in 1944, the change of the name of the city from Stalinogród to Katowice.

[34] There were indeed the so-called satellite political parties, however, should be denied any role in influencing decisions. They were called the "licensed opposition" because it only gave the appearance of democracy.

[35] *J. Gutt*, O przodującej roli PZPR kilka uwag, ND nr 1/1958, p. 20; *A. Łopatka*, Kierownicza rola partii marksistowsko-leninowskiej w systemie demokracji socjalistycznej, Nowe Drogi no 2/1970, p. 18 i n.

[36] *I. Loga-Sowiński*, Partia na czele narodu w walce o wolność i socjalizm, Nowe Drogi no 1/1967, pp. 4 – 18.

[37] *T. M. Jaroszewski*, Kierownicza rola partii w warunkach intensywnego rozwoju, Nowe Drogi no 3/1971, p. 111.

[38] It was then written enigmatically about the "superior management" of *S. Włodyka*, Konstytucyjna zasada, op. cit., p. 656.

[39] *Z. Izdebski*, Rewizja teorii podziału władzy, Państwo i Prawo nr 11/1957, p. 787 i n.; *L. Mażewski*, O stanie polskiej doktryny jednolitości władzy, Państwo i Prawo nr 2/1984, pp. 52 – 64.

2. Justice System of the Polish People's Republic in the Years 1956 – 1970

The state of the judiciary in relation to the party in 1957 was correctly diagnosed by M. Cieślak.[40] The momentary possibility of more freely expressing views, which lasted after the thaw more or less until the end of 1957, and the equally temporary trend of searching for the "Polish road to socialism", allowed him to articulate his doubts, which he closed in the rhetorical question "the principle of judicial independence correspond to the fundamental assumptions of the socialist system – is it possible to reconcile with the principle of the party's leading role?"[41]

Then, he distinguished five institutionalized elements in which the party influences the judiciary. He noticed them in the areas of shaping statutes, shaping personnel matters, political work, meetings of judges with the participation of representatives of party organs[42] and discussions in national councils.[43]

In terms of shaping the acts, it is worth noting that their role in the legal system was reduced, in line with the phrase by the First President of the Supreme Court of the People's Republic of Poland, to "expressing the will of the people who built socialism, the people who implemented the Party's policy".[44] It resulted that "the act may not be interpreted by the judge in a manner inconsistent with the basic principles of Marxism and Leninism, which define the guidelines for the construction of the socialist system".[45] For judges, the model of the semi-secret *lex telex*, described in the further course of the discussion, was more important than the classic *lex*, which in democratic countries are subject to judges.

With regard to the shaping of the judiciary system, the changes were introduced after the thaw of 1956, which, despite the initial hopes for democratization, consolidated the principles of the judiciary introduced just after World War II.

In 1957, the amendment to the law on the system of common courts[46] formally ensured the participation of judges in the court management process, but they were actually under the control of the presidents of Voivodship Courts appointed by party appointments.[47] However, the tightening of the requirements for candidates

[40] *M. Cieślak*, Niezawisłość sędziowska a Partia, Palestra, no 2/1957.

[41] Ibidem, pp. 6 – 7.

[42] In the course of compulsory meetings and training of judges, the Party's jurisprudence policy was dictated.

[43] *M. Cieślak*, Niezawisłość, op. cit., pp. 11 – 14.

[44] Quote after: *A. Rzepliński*, Sądownictwo w PRL, Londyn 1990, p. 23.

[45] *Z. Resich*, Nauka o ustroju organów ochrony prawnej, Warszawa 1970, p. 55.

[46] Ustawa z dnia 29 maja 1957 r. o zmianie przepisów prawa o ustroju sądów powszechnych (Dz. U. nr 31, poz. 132 i 133). The Act of 29th May 1957 amending the provisions of the law on the system of common courts (Journal of Laws No. 31, items 132 and 133).

[47] *K. Niewiński*, PZPR a sądownictwo w latach 1980 – 1985. Próby powstrzymania solidarnościowej rewolucji, Białystok 2016, p. 10.

for judges should be assessed positively, by including in the article 57 the necessity to complete "university law studies", "undergo a judicial training" and "pass a judge's examination". However, the theoretical and façade nature of this regulation is illustrated by the fact that in the period from 1st January 1959 to 1st May 1960, seventeen party members, who had previously been state officials, were appointed to held the office of judge. The act could not restrict the Party's personnel policy towards the judiciary.

Despite the emancipation of the Supreme Court from the common judiciary in 1962,[48] its far-reaching dependence on the Council of State and the Minister of Justice was maintained.[49]

It is also worth paying attention to the significant reform of the common court system of 1963,[50] which was introduced by the article 64 § 1 stating: "The Council of State, at the request of the Minister of Justice, dismisses a judge, if he or she does not guarantee the proper performance of the judge's duties". In practice, this meant the possibility of removing any judge who did not like the party's decision-makers on the basis of a voluntarily and instrumentally assessed legal condition. A. Murzynowski, for example, made an attempt to generalize it, pointing out that a judge should be "a supporter and creator of the socialist system".[51] In practice, this approach meant that a judge who was not a supporter of the political system of the Polish People's Republic could not hold his office.

The introduction and frequent application in practice of the condition of "failure to guarantee the proper performance of the duties of a judge" drained the core of the principle of judicial independence and ultimately broke with the principle of irremovability of judges. The far-reaching possibility of dismissing judges influenced their jurisprudence, in particular those judges who did not internalize Marxist-Leninist doctrine but rules along the party line due to the fear of being dismissed from the profession.

The enforcement of the obedience of judges and the instrumental treatment of the judiciary for the Party's purposes is illustrated by the show trials for economic crimes in 1956 – 1970.[52] The economic criminals were a special group which, after the temporal exhaustion of political processes, was stigmatized by the authorities. They were

[48] Ustawa z dnia 15 lutego 1962 r. o Sądzie Najwyższym (Dz. U. nr 11, poz. 54). The Act of 15th February 1962 on the Supreme Court (Journal of Laws No. 11, item 54).

[49] *K. Niewiński*, PZPR a sądownictwo w latach 1980 – 1985. Próby powstrzymania solidarnościowej rewolucji, Białystok 2016, p. 10.

[50] Ustawa z dnia 19 grudnia 1963 r. o zmianie prawa o ustroju sądów powszechnych The Act of 19th December 1963 on Amending the Law on the System of Common Courts (Dz. U. nr 57, poz. 308).

[51] *A. Murzynowski*, Istota i zasady procesu karnego, Warszawa 1984, p. 210.

[52] See: *K. Madej*, Prawo i wymiar sprawiedliwości wobec przestępczości gospodarczej (1956 – 1970), Pamięć i Sprawiedliwość 5/2(10), 2006, pp. 143 – 166.

blamed for the failure of social and economic reforms, which resulted in lowering the standard of living of the population.

Therefore, people were sentenced to death for the crime of theft. Thanks to demonstrative economic trials, the government has also achieved the effects of disciplining judges towards imposing the most severe penalties in cases relating to state property.

Despite the social expectations expressed in 1956, the turn of the 1960s and 1970s in the People's Republic of Poland "reversed the pendulum movement, brought about a strengthening of the formal and actual supervision of the Party and the executive over the judiciary."[53]

At that time, the task of the courts was not to administer justice, as is the case in democratic systems, but to uphold the system and the interests of the state and the Party.

3. Justice System of the Polish People's Republic in 1970 – 1980

The Party's supervision over the administration of justice continued to deepen and to some extent also institutionalized.

In the 1970s, the phenomenon of achieving budgetary benefits from the administration of justice became apparent. The party was looking for all sources of income for an inefficient economy. Significant increases in fees and court costs in criminal cases were introduced[54], and property confiscation was widely used.

The terms *lex telex* and *ius telefonicum* were also created to describe the phenomenon of "duplicated law",[55] which is characteristic for the entire period of ruling the people in Poland. The phenomenon consisted in instructing judges on a mass scale by means of remote communication how to adjudicate. A specific "telephone monitoring" was very broad, as A. Rzepliński states, it covered matters "from the trials of workers in 1970 and 1976, to the trivial family matters of local Party secretaries."[56]

A very dangerous phenomenon, which intensified in the 1970s, was the hollowing out of the scope of the judicial system of justice for the benefit of out-of-court ruling bodies.[57] Thus, the citizens of the state were deprived of legal proceedings in favor of a completely controlled administration.

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[53] *A. Rzepliński*, Sądownictwo w PRL, Londyn 1990, p. 51.

[54] Ustawa z dnia 23 czerwca 1973 r. o opłatach w sprawach karnych (Dz. U. nr 27, poz. 152). Act of 23rd June 1973 on fees in criminal cases (Journal of Laws No. 27, item 152).

[55] Za *A. Rzepliński*, Sądownictwo w PRL, Londyn 1990, p. 62.

[56] Ibidem, p. 62.

[57] *J. Brol*, Kierunki reformy sądownictwa (Propozycje rozwiązań prawo-organizacyjnych), Państwo i Prawo no 9 – 12/1981, p. 24.

Tort law disputes: for expropriated real estate, for damage caused by wild animals, for damage caused by geological works were transferred to administrative proceedings, which until the establishment of the Supreme Administrative Court in 1980, were deprived of judicial control.[58]

Numerous cases were also removed from the judicial system by handing them over to the competences of newly created bodies: misdemeanor boards, mining committees, commissions for the enfranchisement of peasants, ruling colleges of the Patent Office, state's company disputes committees, supervisory boards of the Social Insurance Found or the Board of Appeal operating under the Minister of Communications.[59]

Thus, the material scope of the administration of justice, which was exercised by the courts, was severely limited. And if at the last stage, judicial control was allowed under the so-called "hybrid cases", the administrative route was tedious and in practice ultimately shaped the rights and obligations of citizens.[60] In fact, despite the formally granted judicial review, it was a "ladder without rungs".

The open debate on the pathological state of the justice system in the People's Republic of Poland was brought about only in 1980, when the centrally planned economy plunged into a deep crisis, which caused numerous social unrests and the emergence of "Solidarność" movement.

4. The Rise of "Solidarność" Movement and the Introduction of Martial Law

The year 1980 brought the emergence of a broad social movement known as "Solidarność". Formally, "Solidarność" was registered as a trade union[61], and in the period until the introduction of martial law in December 1981, that is, the so-called during the "carnival of Solidarność", almost every third Pole was a member of this movement, including every fourth judge.[62] It should be emphasized that independent trade unions were much more popular among office workers of courts (47.7% of all court's clerks). It was an unimaginable change in communist Poland,

[58] Ibidem, pp. 24–25.

[59] Ibidem, p. 25.

[60] For example, it concerned compensation under the water law, compensation for issuing an incorrect employee opinion, remuneration for employee inventiveness.

[61] Full name: Independent Self-Governing Trade Union Solidarność. It is worth noting that the so-called autonomous unions that grouped employees of a specific industry, such as the Independent Self-governing Union of Justice Workers based in Poznań.

[62] Information on the situation in the trade union movement in the Ministry of Justice and its organizational units – prepared by the Administrative Department of the Central Committee of the Polish United Workers' Party on March 2, 1981. AAN, 1354 KC PZPR WA, Wa file no. LI / 22. Quoted after: *K. Niewiński*, PZPR a sądownictwo w latach 1980–1985. Próby powstrzymania solidarnościowej rewolucji, Białystok 2016, pp. 49–54.

the political system was teetering on the verge of collapse. Thus, the first step towards the democratization of the judiciary in post-war Poland was made.

As indicated, "Solidarność" was a strong movement with which also part of the judiciary was sympathetic. They began to articulate demands for a reform of the judiciary aimed broadly at separating the judiciary from the Party's influence. The necessity to introduce the principle of irremovability of judges was raised by abolishing the obligation to provide political guarantees and derogating from the provisions on the term of office of judges of the Supreme Court.[63]

An important role was played by an organizational unit in the form of the National Coordination Committee for Justice Employees of "Solidarność", which supervised the implementation of the demands of "Solidarność" in the area of justice reform.[64] A union cell of "Solidarność" was established at many courts in Poland, also at the Supreme Court[65] and the Ministry of Justice.[66]

First of all, and most importantly, during this period, the party's political position, weakened by the economic crisis, did not block the free exchange of views, diagnoses, and proposals for systemic improvements to the justice system in the People's Republic of Poland. It should be emphasized that not everyone was thinking about the democratization of the entire political system. The Solidarność movement was a broad freedom movement and within it also functioned fewer radical fractions in terms of the complete democratization of the judiciary. The communist reality was so established and over the years so strong that the fall of the "Iron Curtain" exceeded the most daring expectations.

The works carried out at the Ministry of Justice aimed at calming the public mood by meeting some of the demands of "Solidarność" regarding the justice system were brutally interrupted by the introduction of martial law throughout the country on 13th December 1981. This event, described by N. Davies as "the most perfect military coup in modern history of Europe"[67] restored Party rule, which was significantly out of control. The period of martial law was a time of widespread internment, repression against families, and the liquidation of the Solidarność activists who were most disturbing the authorities.

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[63] Ibidem, p. 100.

[64] *A. Strzebmosz*, Sądownictwo polskie u początków "Solidarności", w stanie wojennym i w okresie poprzedzającym przełom w 1989 roku, in: A. Strzebmosz/M. Stanowska, Sędziowie warszawscy w czasie próby 1981 – 1988, Warszawa 2005, pp. 44 – 45.

[65] *S. Rudnicki*, NSZZ "Solidarność" w Sądzie Najwyższym – refleksje z perspektywy lat, in: Ius et lex. Księga jubileuszowa ku czci profesora Adama Strzembosza, Lublin 2002, pp. 293 – 300. It is worth emphasizing that the author of the publication was the chairman of this union unit.

[66] *A. Strzebmosz*, Sądownictwo polskie u początków "Solidarności", w stanie wojennym i w okresie poprzedzającym przełom w 1989 roku, in: A. Strzebmosz/M. Stanowska, Sędziowie warszawscy w czasie próby 1981 – 1988, Warszawa 2005, pp. 46 – 47.

[67] *N. Davies*, Europa. Rozprawa historyka z historią, Kraków 1999, p. 1181.

Until the end of martial law, numerous purges in the judiciary were introduced, numerous blackmailing and threats were committed against judges who proposed changes in 1980 – 1981. A program of increased political indoctrination of judicial trainees was implemented, and administrative supervision over the activities of the courts was strengthened.[68]

5. Summary

After the political turning point in the party leadership in 1956, the reforms introduced did not meet the social expectations of healing the judiciary. Worse still, they made judges more available to the authorities by performing showcase political trials.

The party carried out showcase economic trials, and the judicial system was significantly reduced in favor of quasi-judicial proceedings. The Constitution and statutory law continued to serve as a façade for the core of judicial decision-making in key issues which were fulfilled by the will of party decision-makers.

Only the year 1980 was the first, small step towards the evolutionary democratization of the judiciary in Poland, mainly by allowing the aggregation and articulation of broad social demands with regard to the justice system.

The legal activity of Solidarność movement was quickly stopped due to the introduction of martial law in 1981 in Poland. Systemic changes had to wait. They began to take off right after the suspension of the martial law in 1982. Social pressure, motivated by a strong sense of injustice, could not be stopped later.

IV. Part III: Period 1981 – 1997, The Road to the Democratization of the Judiciary

1. Constitutional Court

The commencement of the functioning of the Constitutional Tribunal was an important event at the institutional level. In the legal debate after World War II in Poland, initially, the need to establish an institution whose task would be to control the constitutionality of the law enacted in Poland was not recognized.[69] This was reflected in the Constitution of the People's Republic of Poland of 22nd July 1952. In the 1960s and 1970s, there were timidly presented voices which considered the idea of constitutional review of law in a socialist state.[70]

[68] *K. Niewiński*, PZPR a sądownictwo w latach 1980 – 1985. Próby powstrzymania solidarnościowej rewolucji, Białystok 2016, pp. 247 – 249.

[69] *S. Rozmaryn*, Kontrola konstytucyjności ustaw, Państwo i Prawo nr 11 – 12/1948; *J. Makowski*, Materiały do projektu przyszłej konstytucji, Państwo i Prawo no 11/1947.

[70] *K. Biskupski*, Problemy ustrojoznawstwa, Toruń 1968, pp. 75 – 76; *L. Garlicki*, Sąd Najwyższy a Sejm, Studia Prawnicze no 38/1973, pp. 33 – 34.

The initial implementation of this idea was to give the State Council, in connection with the amendment to the Constitution of the People's Republic of Poland of 10th February 1976, the role of a guardian of the law's compliance with the Constitution (article 30, paragraph 3, point 3 of the Constitution of the People's Republic of Poland). However, this power did not cover the acts as it would be contrary[71] to the principle of the uniformity of state authority.[72] It should be recognized that such an institutional solution was ineffective not only due to the politicization of the State Council and the narrow scope of the regulations, but also due to the lack of specific procedures for removing from the legal system the legal acts deemed unconstitutional.

The beginning of the process of shaping the institution of the Constitutional Tribunal in Poland was the amendment to the Constitution of the People's Republic of Poland of 26th March 1982,[73] which provided for the Constitutional Tribunal in the system of state organs. After numerous debates and social pressure,[74] the introduced regulation was elaborated on in the form of the Act of 29th April 1985 on the Constitutional Tribunal. Pursuant to the Act, the Constitutional Tribunal was ruling on the compliance with the Constitution of legislative acts and the compliance with the Constitution and legislative acts of other normative acts issued by the State Council and the supreme and central organs of state administration (article 1 of the Constitutional Tribunal Act). The Parliament had the right to veto a judgment of the Constitutional Tribunal on statutes by a majority of 2/3 votes in the form of a resolution (article 6, paragraph 4 of the Act). The control to which the Constitutional Tribunal was entitled was only subsequent (article 3 of the Constitutional Tribunal Act). The Constitutional Tribunal consisted of 12 judges elected by the Parliament for an eight-year term, with the reservation that every four years, half of the judges were replaced (article 34 of the Constitutional Tribunal Act).

It should be noted that this was an important step towards controlling the actions of state power. Symbolic "guards" appeared in the political system of the state, who, despite the lack of wide-ranging competences, could evaluate statutory law. Not used until now, the guarantees of protection of rights and freedoms contained in the Constitution of the People's Republic of Poland of 1952 could have been subtly woven into the legal system in small steps.[75]

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[71] *Z. Witkowski*, Rada Państwa jako organ czuwający nad zgodnością prawa z Konstytucją, Państwo i Prawo no 7/1977, pp. 41 – 42.

[72] *R. Alberski*, Trybunał Konstytucyjny w polskich systemach politycznych, Wrocław 2010, pp. 105 – 106.

[73] Dz. U. 1982, nr 11, poz. 83. Journal Of Laws 1982, No. 11, item 83.

[74] *R. Alberski*, Trybunał Konstytucyjny w polskich systemach politycznych, Wrocław 2010, pp. 109 – 125.

[75] It is worth emphasizing that the Constitutional Tribunal enjoyed great authority from the beginning of its ruling, and judicial decisions were made independently of the state authorities. *Z. Czeszejko-Sochacki*, Sądownictwo konstytucyjne w Polsce na tle porównawczym, Warsaw 2003, p. 58.

The Constitutional Tribunal began its operation on 1st January 1986, and it gained a special role after the political transformation in 1989. It contributed to the introduction and consolidation of the principle of a democratic state of law[76], the principles of correct legislation and the protection of human rights. The achievements of the jurisprudence of the Constitutional Tribunal were of considerable importance in the construction of the Constitution of the Republic of Poland, which was adopted on 2nd April 1997.

2. Supreme Court and Supreme Administrative Court

Testing time for judicial independence and independence of the Supreme Court was the introduction of martial law in the territory of the People's Republic of Poland.[77] It should be stated that the Supreme Court did not cope with this task during the martial law period.[78] This mainly concerned criminal matters. The Supreme Court accepted the breach of the lex retro non agit[79] principle, allowed for backdating of normative acts[80] or treated the principles of criminal law in an instrumental manner, including the principles on the type and level of criminal penalties. The process of adjusting the jurisprudence of the Supreme Court in the field of criminal law established under martial law took place after 1989.

A year after the end of martial law in Poland, a new law on the Supreme Court was passed.[81] It stated that "the Supreme Court guards the political and socio-economic system of the Polish People's Republic, protects the gains of the working people, social property, and the rights of citizens protected by law" (article 1, paragraph 2). Already in this legal norm, it can be noticed that the rights of citizens are treated less favorably due to their placement at the very end of the provision. The political issues were also emphasized, instead of, for example, the rule of law.[82] As A. Lityński points out, the Supreme Court still remained politicized, for example, out of 113 newly appointed judges of the Supreme Court, 99 belonged to the Polish United Workers'

[76] *M. Safjan*, Trybunał Konstytucyjny po 1997 roku – przełom czy kontynuacja, in: F. Rymarz/A. Jankiewicz (eds.), Trybunał Konstytucyjny. Księga XV-lecia, Warszawa 2001, p. 78.

[77] Martial law was formally introduced by the decree of 12 December 1981 on martial law (Journal of Laws 1981, No. 29, item 154).

[78] *M. Kuć*, "Najwyższy Wymiar Niegodziwości" – orzecznictwo Sądu Najwyższego w okresie stanu wojennego, in: A. Grześkowiak (ed.), Prawo karne stanu wojennego, Lublin 2003, pp. 163–180.

[79] This was in contradiction not only with Art. 15 of the United Nations Covenant on Civil and Political Rights, but also the national penal code.

[80] *M. Kuć*, "Najwyższy Wymiar Niegodziwości" – orzecznictwo Sądu Najwyższego w okresie stanu wojennego, in: A. Grześkowiak (ed.), Prawo karne stanu wojennego, Lublin 2003, pp. 171–172.

[81] Ustawa z dnia 20 września 1984 r. o Sądzie Najwyższym (Dz. U. 1984, nr 45, poz. 241). Act of 20th September 1984 on the Supreme Court (Journal of Laws 1984, No. 45, item 241).

[82] *A. Lityński*, Historia prawa Polski Ludowej, Warszawa 2013, p. 68.

Party and satellite parties.[83] Judges were appointed by the State Council for a 5-year term of office and could still be dismissed by it if "they did not guarantee the proper performance of the duties of a Supreme Court judge" (article 38, paragraph 1, point 4).

After the systemic transformation in 1989, the Act on the Supreme Court was thoroughly amended, introducing the irremovability of judges of the Supreme Courts, eliminating the 5-year term of office and removing the competence to issue guidelines for the administration of justice and judicial practice. The latter were to ensure uniformity of the jurisprudence of common courts and its compliance with the principles of "people's rule of law". It should be emphasized that it was often a politically used instrument that restricted the independence of common court judges.

The Supreme Court also exercised judicial supervision over the Supreme Administrative Court established in 1980.[84] This concerned an extraordinary review due to a serious violation of the law by the Supreme Administrative Court and the provision of answers to legal inquiries of the adjudicating panels.[85] The Supreme Administrative Court was the first step towards the democratization of issuing administrative decisions, as it was to control the legality of the activities of public administration. However, its cognition was very limited. The scope of cognition was successively expanded after 1989.[86] The assessment of the activities of the Supreme Administrative Court in the times of the Polish People's Republic is positive. It also allowed for the formation of the doctrine of administrative law and procedure focused on the principle of legality of the public administration activity. Ultimately, the shape of the administrative judiciary was formed by the Constitution of the Republic of Poland of 1997. It based the administrative judiciary system on the principle of two-instance, separate from common courts and judicial independence.

3. State Tribunal

The State Tribunal was established in 1982. Its task was to enforce the responsibility of people occupying the highest state positions (article 1, paragraph 1). Initially, the State Tribunal was to judge the members of the State Council, members of the Government, the president of the Supreme Audit Office, the President of the National Bank of Poland, the prosecutor general of the People's Republic of Poland and heads

[83] Ibidem, p. 69.

[84] Ustawa z dnia 31 stycznia 1980 r. o Naczelnym Sądzie Administracyjnym oraz o zmianie ustawy – Kodeks postępowania administracyjnego (Dz. U. 1980, nr 4, poz. 8). The Act of 31st January 1980 on the Supreme Administrative Court and amending the Act – Code of Administrative Procedure (Journal of Laws 1980, No. 4, item 8).

[85] *J. Borkowski*, Zakres nadzoru sprawowanego przez Sąd Najwyższy nad orzecznictwem Naczelnego Sądu Administracyjnego, Studia Prawno-Ekonomiczne XXIX/1987, p. 52 and the following.

[86] *B. Adamiak/J. Borkowski*, Postępowanie administracyjne i sądowoadministracyjne, Warszawa 2021, pp. 110 – 111.

of central state offices. This liability was limited to constitutional transgression in the scope of office or in connection with the position held. It should be noted that the leadership of the Polish United Workers' Party, which was in fact the heart of the political decisions in the Polish People's Republic, was not subject to such responsibility.

The judges of the Tribunal of State received guarantees of independence and immunity. They were elected by the Parliament for the period of its term of office. It should be noted that proceedings before the Tribunal of State are very rare. And if they do, they end, with two exceptions,[87] with dismissal or acquittal.

The Act of 1982 on the Tribunal of State, after several amendments, functions in the Polish legal system to the present day. The State Tribunal found its foundation in the 1997 Constitution (articles 173, 199–201). It is an organ of judiciary separate from the courts. In the doctrine of Polish constitutional law, it is disputed whether the State Tribunal participates in the administration of justice.[88] From the point of view of procedural law, it is a special criminal court.[89] The judges of the Tribunal of State are independent, subject to the Constitution of the Republic of Poland and statutes shall not be liable to disciplinary action.

4. The Legal Bar

The legal bar (advocacy) played an important role in the transformation of the justice system in Poland. Many lawyers were actively involved in the activities of Solidarność movement. It is worth mentioning that the lawyers Wiesław Chrzanowski, Jan Olszewski and Władysław Siła-Nowicki were the authors of the statute of the first independent trade union in post-war Poland (Solidarność).[90]

In 1982, a new act on the advocacy was passed.[91] The new law guaranteed a fairly strong independence of the bar association. The act stipulated that the advocacy was established to provide legal assistance, cooperate in the protection of civil rights and

[87] The only people convicted by the Tribunal of State in Poland were Dominik Jastrzębski and Jerzy Ćwiek in 1997. They were respectively: the minister of economic cooperation with foreign countries and the president of the Central Customs Office. Both judgments were issued in connection with the so-called an alcohol scandal involving irregularities in the import of alcoholic beverages.

[88] For example, J. Zaleśny expresses the view on the exercise of the judiciary by the Tribunal of State in the material sense. He relates it to both constitutional and criminal liability enforced by the Tribunal of State. *J. Zaleśny*, Charakter prawny Trybunału Stanu. Zagadnienia wybrane, Przegląd Sądowy no. 7–8/2007, pp. 54–56; *L. Garlicki*, Polskie prawo konstytucyjne, Warszawa 2021, p. 434.

[89] *S. Waltoś/P. Hofmański*, Proces karny. Zarys systemu, Warszawa 2016, pp. 41–42; *C. Kulesza/P. Starzyński*, Postępowanie karne, Warszawa 2020, p. 87.

[90] *A. Redzik/T. J. Kotliński*, Historia adwokatury, Warszawa 2014, p. 329.

[91] Ustawa z dnia 26 maja 1982 r. Prawo o adwokaturze (Dz. U. 1982, nr 16, poz. 24). Act of 26th May 1982, Law on the Bar (Journal of Laws 1982, No. 16, item 24).

freedoms, and in shaping and applying the law. Thus, the individual rights are more strongly emphasized in opposition to the issues related to the maintenance of the socialist system in Poland.

Lawyers acted in cases of people repressed by the communist authorities during and after the end of martial law in Poland. The establishment of an independent advocacy was another factor limiting the voluntarism of the state authorities.[92] The quality of protection of the rights of individuals also benefited.

In the article 17 of the Constitution of 1997, professions of public trust, including the profession of an advocate and later legal advisers,[93] received strong guarantees of independence and self-government.

5. Transnational Justice in Poland

Undoubtedly, Poland after 1989 had to deal with its communist past. It is worth noting that the concept of transitional justice was introduced into the legal debate precisely because of the fall of the Iron Curtain.[94] It covers a wide spectrum of processes of various transformations.[95] After 1989, Poland was progressing towards adjusting to the Western model of democracy and the rule of law, including the judiciary.[96]

The immediate starting point of the changes was year of 1989. From 6th February to 5th April 1989, the famous "Round Table" sessions took place. The communist authorities, representatives of the democratic opposition and church hierarchs were involved in the talks. The deliberations included: appointment of the Senate (the parliament's upper house), appointment of the President of the People's Republic of Poland in place of the Council of State, increasing the role of the Parliament and holding semi-democratic elections, as well as allowing the democratic opposition to establish its own media. This allowed for the conclusion of a pact concerning the transformation of the political system in Poland.

Penal justice, including criminal liability for the crimes committed by the communist regime, did not involve the international judiciary. It should also be stated that the model of victor's justice has not been implemented in Poland. In the Polish reality, this could be revealed by the revenge of the political class originating from Solidarność movement over a whole range of people occupying important positions

[92] Ibidem, pp. 340 – 347.

[93] The profession of a legal advisor was conceived in the People's Republic of Poland as a legal base for state-owned enterprises. Currently, it is a profession similar to that of an advocate.

[94] *M. Kritz* (ed.), Transitional Justice: How Emerging Democracies Reckon with Former Regimes, vol. 1 – 3, Washington D.C. 1995.

[95] *R.G. Teitel*, Transitional Justice, Oxford 2000, pp. 6 – 9.

[96] *L. E. Fletcher/H. M. Winstein/J. Rowen*, Context, Timing and Dynamics of Transitional Justice: A historical Perspective, Human Right Quarterly vol. 31, 2009, p. 166.

in the People's Republic of Poland. There are no special criminal courts for this purpose, and there were no truth commissions. Criminal liability of functionaries of the People's Republic of Poland was carried out before military and common courts to a very limited extent.

The right to the truth,[97] in terms of remembering and explaining to society,[98] is exercised by securing documents from the communist period[99] and historians' free access to archives. However, it is said that many documents during the political transformation have been destroyed,[100] especially of high-ranking politicians. Anniversaries of special events of resistance are commemorated in various forms, such as the events in Poznań in 1956, the 1970 massacre on the coast, the 1976 strikes in Radom and Warsaw-Ursus, the rise of Solidarność in 1980 or the victims of martial law in 1981.

The rehabilitation of victims of political persecution during communism was least controversial issue in Poland. Quite quickly (in 1991), the law on declaring invalid judgments issued against people repressed for activities for the sake of the independent existence of the Polish State was passed.[101] It was connected with indemnity issues: compensation for damages and compensation for wrongs.

Problem of political vetting gave rise to much more disputes. Lustration in Poland after 1989 was carried out according to various models[102], and after 2007 it is based on the model of verification of lustration declarations.[103]

[97] Also known as right to know the truth or right to know.

[98] *T. Antkowiak*, Truth as Right and Remedy in International Human Rights Experience, Michigan Journal of International Law, vol. 23, 2001–2002, pp. 997–1013.

[99] First of all, within the framework of the Institute of National Remembrance.

[100] *A. Paczkowski*, Archiwa aparatu bezpieczeństwa PRL jako źródło: co już zrobiono, co można zbadać, Pamięć i Sprawiedliwość, 2/1(3), 2003, pp. 9–21.

[101] Ustawa z dnia 23 lutego 1991 r. o uznaniu za nieważne orzeczeń wydanych wobec osób represjonowanych za działalność na rzecz niepodległego bytu Państwa Polskiego (Dz. U. 1991, nr 34, poz. 149). The Act of 23rd February 1991 on declaring invalid judgments issued against persons repressed for activities for the sake of the independent existence of the Polish State (Journal of Laws 1991, No. 34, item 149).

[102] For example, also according to the model of the so-called a thick line, consisting in reluctance towards historical accounts. This model was implemented in the first years after the political transformation.

[103] See more: *M. Krotoszyński*, Lustracja w Polsce w świetle modelu sprawiedliwości okresu tranzycji, Warszawa 2014.

6. The Constitution of the Republic of 1997

The Constitution of the Republic of 1997, which is in force in Poland to this day, based the organization of power in the state on the principle of the separation of powers.[104]

This was reflected in the article 10 of the Polish Constitution, which states that "The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers". Judicial power has been delegated to the exercise of courts and tribunals.

However, the doctrine states that the article 10 of the Polish Constitution "remains partially lex imperfecta as a principle devoid of operational sanction".[105] It is perceived, inter alia, as the lack of action against acts of legislative and executive interference in judicial matters, which are not normative acts or administrative decisions.[106] This deficit of guarantees of the principle of separation of powers in the context of the judiciary may lead to imbalances of individual powers.[107]

The entire Chapter VIII of the Constitution of the Republic of Poland (articles 173 – 201) is devoted to the organization and guarantees of a fair justice system in Poland. It includes, among others the separateness and independence of courts and tribunals (article 173), the structure of the judiciary (article 175), the instance of judicial proceedings (article 176), judicial independence (article 178), the procedure for appointing judges (article 179), the principle of irremovability of a judge (article 180), judicial immunity (article 181), participation of citizens in the administration of justice (article 182) and supervision over the activities of courts (article 183).

The principle of judicial independence has been particularly developed in the jurisprudence of the Constitutional Tribunal. In accordance with the jurisprudence of the Constitutional Tribunal, the content of the principle of judicial independence consists of five elements: impartiality towards participants in the proceedings; independence from extrajudicial bodies; independence of the judge from the authorities and other judicial bodies; independence from the influence of political factors and internal independence of the judge.[108]

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[104] *M. Chmaj*, Sejm Rzeczypospolitej Polskiej w latach 1991 – 1997, Warszawa 1999, pp. 271 – 271.

[105] *E. Łętowska*, Władza sądownicza a pozostałe władze – stan równowagi czy jej zachwiania, in: R. Piotrowski (ed.), Pozycja ustrojowa sędziego, Warszawa 2015, p. 129.

[106] This applies, for example, to a large extent: the prerogatives of supervisory acts, financial control, or personnel issues. *E. Łętowska*, Władza sądownicza a pozostałe władze – stan równowagi czy jej zachwiania, in: R. Piotrowski (ed.), Pozycja ustrojowa sędziego, Warszawa 2015, pp. 127 – 132.

[107] Ibidem, p. 129.

[108] The justification for the judgment of the Constitutional Tribunal of 24th June 1998, K 3/98, K 3/98, Orzecznictwo Trybunału Konstytucyjnego 1998, nr 4 poz. 52.

In the jurisprudence of the Constitutional Tribunal, numerous guarantees of judicial independence were created or developed so that, after the experiences of the Constitution of the People's Republic of Poland of 1952, it did not become just an empty talk. These include, for example: the finality and enforceability of court judgments,[109] clear rules for promotion of judges[110] or restriction of the legislator's freedom in shaping the status of a judge.[111] The numerous social guarantees (salary, retirement age, working hours, and retirement status) have also been not forgotten.[112]

V. Conclusions

The Soviet model of the judiciary was highly politicized. The actual failure to separate the judiciary from the legislative and executive powers in favor of the Leninist principle of unity of power with the party's central role, along with the possibility of removing judges for political reasons, meant that judges remained at the disposal of party decision makers. The lack of guarantees of the independence of the judiciary resulted in the lack of grounds for developing the principle of independence and irremovability of judges.

This concerned primarily cases submitted to rule, in which the broadly understood interest of the state and the party were protected, as well as the particular interest of individual party members. As A. Rzepliński notes, distinguishing between the notion of the independence of a judge and the impartiality of a judge, "The history of the People's Republic of Poland provides a lot of evidence for the existence of judges who were notoriously available to successive party teams, but ruled impartially in matters of indifference to the interests of these teams, issuing fair judgments in civil cases or cases related family, criminal or labor law".[113]

[109] Wyrok Trybunału Konstytucyjnego z dnia 16 kwietnia 2008 r., K 40/07, OTK-A 2008, nr 8, poz. 97 (Judgment of the Constitutional Tribunal of 16th April 2008, K 40/07, OTK-A 2008, no. 97).

[110] Wyrok Trybunału Konstytucyjnego z dnia 8 maja 2012 r., K 7/10, OTK-A2012, nr 5, poz. 48 (Judgment of the Constitutional Tribunal of 8 May 2012, K 7/10, OTK-A2012, No. 5, item 48).

[111] Wyrok Trybunału Konstytucyjnego z dnia 27 marca 2013, K 27/12, OTK-A 2013, nr 3, poz. 29 (Judgment of the Constitutional Tribunal of 27 March 2013, K 27/12, OTK-A 2013, No. 3, item 29).

[112] Wyrok Trybunału Konstytucyjnego z dnia 7 maja 2013 r., SK11/11, OTK-A 2013, nr 4, poz. 40; wyrok Trybunały Konstytucyjnego z dnia 12 grudnia 2012 r., K 1/12, OTK-A 2012, nr 11, poz. 134; wyrok Trybunału Konstytucyjnego z dnia 4 października 2000 r., P8/00, OTK 2000, nr 6, poz. 189 (Judgment of the Constitutional Tribunal of 7 May 2013, SK11 / 11, OTK-A 2013, no. 40; judgment of the Constitutional Tribunal of 12 December 2012, K 1/12, OTK-A 2012, no. 11, item 134; judgment of the Constitutional Tribunal of 4 October 2000, P8 / 00, OTK 2000, no. 189).

[113] *A. Rzepliński*, Sądownictwo w PRL, Londyn 1990, p. 9.

New conceptual categories should also be highlighted. Judiciary theorists more often considered the concept of legal protection instead of the concept of "justice system". It was defined through the prism of civic duties – enforcing the observance of the law and socialist principles by the citizens of the state.[114] The function of legal protection was dependent, subordinate to the distribution or educational function of the state. It was dominated by the social element (public order), while the protection of individual rights was relegated to the background.[115] Legal protection was closely related to the systemic statutes of common courts and the massive apparatus of repression.

In the practice of the functioning of the judiciary, opposing the will of the party's decision-makers, when the Party's interests materialized in a court case, required deep heroism from the judge, who took serious consequences for him or herself. The judges were put to the test, which could result in the deprivation of their profession and discrimination in access to rationed goods.

This situation was difficult, taking into account the lack of prospects for departure or systemic transformation in Poland in the years 1956 – 1983. Thus, one should agree with the view that "the less heroism a given legal or social system requires from a judge, the better this law and that system is".[116]

It is worth noting that in the Polish model, democratic institutions began to function even before the complete system transformation. The Constitutional Tribunal, the Supreme Administrative Court, or the decreeing of ever greater guarantees of judicial independence were the elements facilitating the transformation of the political system, which finally took place in 1989. Perhaps this is why the systemic changes in Poland were not burdened with civil war and numerous deaths.

This fact shows that the democratization of the judiciary is stretched over time. It should be said that this is a process which requires not only institutional guarantees, but also shaping the legal awareness of the society. One can risk a statement that without the social postulates of freedom and the enormous need of people to live in a better political and economic reality, systemic changes could not take place.

As it is well known, changes in Poland prompted the fall of the Iron Curtain and the dismantling of the communist system in the USSR. The enactment of the Constitution of the Republic of Poland in 1997 was a symbolic culmination of the period of political changes in Poland.

[114] *W. Berutowicz/J. Mokry*, Organizacja ochrony prawnej w PRL, Warszawa 1987, pp. 36 – 40.

[115] Ibidem, p. 11.

[116] *A. Rzepliński*, Sądownictwo w PRL, Londyn 1990, p. 12.

Wartime Sexual Violence and War Responsibility: The "Comfort Women Issue" in Japan

By *Miho Mitsunari*

I. Introduction

In this paper I will examine the aspect of transitional justice by focusing on what is called the "comfort women" issue in Japan from a gender perspective.[1] I will touch upon three points. First, I will discuss the reason why I will refer to the "comfort women" issue as an example of transitional justice, then I will describe the efforts taken towards compensation and reconciliation, and finally, we will examine the future challenges.

It should be noted that the term "comfort women" issue is used by the Japanese government and within academia for historical reasons.

II. "Transitional Justice" and the "Comfort Women" Issue

1. The "Comfort Women" Issue as an Issue of "Unfinished Justice"

In East Asia today, the way "transitional justice"[2] is discussed varies considerably from country to country. In Korea and Taiwan, for instance, it is discussed as a practical issue related to these countries' historical paths. In Japan and China, transitional justice is considered to be an issue concerning countries and regions such as Latin America, South Africa, or South-East Asia – in other words: "other people's affairs"[3].

[1] *Miho MITSUNARI* (2016), Possibilities and Challenges in the Study of Wartime Law: Comments from a Gender Perspective, in: Hiroshi ONO/Yichii DEGUCHI/Naoko MATSUMOTO (eds.), The Wartime Regime and Law Scholars: 1931 – 1952, Kokusaisyoin, pp. 145 – 154 [三成美保「戦時法研究の可能性と課題 ―ジェンダー視点からのコメント」小野博司・出口雄一・松本尚子編『戦時体制と法学者 ―1931~ 1952』国際書院、2016年、145- 154頁].

[2] The Peace Studies Association of Japan (ed.) (2012), Restoration of Human Rights and Justice in a Time of Regime Transition, Peace Research, Vol. 38 [日本平和学会編「(特集)体制移行期の人権回復と正義」『平和研究』38号、2012年]; *Yasue MOTIZUKI* (2012), Transitional Justice: The Pursuit of Justice in the International Community, Horitsubunkasya [望月康恵『移行期正義 ――国際社会における正義の追及』法律文化社、2012年].

[3] *Naoyuki UMEMORI* (2021), Reconciliation Studies as a Method: The East Asian Basis of Conflict Resolution Studies, in: Toyomi ASANO (ed.), An Attempt at Reconciliation Studies:

For Japan, however, transitional justice is not just someone else's problem or an issue of the past, and this is most clearly shown by the "comfort women" issue.

The term "comfort women" was actually used during a certain period in history, namely during the 15 years of war in the Asia-Pacific from 1931 to 1945. Back then, Japan was a militaristic imperial state, but after losing the war in 1945, the regime re-emerged as a democracy. This systemic change led to the Treaty of San Francisco in 1951 and ended Japan's occupation. The Japanese government considered reparations towards South Korea, a former colony, to have been settled in 1965 with the Treaty on Basic Relations Between Japan and the Republic of Korea. However, the "comfort women" issue was never settled. It was ignored throughout the transition period, was never raised as a topic for discussion, and because the victims could not speak out, they were kept from achieving justice. Thus, this issue, that was forgotten during the "transition period", has to be discussed as an issue of "justice". It therefore makes us think about how to address the topic of "unfinished justice" as a whole.[4]

2. Three Premises

Before I get to the main point, let me briefly touch on three premises.

a) Who are "Comfort Women"?

First of all, what kind of women were the "comfort women"? Did they choose to serve as "prostitutes" within a public system by their own free will, or were they rather "sex slaves", tricked and forced into prostitution? This question is the biggest issue concerning a possible "compensation" for the "comfort women".[5]

According to a definition by the "Asian Women's Fund" that was established under the leadership of the Japanese government, the "comfort women" were "those [women] who were taken to former Japanese military installations, such as

Memory, Emotion*, and Value* (Reconciliation Studies Series, Volume 1: Principles and Methods), Akashisyoten, p. 45 [梅森直之「方法としての「和解学」ー紛争解決学の東アジア的基礎」浅野豊美編『和解学の試みー記憶・感情・価値』 (和解学叢書第1巻＝原理・方法) 明石書店、2021年、45頁].

[4] *Miho MITSUNARI* (2017), Wartime sexual violence and Law – "The Comfort Women Issue" and War reparation: Coordinator's Comments, Gender and Law, No. 14 [三成美保「戦時性暴力と法:慰安婦問題と戦後補償:企画趣旨」『ジェンダーと法』14号、2017年].

[5] *Yoshiaki YOSHIMI* (2010), What is the Japanese Military "Comfort Women" System?, Iwanamisyoten [吉見義明『日本軍「慰安婦」制度とは何か』岩波書店、2010年]; *Noriko OHMORI/Fumiko KAWADA* (2010), The "Comfort Women" Issue, Iwanamisyoten [大森典子、川田文子『「慰安婦」問題が問うてきたこと』岩波書店、2010年].

comfort stations, for a certain period during wartime in the past and forced to provide sexual services to officers and soldiers".[6]

Figure 1 shows us where the so-called "comfort stations" were established.[7]

The thick line shows the maximum area occupied by Japan. It covers a broad range from East to South-East Asia, and the dots show the so-called "comfort stations." These were the places where the "comfort women" lived. You can see that "comfort stations" were built everywhere where the Japanese military moved in. The number of "comfort women" is also a disputed topic and estimations vary between 80,000 and 200,000. Their nationalities and backgrounds were diverse, that is, they were not only Asian women – in Indonesia, for example, there were also Dutch "comfort women."[8]

b) Historical Background

Now I would like to discuss the historical background of the "comfort women." Here, it is important to understand that both prostitution and colonial domination were intersectional because Japan (the homeland) and the colony (as the overseas territory) had asymmetrical relations and had different standards concerning prostitution. It was legal for men to purchase sex from prostitutes, whereas women who sold sex for money were disdained as "shameful prostitutes". Next to this double standard on sexuality, a double standard for women existed between the women in Japan and those in the colonies because women in the colonies were forced to be prostitutes, while women in Japan were required to stay sexually pure.

The public prostitution system was introduced to Japan from Europe in the late 19th century during the Meiji Era.

A system of controlled prostitution known as '*yukaku*' had also existed in Japan during the Edo period (1603 – 1868). Prostitution districts authorized by the Shogunate were set up in Edo, Kyoto and Osaka, where girls who were sold as collateral for their parents' debts had to work in brothels. In the early Meiji period, this system was abolished on the grounds that it was based on human trafficking, and a public prostitution system was established, with the prostitution business being conducted formally based on a 'contract'. Instead of managing districts, individual prostitutes were the subjects to be managed.

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[6] Digital Museum The Comfort Women Issue and the Asian Women's Fund [デジタル祈念館慰安婦問題とアジア女性基金], https://awf.or.jp/e1/facts-00.html, last visit 18.09.2023.

[7] Women's Active Museum on War and Peace (wam) [アクティブ・ミュージアム「女たちの戦争と平和資料館」], https://wam-peace.org/ianjo/map/, last visit 18.09.2023.

[8] Women's Active Museum on War and Peace (ed.) (2013), The Japanese military "comfort women" issue, all your questions answered, Godosyuppan [アクティブ・ミュージアム「女たちの戦争と平和資料館」(wam) 編著『日本軍「慰安婦」問題、すべての疑問に答えます。』合同出版、2013年].

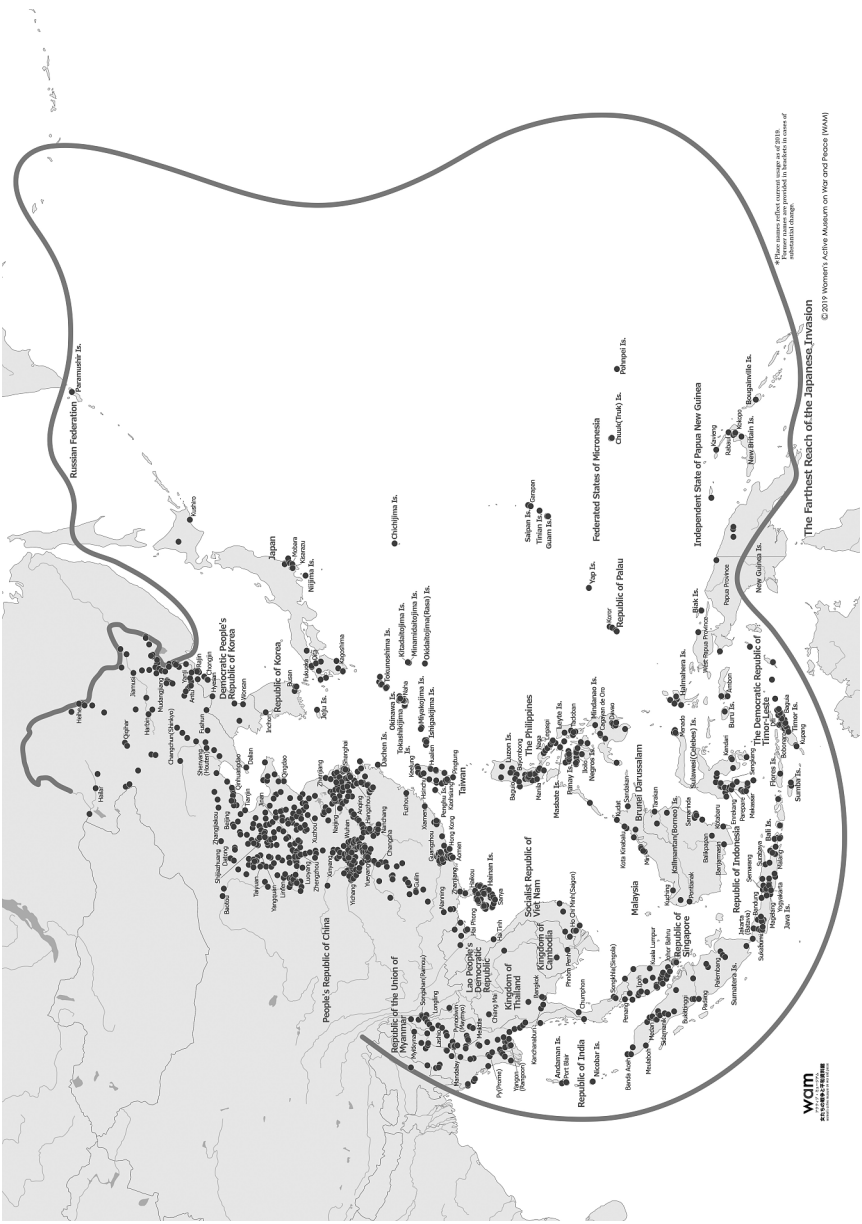

Figure 1: Map of "comfort stations" © Women's Active Museum on War and Peace (WAM)

In practice, many women could not quit their roles as prostitutes because they had sold themselves into bondage.

In 1900 a modern public prostitution system was established, and a Christian abolitionist movement developed at the same time. As a result of the latter movement, the public prostitution system was abolished in some areas during the war years from the 1930s onwards.

From the 1920s onwards, the public prostitution system for colonies was introduced. Contrary to Japan, brothels in the colonies could not close down freely and the prostitutes were not allowed to leave freely, so the brothels there were more profitable than in the Japanese homeland. Both the activists against prostitution as well as the women in Japan saw the forced prostitution of women in the colonies as a necessary thing to protect the purity of Japanese women. So, being a woman – in a colony – as a prostitute – were three intersectional attributions that made "comfort women" being disdained more than other women on mainland Japan.

c) What Happened in the 1990s?

In 1991, a former "comfort woman" named Kim Hak-sun came forward publicly and filed the first lawsuit of this kind to seek compensation. Over the next ten years, ten more cases arose as former "comfort women" from Taiwan, China, the Philippines, and the Netherlands followed suit. Why did the victims keep silent for almost 50 years and then come forward and file lawsuits in the 1990s? To answer this two-part question, we have to consider the issues of transitions, both in South Korea as well as throughout the whole world.

After the Korean War (1950–1953), a "developing dictatorship" was established in Korea after a military coup in the 1960s. Under this dictatorial system, sexuality was treated in three different ways. Within Korea, prostitutes were being punished. But for US Forces stationed in the country, comfort stations were installed and for Japanese tourists package sex tours (known as "Gisaeng-tourism") were organized. As prostitution was considered immoral and deemed to be a particular service for foreigners, former "comfort women" had to remain silent, had to hide their past from their husbands even after getting married, and many women suffered both from physical as well as psychological aftereffects. In 1987, South Korea became a democracy. With this systemic transition, the female victims, could come forward as "former comfort women" for the first time.

Changes arose in other parts of the world, as well, as the Cold War ended in 1990 and many countries transformed from former socialist systems to capitalist economies. The 1990s were a time when "Violence against Women" that was committed during these transition periods became recognized as an international human rights issue. The "comfort women" issue can be considered as a starting point. In 1993, the Declaration on the Elimination of Violence against Women was adopted, and the United Nations established international tribunals, where wartime sexual violence also played a role. In 1995, we had the Beijing Declaration, the establishment of a permanent International Criminal Court with the Rome Statute of 1998, which de-

fined sexual violence in wartime as a crime against humanity for the first time. This contributed to the establishment of an international system to prosecute sexual violence, so the "comfort women" issue was no longer a matter limited to just Japan and South Korea, but rather an issue that the international community looked to as a model case of how to achieve "justice".

3. Remarks from Several UN Committees

The actions taken by the Japanese government concerning the "comfort women" issue are not considered sufficient by the international community. Several UN Committees have recommended that Japan improves its response to the issue. The United Nations Human Rights Committee (CCPR) stated in its concluding observations of 2014 that the "comfort women" were sex slaves and that violations of the victim's human rights violations were still ongoing (see Document 1). In the concluding observations on the seventh periodic report of Japan (30 November 2022), the Japanese government was harshly criticized for "the State party has made no progress" and "regrets … the lack of effective remedies and full reparation to all victims of past human rights violations" (see Document 2. The UN Committee on the Elimination of Discrimination against Women (CEDAW) also touched upon the "comfort women" issue in concluding observations of 2009 and 2016. In 2009 it was kept to a short general recommendation[9], but the observations of 2016 went into further detail (see Document 3).[10] This time, the CEDAW expressed its regret that Japan's position was that sexual violence during wartime in the Asia-Pacific region did not fall within the mandate of the Convention (on the Elimination of All Forms of Discrimination against Women). The Committee made clear that measures against those human rights violations were not precluded ratione temporis. It therefore expected reports to be made on the extent of consultations with survivors and other measures taken to ensure the rights of victims to truth, justice, and reparations. This recommendation from 2016 can be considered to reflect the notion of "transitional justice".[11]

[9] http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsryr9E9fM8JLxSfpAS5QTBBAcZeXryG1RJoq1oEcE7klxKgzUpuPATBd7Jxtc6VzfoKizUrHQ60HytBmY1fidz%2FVnXMz90i2C3uXrOICa6qa, last visit 18.09.2023.

[10] https://www.gender.go.jp/international/int_kaigi/int_teppai/pdf/CO7-8_e.pdf, last visit 18.09.2023.

[11] *Koki ABE* (2017), For Whom the Bell of International Law Rings?: The "Unofficial" Judicial Project of the Tokyo Women's Tribunal Revisited, Gender and Law, No. 14 [阿部浩己 「女性国際戦犯法廷の地平――民衆法廷という司法プロジェクト」『ジェンダーと法』14号、2017年].

Document 1: United Nations Human Rights Committee: Concluding observations on the sixth periodic report of Japan, 20 August 2014

Sexual slavery practices against "comfort women"

14. The Committee is concerned by the State party's contradictory position that the "comfort women" were not "forcibly deported" by Japanese military during wartime but that the "recruitment, transportation and management" of women in comfort stations was done in many cases against their will, through coercion and intimidation by the military or entities acting on behalf of the military. The Committee considers that any such acts carried out against the will of the victims are sufficient to consider them as human rights violations involving the direct legal responsibility of the State party. The Committee is also concerned about revictimization of the former "comfort women" by attacks on their reputations, including by public officials, and some that are encouraged by the State party's equivocal position. The Committee takes into account information that all claims for reparation brought by victims before Japanese courts have been dismissed, and all complaints to seek criminal investigation and prosecution against perpetrators have been rejected on the ground of the statute of limitations. The Committee considers that this situation reflects ongoing violations of the victims' human rights, as well as a lack of effective remedies available to them as victims of past human rights violations (arts. 2, 7 and 8).

The State party should take immediate and effective legislative and administrative measures to ensure:

(a) That all allegations of sexual slavery or other human rights violations perpetrated by the Japanese military during wartime against the "comfort women" are effectively, independently and impartially investigated and that perpetrators are prosecuted and, if found guilty, punished; (b) Access to justice and full reparation to victims and their families; (c) The disclosure of all available evidence; (d) Education of students and the general public about the issue, including adequate references in textbooks; (e) The expression of a public apology and official recognition of the responsibility of the State party; (f) Condemnation of any attempts to defame victims or to deny the events.

Document 2: United Nations Human Rights Committee: Concluding observations on the seventh periodic report of Japan, 30 November 2022 (CCPR/C/JPN/CO/7)

Elimination of slavery, servitude and trafficking in persons

28. The Committee notes the information provided by the State party regarding its efforts towards addressing human rights violations against "comfort women". It regrets, however, that the State party has made no progress with regard to the Committee's previous recommendations and continues to deny its obligation, under the Covenant, to address the continuing violations of the victims' human rights. It also regrets the lack of criminal investigation and prosecution of perpetrators, and the lack of effective remedies and full reparation to all victims of past human rights violations (arts. 2, 7 and 8).

29. The Committee reiterates its previous recommendations, and urges the State party to take immediate and effective legislative and administrative measures to ensure:

(a) That all allegations of human rights violations perpetrated by the Japanese military during wartime against "comfort women" are effectively, independently and impartially investigated, that all available evidence is disclosed, and that perpetrators are prosecuted and, if found guilty, punished; (b) Access to justice and full reparation to all victims and their families, including victims from other countries; (c) Education about the issue, including

adequate references in textbooks, and strong condemnation of any attempts to defame victims or to deny the events.
(SOURCE) https://www.mofa.go.jp/mofaj/files/000054775.pdf

Document 2: CEDAW:Committee on the Elimination of Discrimination against Women: Concluding observations on the combined seventh and eighth periodic reports of Japan* (7 March 2016)
"Comfort women"
28. The Committee recalls its previous concluding observations (CEDAW/C/JPN/CO/6, paras. 37 and 38) and also refers to numerous recommendations on the unresolved issue of "comfort women" made by other United Nations human rights mechanisms such as the Committee on the Elimination of Racial Discrimination (CERD/C/JPN/CO/7–9), the Human Rights Committee (CCPR/C/JPN/CO/6), the Committee Against Torture (CAT/C/JPN/CO/2), the Committee on Economic, Social and Cultural Rights (E/C.12/JPN/CO/3), several United Nations Special Procedures mandate holders of the Human Rights Council and the Universal Periodic Review (A/HRC/22/14/Add.1, para.147–145 et seq.). While noting the efforts by the State party to attempt to resolve the issue of "comfort women", most recently through the bilateral agreement between the State party and the Republic of Korea announced on 28 December 2015, the Committee regrets the State party has not implemented the aforementioned recommendations and its position that the issue of "comfort women" does not fall within the mandate of the Committee, as the alleged violations occurred prior to the entry into force of the Convention for the State party in 1985. The Committee further regrets that: (a) Recently, there has been an increase in the number of statements from public officials and leaders regarding the State party's responsibility for violations committed against "comfort women"; and that the announcement of the bilateral agreement with the Republic of Korea, which asserts that the "comfort women" issue "is resolved finally and irreversibly" did not fully adopt a victim-centred approach; (b) Some "comfort women" have died without obtaining an official unequivocal recognition of responsibility by the State party for the serious human rights violations that they suffered; (c) The State party has not addressed its obligations under international human rights law towards "comfort women" victims in other concerned countries; and (d) The State party deleted references to the issue of "comfort women" in textbooks.
29. The Committee reiterates its previous recommendations (CEDAW/C/JPN/CO/6, paras. 37 and 38) and observes that the issue of "comfort women" gives rise to serious violations that have a continuing effect on the rights of victims/survivors of those violations that were perpetrated by the State party's military during the Second World War given the continued lack of effective remedies for these victims. The Committee, therefore, considers that it is not precluded ratione temporis from addressing such violations, and urges the State party to: (a) Ensure that its leaders and public officials desist from making disparaging statements regarding responsibility, which have the effect of re-traumatising victims; (b) Recognize the right of victims to a remedy, and accordingly provide full and effective redress and reparation, including compensation, satisfaction, official apologies and rehabilitative services;(c) Ensure that in the implementation of the bilateral agreement announced jointly with the Republic of Korea in December 2015, the State party takes due account of the views of the victims/survivors and ensure their rights to truth, justice, and reparations; (d) Adequately integrate the issue of "comfort women" in textbooks and ensure that historical facts are objectively presented to students and the public at large; and (e) Provide information in its next periodic

report on the extent of consultations and other measures taken to ensure the rights of victims/survivors to truth, justice and reparations.

(SOURCE) United Nations, International Covenant on Civil and Political Rights, Human Rights Committee, Concluding observations on the seventh periodic report of Japan, 30 November 2022 (CCPR/C/JPN/CO/7), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FJPN%2FCO%2F7&Lang=en

III. Initiatives for Compensation and Reconciliation

The "comfort women" issue was excluded from the realization of "justice" during the "transition period", and although attempts for "reconciliation" and "compensation" finally began in the 1990s, ways to gain "compensation" have been blocked by the Japanese government and the Japanese judiciary. Descriptions of "comfort women" have been removed from history textbooks, and the path to "reconciliation" is also facing difficulties. Interviews with victims have been conducted since the 1990s, but the reality is that a growing number of victims have already passed away.

In Japan, compensation and reconciliation issues concerning the "comfort women" issue face high obstacles in terms of politics, the judicial system, education, and public opinion, both within Japan as well as in terms of international diplomacy. I would like to address three things here: First, academics, especially tendencies in historical research. Second, the responses of the government and the judicial system, and third, the Women's Tribunal.

1. The "Comfort Women" Issue in Historiography

a) Post-War Histography and the "Comfort Women" Issue

Post-war history studies in Japan eagerly researched the Asia-Pacific War, but the topic of war crime history lagged significantly. Instead, the focus was on the Tennō system, imperialism, fascism, and other domestic issues, but there was a lack of studies about colonialism. In 1982, the issue was raised and war crime research gained momentum, but that did not mean that research about the "comfort women" issue also got into full swing right away. Official documents concerning the military had largely been burned and disposed of, and history studies avoided to address the issue of a responsibility of the Japanese people. In addition, the gender perspective was missing completely within the Japanese historiography. All this led to a lack of awareness regarding the "comfort women" issue. In 1991, when Kim Hak-sun came forward as a former "comfort woman", Japanese historians were shocked and research about the "comfort women" immediately gained momentum. The 1990s also marked the beginning of gender studies in Japan so that many gender scientists from various fields such as political sciences, historiography and legal stud-

ies started looking into the "comfort women" issue. The cooperation among journalists, civil groups, and researchers was also strengthened.

In the beginning, the Japanese government denied military involvement, but when documents were found in 1992, they changed their stance and began research themselves. Based on the findings, a statement by then Chief Cabinet Secretary Yohei Kono (referred to as the "Kono Statement") was issued in 1993 (see Document 3).[12] The Kono Statement acknowledged the following: The Japanese Imperial Army was directly and indirectly involved in the establishment of "comfort stations" and the transport of "comfort women," that there were numerous cases of forced prostitution, and that the atmosphere in the "comfort stations" was coercive. It then expressed apologies and remorse and reiterated "a firm determination never to repeat the same mistake by forever engraving such issues in our memory through the study and teaching of history." In responding to questions in the Diet in 2021, the Japanese government also reaffirmed its continued adherence to the Kono Statement.

Document 3: Statement by Chief Cabinet Secretary Yohei Kono on the Result of the Study on the Issue of "Comfort Women", 4 August 1993

The Government of Japan has been conducting a study on the issue of wartime "comfort women" since December 1991. I wish to announce the findings as a result of that study.

As a result of the study which indicates that comfort stations were operated in extensive areas for long periods, it is apparent that there existed a great number of comfort women. Comfort stations were operated in response to the request of the military authorities of the day. The then Japanese military was, directly or indirectly, involved in the establishment and management of the comfort stations and the transfer of comfort women. The recruitment of the comfort women was conducted mainly by private recruiters who acted in response to the request of the military. The Government study has revealed that in many cases they were recruited against their own will, through coaxing, coercion, etc., and that, at times, administrative/military personnel directly took part in the recruitments. They lived in misery at comfort stations under a coercive atmosphere.

As to the origin of those comfort women who were transferred to the war areas, excluding those from Japan, those from the Korean Peninsula accounted for a large part. The Korean Peninsula was under Japanese rule in those days, and their recruitment, transfer, control, etc., were conducted generally against their will, through coaxing, coercion, etc.

Undeniably, this was an act, with the involvement of the military authorities of the day, that severely injured the honor and dignity of many women. The Government of Japan would like to take this opportunity once again to extend its sincere apologies and remorse to all those, irrespective of place of origin, who suffered immeasurable pain and incurable physical and psychological wounds as comfort women.

It is incumbent upon us, the Government of Japan, to continue to consider seriously, while listening to the views of learned circles, how best we can express this sentiment.

We shall face squarely the historical facts as described above instead of evading them, and take them to heart as lessons of history. We hereby reiterate our firm determination never to repeat the same mistake by forever engraving such issues in our memories through the study and teaching of history.

[12] https://www.mofa.go.jp/a_o/rp/page25e_000343.html, last visit 18. 09. 2023.

As actions have been brought to court in Japan and interests have been shown in this issue outside Japan, the Government of Japan shall continue to pay full attention to this matter, including private researched related thereto.
(SOURCE) https://warp.da.ndl.go.jp/info:ndljp/pid/10310403/www.awf.or.jp/e6/statement-02.html

However, gender bashing increased during the 21st century in Japanese society, and gender mainstreaming stagnated. Politicians repeatedly and publicly made statements that denied the dignity of "comfort women," when in 2014 it was reported that the memoirs of a man claiming to have assisted in kidnapping "comfort women," referred to as the "Yoshida Testimony", was fake. Until then, the memoirs had been considered to be proof for the coercion exerted on "comfort women," and with the revelation that the memoirs' claims were in part fabrications[13], movements to deny the existence of "comfort women" gained strength. In that situation, two major historical science societies in Japan jointly organized a symposium in 2013. The fact, that this was the very first symposium on the "comfort women" issue by these societies shows, how little importance was attached to a gender perspective among Japanese historians until then. However, for the "comfort women" research this was groundbreaking. The findings from the symposium were compiled into a book in 2014.[14]

b) Historical Perception and Legal Responsibility

What are the conflicting historical perceptions of the "comfort women"?

The perceptions based on historical research and those of the Kono Statement have a common foundation, but the perception of the government since the Abe Administration in the 21st century differs greatly from this (see Table 1).[15]

[13] The Asahi Shimbun Co. Third-Party Committee, Report (Abridged), December 22, 2014 [朝日新聞社第三者委員会「報告書（要約版）」2014年12月22日], https://www.asahi.com/shimbun/3rd/report20150728e.pdf, last visit 18.09.2023; The Asahi Shimbun, Thinking about the comfort women issue, 2014 [朝日新聞「慰安婦問題を考える」2014年], https://www.asahi.com/topics/ianfumondaiwokangaeru/en/, last visit 18.09.2023.

[14] REKISHIGAKU KENKYUKAI (The Historical Science Society of Japan)/NIHONSHI KENKYUKAI (The Japanese Society for Historical Studies) (eds.) (2014), Considering the "Comfort Women" Issue: Military Sexual Violence and the Everyday World, Iwanamisyoten [歴史学研究会、日本史研究会編『「慰安婦」問題を/から考える――軍事性暴力と日常世界」岩波書店、2014年].

[15] Ministry of Foreign Affairs of Japan, Issues regarding History, Japan's Efforts on the Issue of Comfort Women [外務省「慰安婦問題についての我が国の取組」], https://www.mofa.go.jp/policy/postwar/page22e_000883.html, last visit 18.09.2023.

Table 1
Comparing Views on the "Comfort Women Issue"

	Historical research	**Japanese government**
Existence of comfort women/ comfort stations	Admits	Admits
Number of comfort women	80,000 to 200,000	Number unknown (200,000 cannot be confirmed)
Coercion	Happened	Cannot be confirmed
Involvement of Japanese military	Direct and indirect involvement	No direct involvement
Existence of private agents (who directly operated the comfort stations)	Private agents acted under the control of the military	Private agents operated freely (military was a customer)
Women who became comfort women	Were often tricked	Were often former prostitutes who entered into free contracts upon conviction
compensation	Individual compensation issues are not solved yet	Individual compensation is included in the compensation to the Korean government based on the Treaty on Basic Relations Between Japan and the Republic of Korea of 1965

As shown in the chart[16], both acknowledged that the "comfort women" and the "comfort stations" existed. The positions differ on the following: the number of "comfort women," whether or not they were forced to be "comfort women," whether or not the military was directly involved, the role of private brothel operators, and the conditions for women forced to be "comfort women." Resulting from these differences in the historical perceptions, there are also conflicting views about the legal responsibilities for individual compensations. In other words, the historic perception and recognition of legal liability essentially differ between the historiographic research and the Japanese government.

c) The Statement of 2015

In May 2015 a joint statement of 16 historical societies, including the major Japanese ones, was published (Document 4).[17] The cause for this was a statement by the Mayor in Osaka in 2013 as well as the "Yoshida testimony issue" of 2014. Mayor Hashimoto (at the time) said that the "military comfort women" system was necessary to maintain military discipline and provide rest for soldiers, and that there was no evidence that the Japanese government at the time forcibly brought comfort women into Japan[18]. His comments were strongly criticized by various social strata[19]. "Com-

[16] https://wam-peace.org/ianjo/map/, last visit 18.09.2023.

[17] 日本史研究会「「慰安婦」問題に関する日本の歴史学会・歴史教育者団体の声明」(2015年5月25日), https://www.nihonshiken.jp/20151104-statement/, last visit 18.09.2023.

[18] Nikkei Inc., Hashimoto's Major Comments on the Comfort Women Issue and Other Issues, May 17, 2013 [日本経済新聞「慰安婦問題などを巡る橋下氏の主な発言」2013年

fort women" were increasingly the subject of derogatory comments in Japanese society at that time, which alarmed the historical societies and prompted the statement. The main points of the joint statement were as follows: First, the Yoshida testimony had not been used as a document for historical research, so the "Kono Statement" was still based on solid facts. Second, "comfort women" were sex slaves and the contracts themselves were forced on them. And thirdly, unjust attacks towards "comfort women" researchers should be stopped.

Japanese Studies Scholars in the US immediately issued a supportive statement as well. In it, they stated that many countries still struggled to acknowledge past injustices and that it took over forty years for the US government to compensate Japanese-Americans [for their internment during World War II]. They also touched upon the fact, that "the promise of equality for African Americans was not realized in US law until a century after the abolition of slavery".[20]

Historians from both Japan and the US say that the "comfort women" issue is a violation of human rights and should never be forgotten. As it will take a long time until it is seen as such and matters of compensation and reconciliation are realized, it is even more necessary for historical research to keep this memory alive.

Document 4: Joint Statement by Associations of History Scholars and Educators in Japan on the "Comfort Women" Issue (May 25, 2015)

In the wake of the August 2014 cancellation of an article by the Asahi Shimbun, some politicians and media have been acting as if the fact of the forced marriage of Japanese "comfort women" had lost its basis. We, the Japanese historical societies and history educators' organizations, point out the following three problems with this unjust view.
First, the Japanese government's admission that the Japanese military was involved in the forced rendition of "comfort women" (the Kono Statement) was not based on the article in question or the testimony of Seiji Yoshida on which it was based. Therefore, the cancellation of the article does not destroy the basis of the Kono Statement. The existence of "comfort women" who were forcibly taken away from their homes has been proven by numerous historical documents and studies. Forced removal should not be limited to cases of forced removal (confirmed in Semarang, Indonesia, and Shanxi Province, China; there are also many testimonies from the Korean Peninsula), but should be understood to include cases of removal

5月17日], https://www.nikkei.com/article/DGXNASHC1603M_W3A510C1000000/, last visit 18.09.2023.

[19] Japan Federation of Bar Associations (2013), Chairman's Statement Calling for the Withdrawal and Apology of Toru Hashimoto's Comments on Japanese Military "Comfort Women" and the "Sex Industry" (May 24, 2013) [日本弁護士連合会会長談話「橋下徹氏の日本軍「慰安婦」及び「風俗業」に関する発言の撤回と謝罪を求める会長談話」(2013年5月24日), https://www.nichibenren.or.jp/document/statement/year/2013/130524_3.html, last visit 18.09.2023;
Joint NGO Statement, Immediate Release, May 23, 2013 [NGO共同声明「市民社会は、橋下大阪市長による「従軍慰安婦」に関する発言に対し、強く抗議する」2013年5月23日], https://hrn.or.jp/activity_statement/1886/, last visit 18.09.2023.

[20] https://ch-gender.jp/wp/?page_id=10540, last visit 18.09.2023.

against the will of the person (confirmed in a wide range of areas including the Korean Peninsula).
Second, the women who were considered "comfort women" were subjected to indescribable violence as sex slaves. Recent historical studies have revealed not only the coercive nature of the mobilization process, but also that the women who were mobilized were placed in a state of sexual slavery in which their human rights were violated. It also points out the linkage between the "comfort women" system and everyday colonial rule and discriminatory structures. Even if there was a contract for sex trafficking, an unequal and unfair structure existed behind it, and to ignore this political and social background is to turn a blind eye to the whole picture of the problem.
Third, some of the mass media reports that emphasize "misinformation" have led to unjustified attacks on university faculty members involved in the "comfort women" issue and their affiliated institutions, including threats of resignation and cancellation of lectures. This is an infringement on academic freedom and must not be tolerated.
If some politicians and the media continue to adopt an irresponsible attitude of turning a blind eye to the facts regarding the issue of Japanese "comfort women", it will be tantamount to sending a signal internationally that Japan does not respect human rights. This attitude will further violate the dignity of the victims of Japanese military sexual slavery, who suffered severely. What is required now is to keep these issues in mind through historical research and education, as stated in the Kono Declaration, and not to repeat the mistakes.
We again call on the politicians and the media concerned to seriously confront the facts of the past perpetration and its victims.
May 25, 2015 16 organizations related to historical studies
(SOURCE) NIHONSHI KENKYUKAI (The Japanese Society for Historical Studies) (May 25, 2015), Joint Statement by Associations of History Scholars and Educators in Japan on the "Comfort Women" Issue [日本史研究会「「慰安婦」問題に関する日本の歴史学会・歴史教育者団体の声明」2015年5月25日, https://www.nihonshiken.jp/20151104-statement/]

2. The Japanese Government and Judiciary

a) The Japanese Government's Position of Issues Being Settled – Re-Reading the Treaty on Basic Relations Between Japan and the Republic of Korea

The Japanese government's position is that compensation issues regarding South Korea have been concluded with the Property Claims Agreement mentioned in the 1965 Treaty on Basic Relations Between Japan and the Republic of Korea. A critical approach towards this treaty was made possible in 2005 when official documents on the negotiation process for establishing diplomatic relations between the two countries were made public. According to recent research, there are three problems with the argument that the issue has been settled.

The first problem is that "property" and "claims" are based on theories justifying colonial rule rather than taking responsibility for that rule. Colonial rule is justified based on three grounds: that colonial rule was justified by international law; that co-

lonial rule helped the modernization process of the colonies; and that recognizing Korea's independence was a mere territorial separation. This theory was also shared by the Allied nations as the other party to the Treaty of San Francisco, so the Allies and Japan can be considered to be accomplices in not questioning the principles of colonial rule.[21]

The second problem with saying the issue has been settled is that the treaty with South Korea was negotiated as a form of economic assistance during the Cold War. In South Korea, a developing dictatorship had just been established, and at that time economic cooperation connected to development aid was given a high degree of importance within the international community.

Finally, the third problem was that the treatment became "violence through law" against the victims. The treaty was signed between two states, but the voices of the victims were not reflected in it at all, so for the victims, the issues were far from being settled.

b) The Two Faces of Justice – Find the Facts, but Don't Judge About the Legal Responsible

Between 1991 and 2001, ten cases were brought before the court system with diverse plaintiffs. In 2010, the final Supreme Court decision was made, with the court dismissing all claims of former "comfort women." Only one case before a district court (the Shimonoseki Trial) in 1998 was won by the plaintiffs, where the "legislative inaction" of the state was acknowledged. In eight of ten cases the detailed allegations of the "comfort women" were acknowledged as facts.

The points disputed in court included issues concerning international law as well as domestic law.

aa) Illegality Under International Law

The plaintiffs claimed that the system of "comfort stations" was in violation of international law applicable at that time, namely the Slavery Convention, the Forced Labour Convention, The International Convention for the Suppression of the Traffic in Women and Children, and the Hague Convention, and should be considered a crime against humanity and a war crime. The courts, however, argued that international treaties regulated relations between states, and that individuals could not sue states based on international treaties.

[21] *Osamu OTA* (2017), The Problem of the Japan-Korea Treaty: Reconsidering the "Settled" Thesis, Gender and Law, No. 14 [太田修「日韓条約の何が問題か:『解決済み』論批判」『ジェンダーと法』14号、2017年].

bb) Legal Responsibility and Domestic Law

There were mainly three issues in terms of domestic law: The responsibility of the state, the period of exclusion and the waiver of claims. The government established the concept of "absence of liability," and also stated that the twenty-year statute of limitations for tort cases had passed and repeated the government's basic stance that compensation claims were waived with the Treaty of San Francisco. The court accepted the government's claims. Japanese courts therefore decided that there was no legal obligation for the Japanese government to respond to the claims of the plaintiffs from the perspectives of both international as well as domestic law. However, they also accepted the fact that 35 victims were severely harmed. 30 of them were still teenagers when they suffered from these crimes. It was acknowledged that the victims were taken to the comfort stations forcefully, no money was paid, and that they suffered from physical injuries and trauma that they kept silent about even to their families and husbands after marriage, so the lawsuits were not meaningless. The female victims had a chance to talk about facts which were then kept as records and strengthened the sense of solidarity within the international community.

c) Attempts and Setbacks of the "Asian Women's Fund"

In Japan, the idea that the government and the people should share a moral responsibility even though there was no legal responsibility for the comfort women gained strength, and thus the "Asian Women's Fund"[22] was established. Around 600 million yen were collected in this fund, but it failed[23] because it did not pursue a victim-centered approach.[24] The selection of recipient countries and victims as well as different thoughts on how to proceed with the compensation, and if there should be a letter of apology by the Japanese Prime Minister, divided the victims and caused confusion and division among those victims and the support groups. Many women in South Korea refused to accept the compensation because they felt that the government was just trying to hide its legal responsibility and the victim's dignity would not be restored. As a result, it is said that the Asian Women's Fund and its attempt to meet a moral responsibility failed, partly also due to interventions of the South Korean government.[25]

[22] Asian Women's Fund (https://www.awf.or.jp/), last visit 18.09.2023.

[23] Ministry of Foreign Affairs of Japan, Measures Taken by the Government of Japan on the Issue of "comfort women" [日本外務省「アジア女性基金による事業の概要」], https://www.mofa.go.jp/policy/women/fund/policy.html, last visit 18.09.2023.

[24] See note 8, p. 37.

[25] In May 1998, the new government led by President Kim Dae-jung paid almost the same amount as the Fund's compensation to 142 former "comfort women" who pledged not to receive compensation from the Asian Women's Fund, but not to the 11 who had received compensation from the Fund. Asian Women's Fund, "Details of Reparations Programs in Each

3. The Women's International War Crimes Tribunal

In 2000, the Women's International War Crimes Tribunal took place in Tokyo as one form of a people's tribunal. The difference to other people's tribunals was that it aimed at victimize gender justice and thus can also be considered to be a "women's tribunal." The people's tribunal model was established by Russ Russell and Jean-Paul Sartre in order to ensure justice for war crimes committed by members of the United States' military during the war in Vietnam in 1967. Until 2014, more than 80 people's tribunals had been held. These tribunals are not legally binding. However, they help to shed light on cases in which people are not protected by law or the judicial system, they give victims a chance and a voice, and they also function as an instrument of the people to restore justice.

The Women's International War Crimes Tribunal chose a victim-centered approach, and 64 female victims from eight Asian countries participated. Experts in international human rights law functioned as judges, and the proceedings were conducted according to real court procedures. The Tribunal acknowledged that the "comfort women" system constituted the crime of sexual slavery according to the international laws which were in effect at that time. Nine persons, including the Emperor Shōwa, were convicted. The Tribunal also found that the violations of the law were still ongoing due to the Japenese government's failure to act and its inappropriate conduct (Document 5).[26]

The Tribunal also affected other people's tribunals judging sexual violence cases and measures concerning human rights taken by the UN. It was widely covered by media outside of Japan, but almost not at all within Japan. In 2001, the Japanese public broadcaster NHK (Japanese Broadcasting Corporation) reported about the Women's Tribunal, but due to pressure from politicians, they had to change the content. VAWW-NET Japan ("War and Violence Against Women" Japan Network), the organizer of the tribunal, filed a lawsuit against NHK, and although the plaintiff lost in the first instance, the court of appeal (Tokyo High Court) found that the plaintiff had "abused or deviated from the editorial authority guaranteed in the Constitution" and accepted the plaintiff's claim (2007). However, the Supreme Court reversed the decision, and the plaintiff's case was decided[27] (2008).

Country/Region-Korea", https://www.awf.or.jp/3/korea.html, last visit 18.09.2023), see note 8, p. 37.

[26] Violence Against Women In War-Network Japan (VAWW-NET JAPAN) (ed.) (2000–2002), Judging Japanese Military Sexual Slavery: The Record of the 2000 International Tribunal for Women War Criminals, 6 Vols., Ryokufusyuppan [『戦争と女性への暴力』日本ネットワーク (VAWW-NETジャパン) 編『日本軍性奴隷制を裁く:2000年女性国際戦犯法廷の記録』全6巻、緑風出版、2000–2002年].

[27] Violence Against Women In War-Network Japan (VAWW-NET JAPAN) (ed.) (2010), The Truth Revealed: The NHK Program Falsification Case: The Women's International War Crimes Tribunal and Political Intervention, Gendaisyokan [『戦争と女性への暴力』日本ネットワーク (VAWW-NETジャパン) 編 (西野瑠美子、東海林路得子責任編集)『暴かれた真実——NHK番組改ざん事件:女性国際戦犯法廷と政治介入』現代書館、2010年].

After that, the "comfort women issue" was rarely covered by the media.

Document 5: The Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery: Judgement on the Common Indictment and the Application for Restitution and Reparation

J. THE L EGAL AND M ORAL BASIS OF THE WOMEN' S I NTERNATIONAL WAR CRIMES TRIBUNAL
1. The History of Peoples' Tribunals
63. The Women's International War Crimes Tribunal is not the first Peoples' Tribunal – it is built upon prior examples, such as the Vietnam War Crimes Tribunals instituted by Lord Bertrand Russell in the late 1960s. …
64. Another example of a Peoples' Tribunal is the permanent Peoples' Tribunal established in Italy in the 1970s by "private citizens of high moral authority" from a number of countries. …
65. Peoples' Tribunals are premised on the understanding that "law is an instrument of civil society"that does not belong exclusively to governments whether acting alone or in conjunction with the states. Accordingly, where states fail to exercise their obligations to ensure justice, civil society can and should step in. …
68. A Peoples' Tribunal can step in to fill lacunae in international law and to forge new ground in the development of international law by creating a "law of peoples" arising from principles of humanity and justice. …
71. This Peoples' Tribunal represents a belief that states cannot, through their political agreements and settlements, ignore or forgive crimes against humanity committed against individuals. Three characteristics in particular distinguish this Tribunal from its predecessors. First, these proceedings were held in Japan, the country which has perpetrated the wrongs charged in the Indictments and the Application for Restitution and Reparations. Second, it is a Women's Tribunal, a Tribunal specifically established by an international committee of women's groups to redress crimes of sexual violence against women. Third, the Tribunal was established by grassroots organisers from within the victimized countries rather than by distinguished persons from outside. It focuses upon crimes of sexual violence and slavery routinely discounted in peace settlements and effectively erased from or ignored in the official records.
72. The reliance in the earlier Peoples' Tribunals upon well-known persons from "cultural, legal and religious life" 41 did not, however, ensure the inclusion of women's voices. …
74. … It is our hope that the determinations of this Tribunal will not provide the former "comfort women" with the only form of redress they ever receive, particularly in light of their advancing years; but rather that the force of the Judgement of this Peoples' Tribunal will finally persuade the state of Japan, the Allies, and the international community at large to fulfil their respective responsibilities to ensure the long and painfully overdue legal recognition of wrongdoing and provision of full remedies to the survivors and to those who claim on behalf of women who did not survive the atrocities.

(SOURCE) https://archives.wam-peace.org/wt/wp-content/uploads/2020/02/Part-I.pdf

IV. Future Issues

1. Passing on "Memories" and "Reconciliation" – Textbooks and Museums

Memories have to be passed on in order to achieve reconciliation, and in that sense education is key. However, descriptions of "comfort women" were deleted from Japanese textbooks due to the government textbook authorization system.

In 1997, descriptions about "comfort women" and the term "post-war compensation" appeared in all junior high school history textbooks for the first time. In 1997, the Supreme Court ruled that censorship of terms like "Nanjing Massacre",[28] "Unit 731[29], "rape," and "comfort women" was unlawful. However, this led to politicians intervening even more strongly into the field of education. This is symbolized by a revision of the Basic Act on Education in 2006 by the Abe administration and the establishment of the "Council for the Implementation of Education Rebuilding" in 2012. This council was placed directly under the oversight of the prime minister. The term "comfort women" has been included in textbooks for junior high school social studies (historical field) approved by the Ministry of Education since 1997. At that time, all seven types of history textbooks included related descriptions, but in 2002 the number was reduced to three, in 2006 to two, and in the 2011 certification (junior high school social studies textbooks from the 2012 academic year onward), all of them disappeared. In a 2021 parliamentary debate about textbooks, the government decided to still support the Kono Statement, but at the same time parliamentarians demanded that the basic stance of the government on descriptions of "comfort

[28] The Nanjing Massacre (Nanking Incident) is an incident in which the Imperial Japanese Army occupied the city of Nanjing in the Republic of China at the end of 1937, at the beginning of the Sino-Japanese War, and allegedly killed, looted, raped, and torched many prisoners of war, defeated soldiers, and ordinary citizens over a two-month period. This fact was recognized at the postwar International Military Tribunal for the Far East (Tokyo Tribunal). The number of victims varies from several tens of thousands to more than 300,000. Although Japanese historical studies believe that the Nanking Incident is based on historical fact, conservatives strongly argue that the Nanking Incident did not take place. *Tokuji KASAHARA* (2018), The History of the Nanjing Incident Controversy: How Japanese People Have Perceived the Historical Facts (Enlarged Edition), Heibonsya [笠原 十九司『増補 南京事件論争史:日本人は史実をどう認識してきたか』平凡社、2018年].

[29] "Unit 731" was one of the research institutes that existed in the Imperial Japanese Army in 1936, and its official name was the Headquarters of the Quarantine and Water Supply Department of the Kanto Army (commonly known as the 73rd Manchuria Division). Based in Manchuria, its main mission was to prevent infectious diseases among soldiers and control water supply. At the same time, it was also engaged in research and development of biological weapons, and is said to have conducted experiments on human subjects and actual use of biological weapons. The defeat of the war led to the destruction of evidence, and according to U.S. military documents, the U.S. government concluded that the government should not hold the Far Eastern Military Tribunal to obtain information on Japanese biological warfare research, so the people involved were not charged with any crimes. *Keiichi TSUNEISHI* (2022), The Complete History of Unit 731, Kohbunken [常石敬一『731部隊全史』高文研、2022年].

women" was to be reflected in the books[30]. Following this, descriptions of "comfort women" were removed from almost all high school history textbooks as well. The Japan Federation of Bar Associations (JFBA) has issued a number of statements criticizing the government's move to censor the textbooks regarding the description of comfort women[31].

However, the issue of "comfort women" has not been erased entirely. In 2005, the Women's Active Museum on War and Peace[32] was opened in Tokyo. Records and materials related to the "comfort women" from the Woman's International War Crime Tribunal are saved and displayed here.

2. The Importance of "Restoring Dignity" – Legal Responsibility and Moral Obligation

Many female victims refused to accept the compensation payments from the Asian Women's Fund, but they were grateful for the restoration of their dignity through the Women's Tribunal. This fact shows that the restoration of dignity is key when it comes to the question of taking responsibility. Many victims said that the reason for them to come forward was their anger at the fact that their situation was distorted and disrespected.

The South Korean government has registered 273 "comfort women" victims, but in 2013 more than 70% of them had already died. Not only the dignity of individual victims has to be restored, but of all female victims, regardless of whether they could come forward or not. Therefore, an official apology is needed about the whole system of "comfort women." For that, we need to preserve the memory of what happened and pass it on to the next generations.

[30] On October 26, 2021, the Society for the Study of Japanese History published a letter of protest against the government's intervention in textbook descriptions of "comfort women" and other historical terms, demanding the withdrawal of the government's view and approval of applications for correction based on it, and the abolition of the 2014 revised examination standards (letter of demand).

[31] Japan Federation of Bar Associations (2014), Opinion Paper Concerning the Revision of Textbook Examination Standards, the Guidelines for the Screening of Textbook Examination Standards, and the Adoption of Textbooks (December 19, 2014), https://www.nichibenren.or.jp/en/document/opinionpapers/20141219.html, last visit 18.09.2023 [日本弁護士連合会「教科書検定基準及び教科用図書検定審査要項の改定並びに教科書採択に対する意見書」(2014年12月19日)]; Japan Federation of Bar Associations (2022), Statement against the Advocacy to Change Certain Descriptions in Textbooks in Line with the Government's Point of View (February 17, 2022), https://www.nichibenren.or.jp/en/document/statements/220217.html, last visit 18.09.2023 [日本弁護士連合会「政府見解により教科書の「従軍慰安婦」「強制連行」等の記述を変更させる動きに関する会長声明」2022年2月17日].

[32] https://wam-peace.org/en/, last visit 18.09.2023.

3. Understanding Wartime Sexual Violence – From "Asking" to "Listening"

Wartime sexual violence is not a sudden incident that appears out of nowhere during wartime – it is linked to everyday structural gender discrimination. Of course, not all sexual relationships during those times were violent. Some were based on mutual consent, some developed into love and marriage, and some resulted in pregnancy and childbirth, both wanted and unwanted. This continuum has to be acknowledged[33] and all experiences and thoughts of victims have to be accepted and listened to without any disrespect. We have to listen to the voices of the victims. In recent "comfort women" research respect towards the autonomy of the victims is shown. It tries to re-form the memory by listening to what the persons concerned want to tell, rather than asking what the audience wants to hear.[34]

V. Conclusion – International Frameworks to Pursue "Transitional Justice"

The theoretical structure of transitional justice is very meaningful for understanding Japan's "comfort women" issue, and the following points can be considered particularly from a gender perspective.

First, it is necessary to talk about the continuity of human rights violations. Wartime sexual violence against women was not seen as an international issue until the 1990s, something which must be borne in mind. This means that human rights have to be restored retroactively. For that, we must also acknowledge that the victims continue to suffer because there was no rescue mechanism or saving mechanism during the transitional periods in their home countries, and they had to remain silent about their physical and psychological suffering.

We also need an approach that does not limit the issue to the transition from dictatorship to democracy within one country. Instead, we need to discuss it within the context of two or even more states and also bear in mind transitions of the international community as a whole. The "comfort women" issue shows that for victims to

[33] *Chizuko UENO/Shinzo ARARAGI/Kazuko HIRAI* (2018), Toward a Comparative History of War and Sexual Violence, Iwanamisyoten, p. 1 [上野千鶴子・蘭信三・平井和子編『戦争と性暴力の比較史へ向けて』岩波書店、2018年、1頁].

[34] *Puja KIM/Akane ONOZAWA* (ed.) (2020), Listening to the Victims of Sexual Violence: From "Comfort Women" to Contemporary Sexual Exploitation, Iwanamisyoten [金富子・小野沢あかね編『性暴力被害を聴く――「慰安婦」から現代の性搾取へ』岩波書店、2020年]; Korean Council on the Issue of Paramilitary Personnel, 2000 Women's International War Crimes Tribunal Testimony Team (translated by Tomiko KIM and Aya FURUHASHIi, eds.) (2020), Rewriting History with Memory: Listening to 'Comfort Women' Survivor's Katari, Iwanamisyoten. [韓国挺身隊問題対策協議会・2000年女性国際戦犯法廷証言チーム (金富子・古橋綾編訳) (2020)『記憶で書き直す歴史――「慰安婦」サバイバーのカタリを聴く』岩波書店].

speak up, a regime change in their countries was necessary. However, the states responsible for perpetrating the crimes often supported and upheld dictatorships, or they just kept silent and accepted the actions of the dictator countries. Responsibility must therefore also be taken for not allowing a transition in those countries and therefore contributing to a longer continuation of the suffering.

Finally, we have to understand that cases concerning post-war compensation are pursued by victims of war crimes that have not yet been brought to justice. The "comfort women" lawsuits can be considered "retrials" of the International Military Tribunal for the Far East (Tokyo Trial of 1946). International law developed as a means to maintain interstate order and provided a legal basis for asking for war responsibility and peace. Post-war international human rights law supplemented this aspect of international law, but it still could not escape from a Western and male-dominated model. After human rights and gender mainstreaming were made possible in the 1990s, apologies were made and, for the first time, facing actions of the past was considered to be an element of justice. Thinking about the "comfort women" issue is an important historical opportunity for broadening the intertemporal approach of international human rights law towards a more transtemporal approach, and at making this approach more precise.

The Amnesty Measures of the Spanish Transition[1]

By *José Antonio Pérez Juan*

I. The First Amnesty Measures of the Spanish Transition

1. The General Pardon of 1975

Barely some days after the death of the dictator, a first rule that aimed for reconciliation and forgiveness between Spanish people was published. On the occasion of the proclamation of his majesty Juan Carlos as King of Spain, the 25th of November of 1975, a decree granting a general pardon was issued.[2]

Said decree would mention, first of all, the wish of the King to begin his reign exalting justice " – that is the fundament of Law and Order – with the exercise of Clemency has been a constant in the line of our best historical and religious traditions".[3] Although the exposition of motives pays tribute to Generalissimo Franco, nonetheless, the measure is justified by the king′s wish that "the Spanish people that I make beneficiaries of this royal decision will incorporate themselves, with the best spirit of service to the homeland (…) to the national concordance to consolidate the principal objective of the Monarchy: the unrenounceable good of Peace".[4] It should be noted that, although this decree is reminiscent in its wording to others approved throughout the dictatorship, with its mentions to religion and tradition, none-

[1] This article is published within the framework of the research project *Conflicto y reparación en la historia jurídica española moderna y contemporánea*, referencia PID2020–113346GB-C21, financiado por el Ministerio de Ciencia e Innovación del Gobierno de España en el marco del Programa Estatal de Generación de Conocimiento y Fortalecimiento Científico y Tecnológico del Sistema de I+D+i del Plan de Investigación Científica y Técnica y de Innovación 2017–2020 (AEI/10.13039/501100011033).

[2] Decreto, 2940/1975, de 25 de noviembre, por el que se concede indulto general con motivo de la proclamación de Su Majestad Don Juan Carlos de Borbón, como Rey de España, in: Boletín Oficial del Estado, núm. 284, de 26 de noviembre de 1975, p. 24666.

[3] This pardon must correspond to the royal tradition, *Parra Iñesta*, E., "Las otras amnistías de la Transición española: extrañados y amnistía a presos sociales. Historias de éxito y fracaso", in: Clio & Crimen, núm. 18, 2021, p. 140; and *Linde Paniagua*, E., Amnistía e indulto en España, Tucar Ediciones, 1976, p. 125.

[4] Decreto, 2940/1975, de 25 de noviembre, p. 24666.

theless its objective is not to reincorporate the families of the condemned – "regretful of their past mistakes" –, but to incorporate them into national concord.[5]

Pardon is granted for sentences and corrections of deprivation of liberty, pecuniary "and deprivation of driving license" for acts committed prior to November 22, 1975, with the reduction of the sentence being graduated according to the seriousness of the conviction.[6] Excepted from the pardon are "sentences for crimes of terrorism and related crimes, for crimes of propaganda of a terrorist nature and for crimes of membership in associations, groups and organizations included in the legislation on terrorism", as well as certain monetary crimes.[7] Also excluded from this pardon are all legal sanctions that were not strictly criminal, that is, sanctions imposed on the basis of the Public Order Law, the Press and Printing Law, traffic fines or university disciplinary sanctions, etc…[8]

It is estimated that the application of this measure benefitted all prisoners for common crimes and some 700 political prisoners, although this did not mean that the petitions of all kinds of groups for the sake of an amnesty, which was considered essential, ceased.[9] Thus, throughout the first months of 1976, numerous political and trade union organizations, academic authorities and social movements, claimed in their programs and calls for a total amnesty as the first requisite for advancing towards democracy[10]

[5] "La coronación del Rey, una semana después de la muerte de Franco, fue acompañada de un primer indulto, con lo que se pretendió vincular el concepto de monarquía con el de aceptación de todos los españoles y de reconciliación entre ellos, aplicando así las palabras pronunciadas por el Monarca", *Cuesta Bustillo*, *J.*, "Recuerdo, silencio y amnistía en la Transición y en la democracia españolas (1975–2006), in: Studia Historica. Historia contemporánea, núm. 25, 2007, p. 137. Asimismo, vid., *Orza*, R., "Amnistías e indultos durante el Franquismo y la Transición", in: J.A. Pérez Juan/S. Moreno Tejada (coords.), Represión y Orden público durante la II República, la Guerra civil y el Franquismo. Una visión Comparada, Thomson-Reuters, Cizur Menor, 2019, p. 128.

[6] "(…) a) De la totalidad de las penas y correctivos de privación de libertad y de privación del permiso de conducción hasta 3 años y de las pecuniarias cualquiera que sea su cuantía; b) De la mitad de las penas y correctivos de privación de libertad y de privación del permiso de conducción superiores a 3 años, que no excedan de 6; c) De la cuarta parte de las superiores a 6 años, que no excedan de 12 años; d) De la quinta parte de las superiores a 12 años, que no excedan de 20; e) De la sexta parte de las superiores a 20 años, salvo las impuestas por conmutación de la pena capital", Artículo primero, decreto, 2940/1975, 25-XI-1975.

[7] Arts. segundo y tercero, decreto, 2940/1975, 25-XI-1975.

[8] *Sobremonte Martínez*, J.E., Indultos y Amnistías, Universidad de Valencia, Valencia, 1980, p. 218.

[9] *Rivera*, A., "La amnistía de 1977 y los debates sobre el pasado", in: Clio & Crimen, núm. 18, 2022, p. 160.

[10] *Orza*, "Amnistías e indultos durante el Franquismo y la Transición", op. cit., p. 130; *Muñoz Soro*, J., "La reconciliación como política: memoria de la violencia y la guerra en el antifranquismo, in: Rodrigo J./Ruiz Carnicer, M.A. (coords.), Dossier: Guerra civil: las representaciones de la violencia. Revista de historia Jerónimo Zurita, núm. 84, 2009, p. 122; and *Juliá, S.*, "Las dos amnistías de la transición", in: https://www.tendencias21.net/espana/Las-dos-amnistias-de-la-transicion_a13.html (last visit 26.08.2021).

2. The First Amnesty of the Spanish Transition

Since July 3rd, 1976, a new phase opens up in the Spanish Transition with the designation of Adolfo Suárez as president of the government by the King. With this designation a new phase of accelerated changes begins in the institutional organization of the State that will reach its peak with the approval of Law 1/1977, 4th of January, for the Political Reform (BOE of the 5th of January of 1997), the celebration of the first democratic elections on June 15, 1977, and the approval of the Constitution.[11]

A first manifestation of the new ways with which the State was to be endowed is represented by the Royal Decree Law on amnesty approved on July 30, 1976.[12] This provision was intended to meet the aspirations of a large sector of the Spanish population who considered the 1975 pardon too limited, taking into account the severity with which the criminal law of the time punished political delinquency.[13] The objective of this first amnesty is very clear in its explanatory statement:

> "The Crown symbolizes the will of all the individuals and people that form part of the indissoluble Spanish national community to live together. Thus, one of its main missions is to promote the reconciliation of all the members of the Nation, culminating then the various legislative measures that, since the forties, have reached to surpass the differences between the Spanish people (…) Spain is moving towards full democratic normality, the time has come to complete this process by forgetting any discriminatory legacy of the past in the full fraternal coexistence of Spaniards".[14]

The decree law grants amnesty for all crimes and misdemeanors of political intention and opinion committed prior to July 30, 1976. Thus, unlike the previous pardon, common prisoners were excluded. Furthermore, and this is the most important point, the application of this measure of pardon was conditioned in the legal text itself to the fact that the crime or offense committed "has not endangered or harmed the life or integrity of persons or the economic patrimony of the Nation through monetary smuggling".[15]

The amnesty was processed by the judicial authorities, either at the request of a party or ex officio, and its recognition entailed the cancellation of the criminal record,

[11] *Sainz Moreno, F.*, "Efectos materiales y procesales de la Amnistía. (Responsabilidad patrimonial de la Administración, devolución de sanciones pecuniarias, satisfacción extraprocesal de la pretensión", in: Revista de administración pública, núm. 87, 1978, p. 361.

[12] Real Decreto-ley 10/1976, de 30 de julio, sobre amnistía, in: Boletín Oficial del Estado, núm. 186, 4 de agosto de 1976, pp. 15097 – 15098.

[13] *Orza*, "Amnistías e indultos durante el Franquismo y la Transición", op. cit., pp. 130 – 131; and *Sobremonte Martínez*, Indultos y Amnistías, op. cit., p. 98.

[14] Preámbulo, Real decreto-ley 10/1976, 30-VII-1976.

[15] Amnesty is also granted for the crimes of rebellion and sedition, as well as for fugitives and deserters. As a change, conscientious objectors who have refused to do military service are included in the amnesty. Finally, this measure is extended to violations of the sentence of the amnestied crimes in artículo primero, Real decreto-ley 10/1976, 30-VII-1976.

even if the convicted person had died.[16] It should be noted that few convicted persons benefited from the application of this amnesty (some sources point specifically to 287 political prisoners). As Santos Juliá has pointed out, on January 11, 1977, the Spanish political class asked President Suárez to extend the amnesty. Thus, the representative of the PNV demanded "that an amnesty be granted for all the events and crimes of political intentionality which occurred between July 18, 1936 and December 15, 1976". Previous pardons were not enough, but "a great solemn act was needed to forgive and forget all the crimes and barbarities committed by the two sides of the civil war, before it, during it and after it, up to the present day".[17]

The criticisms received forced the government to promote a legal reform that would eliminate the limits imposed for the recognition of amnesty and facilitate its processing.[18] In mid-March 1977 we witnessed a new legislative change in this area. At that time, the legal obstacles to a generous interpretation of the previous amnesty for political prisoners were eliminated, allowing its application a few dozen prisoners who left prison thanks to the suppression of the clause "endangered".[19] However, neither this provision nor another decree, also of March 14, on general pardon only served to extend and broaden the mobilization for a general amnesty.[20]

II. Law 46/1977, October 15 of Amnesty

1. Parliamentary Processing

After the celebration of the first democratic elections, the need for a new amnesty that could resolve the convictions that were still in force for political reasons was placed in the political debate.[21] On October 1977, a Proposed Law on amnesty was presented.[22] Although the text did not contain an Explanatory Statement,

[16] Artículo cuarto, Real decreto-ley 10/1976, 30-VII-1976.

[17] *Julia*, S., "Las dos amnistías de la transición", in: https://www.tendencias21.net/espana/Las-dos-amnistias-de-la-transicion_a13.html, last visit 26.08.2021; and *Orza*, "Amnistías e indultos durante el Franquismo y la Transición", op. cit., p. 132.

[18] However, to the criticism received "hay que valorar que esto se realizaba en el verano de 1976, con Suárez recién llegado al puesto de presidente del gobierno. Hay que entenderlo como un gesto de buena voluntad frente a una importante parte de la oposición, la cual se pretendía se aceptase el futuro proyecto de Ley de Reforma política", *Parra Iñesta*, "Las otras amnistías de la Transición española …", op. cit., p. 141.

[19] Real Decreto-ley 19/1977, de 14 de marzo, sobre medidas de gracia en Boletín Oficial del Estado, núm. 65, 15 de marzo de 1977, pp. 6201–6202.

[20] Real decreto 388/1977, de 14 de marzo, sobre indulto general en Boletín Oficial del Estado, núm. 66, 18 de marzo de 1977, pp. 6301–6302.

[21] *Molinero*, C., "La política de reconciliación nacional. Su contenido durante el franquismo, su lectura en la Transición", in: Ayer, núm. 66, 2007, p. 217.

[22] "Por el Sr. Secretario de la Cámara se va a dar lectura de la proposición de ley de amnistía que ha sido formulada conjuntamente los Grupos parlamentarios de Unión de Centro

from the reading of the parliamentary debates, we can extract the reasons for its drafting.[23] On the one hand, this law seeks reconciliation. The implementation of a democratic regime in Spain demanded the necessary coexistence among all Spaniards. Thus, the Parliament, although aware that the "amnesty would never be fair", considered it a "necessary measure"[24] that people must adopt at certain moments in their history in order to build something new.[25] In this sense, amnesty is presented as the "ethical-political presupposition of democracy, of that democracy to which we aspire which, because it is authentic, does not look backwards, but fervently wants to overcome and transcend the divisions that separated and confronted us in the past".[26]

On the other hand, the second motivation that justifies the enactment of the 1977 Amnesty Law is the reparation of the damage caused.[27] It is a duty of democracy, a commitment to freedom, to try to "repair, if reparation is possible, the damage, the harm, the injustice caused by an authoritarian regime". In this sense, Amnesty cannot be interpreted as a symptom of weakness of the new political stage, protecting unjust situations. On the contrary, it should be considered the end of an era and the beginning

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Democrático, Socialista del Congreso, Comunista, de la Minoría Vasco-Catalana, Mixto y Socialistes de Catalunya", Diario de Sesiones del Congreso de los Diputados, sesión plenaria núm. 11, celebrada el viernes, 14 de octubre de 1977, p. 954.

[23] "(…) resulta a todas luces conveniente conocer la opinión de todos los partidos en el debate de la Ley para entender las razones de tal decisión y la clarividencia casi absoluta de la opinión pública, partidaria de una política del olvido", *Moreno*, R./*Candela*, V., "Amnistía y (Des)memoria en la transición española", in: e-l@tina, Revista electrónica de estudios latinoamericanos, vol. 16, núm. 64, 2018, p. 53.

[24] In these terms, the spokesperson for "Unión de Centro de Democrático", said: "Somos conscientes de que la amnistía política, en si misma, no es una solución concreta de ningún problema específico. Ni siquiera es impensable desde el punto de vista de la justicia estricta, porque imposibilitada de eludir como acto de gracia el mero agravio comparativo de los delitos comunes, la amnistía nunca sería suficientemente justa", Diario de Sesiones del Congreso de los Diputados, sesión plenaria núm. 11, celebrada el viernes, 14 de octubre de 1977, p. 972.

[25] This same deputy continues: "Ocurre, sin embargo, que en la amnistía, sustancialmente, una decisión política constituye una medida necesaria en determinados momentos de la historia de los pueblos, especialmente de aquellos cuyo periplo vital como colectividad se singulariza por acusadas oscilaciones, y en todos los casos creemos que la amnistía es necesaria siempre que se persiga construir algo nuevo", Diario de Sesiones del Congreso de los Diputados, sesión plenaria núm. 11, celebrada el viernes, 14 de octubre de 1977, p. 973.

[26] Diario de Sesiones del Congreso de los Diputados, sesión plenaria núm. 11, celebrada el viernes, 14 de octubre de 1977, p. 973.

[27] It is necessary to reproduce some of the words of the deputy Benegas Haddad. He said: "Pero que nadie se crea que hoy estamos concediendo algo, que hoy estamos otorgando algo, que hoy estamos adoptando medidas de gracia. Hoy solamente estamos cumpliendo con un profundo deber de demócratas, con un ineludible compromiso con la libertad, que no es más que intentar reparar – si reparación cabe – los daños, los perjuicios, las injusticias provenientes de un régimen autoritario que no dudo en calificar como uno de los más implacables del siglo XX contra sus adversarios políticos. Estamos cumpliendo nuestro primer compromiso con la nueva etapa iniciada el pasado 15 de junio", Diario de Sesiones del Congreso de los Diputados, sesión plenaria núm. 11, celebrada el viernes, 14 de octubre de 1977, p. 966.

of another in which all democratic rules established by the popular will must be respected, and whoever does not respect these rules, whoever systematically violates them must be punished by the sanctions established by the legal system for the safeguarding of freedom and citizens' rights.[28]

Despite the misgivings expressed in the parliamentary debates by some deputies, who considered the amnesty to be an exceptional measure of the rule of law,[29] the law was approved in Congress and sent to the Senate.[30]

On the same day, the Senate approved the law.[31] Undoubtedly, the reasons that led to the ratification of this legal text are perfectly summarized in this brief speech by the Socialist Senator Fernández-Torrecilla who, speaking of the Amnesty Law, stated:

> "In this law, ladies and gentlemen Senators, we pardon all acts of political intent. In this law, ladies and gentlemen Senators, we definitively put an end to the division and enter the era of harmony, in the era of the reunion between Spaniards, of establishment of liberty, and of democracy, of the serious road to the future".[32]

Just two days later the new legal text was published in the "Boletín Oficial del Estado".[33]

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[28] Diario de Sesiones del Congreso de los Diputados, sesión plenaria núm. 11, celebrada el viernes, 14 de octubre de 1977, p. 968.

[29] In this regard, deputy Carro Martínez said: "(…) nuestro voto responde a una actitud reflexiva; porque nuestro voto responde a una verdadera preocupación de Estado y porque nuestro voto, sobre todo, responde a un problema de conciencia (…). Pero en cuanto hombres de Estado hemos de ser conscientes de que la amnistía es una institución de excepción en todo Estado de Derecho. Silvela, el gran político y jurista, afirmaba que la amnistía era la derogación retroactiva de la ley penal. Y esto, señores Diputados, es algo tan extraordinario que en algunas democracias de Occidente hace siglos que no se usa de esta institución (…)", Diario de Sesiones del Congreso de los Diputados, sesión plenaria núm. 11, celebrada el viernes, 14 de octubre de 1977, p. 957.

[30] In the Congress the text of the Project was approved without modifications with the following result: "317 votos emitidos; 296 afirmativos; 2 negativos; 18 abstenciones, y 1 nulo, que ha votado con dos teclas. Esto está claro. Señores Diputados, ha quedado aprobada la Ley de Amnistía (*Fuertes y prolongados aplausos de los señores Diputados puestos en pie*). Se levanta la sesión hasta las cinco de la tarde. *Eran las dos y treinta y cinco minutos*", Diario de Sesiones del Congreso de los Diputados, sesión plenaria núm. 11, celebrada el viernes, 14 de octubre de 1977, p. 974.

[31] The law was approved by 196 votes for, no votes against and 6 abstentions. These are those of the deputies of the "Alianza Popular" party. They expressed their misgivings that the Amnesty could be misunderstood and favor social insecurity, Diario de Sesiones del Senado, núm. 8, sesión celebrada el viernes, 14 de octubre de 1977, p. 230.

[32] Conclude this paragraph as follows: "Y a partir de ahora, sin reserva mental, a partir de este momento, podremos defender la plena restauración del orden jurídico, el restablecimiento de la convivencia de los españoles y el respeto a la ley, que no por culpa del pueblo estaba ausente de esa convivencia", Diario de Sesiones del Senado, núm. 8, sesión celebrada el viernes, 14 de octubre de 1977, p. 222.

[33] Ley, 46/1977, de 15 de octubre, de Amnistía, in: Boletín Oficial del Estado, núm. 248, de 17 de octubre de 1977, pp. 22785–22766. About this law, vid., *Jimeno Aranguren, R.*, Amnesties, Pardons and Transitional Justice. Spain's pact of forgetting, Routledge, Londres,

2. Content and Application

The Amnesty Law has only twelve articles and does not have preamble or explanatory statement. This legal text, unlike the previous provisions, it does not contemplate any limitation, granting the measure of amnesty for all crimes and misdemeanors committed before December 15, 1976 without any kind of limit or restriction, that is to say, regardless of the result.[34] Likewise, amnesty is granted for acts of the same nature carried out between December 15, 1976 and June 15, 1977, when the political intentionality also includes a motive of vindication of public liberties or of the autonomy of the peoples of Spain. This provision extends to acts carried out up to October 6, 1977 "provided that they did not involve serious violence against the life or integrity of persons".[35]

It is interesting to note that this is a true amnesty pact because in exchange for the amnesty of those convicted of terrorist acts, which were those contemplated in the first article of the law, the second precept also includes the "crimes and misdemeanors committed by the authorities, officials and agents of public order on the occasion of the investigation and prosecution of the acts included in this law, as well as the crimes of public officials against the exercise of the rights of persons".[36] This is one of the most relevant and controversial issues of the 1977 Amnesty Law. No political party, not even the extreme left or the most radical nationalists included in their programs "a retroactive justice for the violation of rights committed during the dictatorship". At the release of the ETA prisoners, according to professor Santos Juliá, there was a total amnesty for all crimes committed by any of the State officials".[37]

2019; and *Lorca Ortega*, J., La ley de Indulto (Comentarios, Jurisprudencia, Formularios y notas para su reforma), Tirant lo Blanch, Valencia, 2003.

[34] *Cuenca Morales*, J., "Del indulto general a la ley 46/1977, de 15 de octubre, de Amnistía: alcance, contenido, límites y beneficiarios del proceso. Posiciones convergentes y divergentes sobre la misma de las élites políticas reformadoras y de la izquierda radical", in: Las otras protagonistas de la Transición. Izquierda radical y movilizaciones sociales, Fundación Salvador Seguí, Madrid, 2018, p. 670.

[35] Artículo primero, Ley, 46/1977, de 15 de octubre, de Amnistía. For Santos Juliá, the only relevant thing that the amnesty of October 1977 added to that of July of the previous year was "poner en la calle a los presos de ETA condenados por delitos de terrorismo, aún en los casos de que su resultado hubiera sido la muerte", *Julia*, S., "Echar el olvido. Memoria y amnistía en la transición a la democracia", in: Claves de la Razón práctica, núm. 243, 2015, p. 265.

[36] Apartados e) y f), artículo segundo, Ley, 46/1977, de 15 de octubre, de Amnistía. In addition, this article includes in the amnesty the following assumptions: "a) Los delitos de rebelión y sedición, así como los delitos y faltas cometidos con ocasión o motivo de ellos, tipificados en el Código de Justicia Militar; b) La objeción de conciencia a la prestación del servicio militar, por motivos éticos o religiosos; c) Los delitos de denegación de auxilio a la Justicia por la negativa a revelar hechos de naturaleza política, conocidos en el ejercicio profesional; d) Los actos de expresión de opinión, realizados a través de prensa, imprenta o cualquier otro medio de comunicación", Artículo segundo, Ley, 46/1977, de 15 de octubre, de Amnistía.

[37] "Los apartados e) y f) del artículo 2, los que se referían a los funcionarios de la dictadura, no se colaron de rondón en el proyecto de ley, sino que se incorporaron a su texto con la plena

Contrary to what we might think, the application of this law was scarce, benefitting mostly members convicted of terrorism belonging to armed gangs such as ETA or GRAPO. This circumstance responds to the fact that the previous pardon measures already mentioned had already produced their effects on the majority of common or political prisoners.[38] Furthermore, the approval of the 1977 amnesty was interpreted by ETA as an act of weakness on the part of the government and led this criminal organization to intensify its attacks. In 1978 alone, ETA attacks produced 68 fatal victims, more than in all its previous history; but this number would soon be surpassed by the 76 victims in 1979 and the 91 in 1980.[39]

3. Evaluation

In general terms, we can affirm that the Amnesty Law of 1977 contributed to a great extent to the success of the political transition process that had begun with the death of the dictator Franco. Reconciliation and reparation of damages, although mitigated, met the expectations of all social and political sectors, and the law was approved unanimously in parliament. However, since 2006 and, especially, as a result of the resolutions adopted by various international organizations, we have witnessed a process in which the terms in which the law was drafted are being questioned and there is a call for its reform. We will focus the last part of our work on the study of this debate.

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conciencia de que esa era la contrapartida exigida por la amnistía para todos los actos de intencionalidad política, cualquiera que fuese su resultado, como establecía el artículo 1", *Julia*, S., "Echar el olvido …", op. cit., p. 266. In similar terms, *Cuenca Morales*, "Del indulto general …", op. cit., p. 672.

[38] "Así, siguiendo fuentes del Ministerio de Justicia, el diario El País ofrecía la cifra de 89 "presos políticos" como únicos posibles afectados por la amnistía de octubre de 1977, de ellos 85 preventivos y cuatro en fase de cumplimiento de la pena (tres del FRAP). En aplicación del indulto de 25 de noviembre de 1975 fueron liberados 8903 presos, el Real Decreto-ley de Amnistía de 30 de julio de 1976 supuso la excarcelación de 287 y 1940 internos como consecuencia de el Real Decreto-ley sobre Medidas de gracias y sobre indulto de 14 de marzo de 1977, más varias órdenes y Reales decretos complementarios", *Cuenca Morales*, "Del indulto general …", op. cit., p. 672.

[39] *Julia*, S., "Las dos amnistías de la transición", in: https://www.tendencias21.net/espana/Las-dos-amnistias-de-la-transicion_a13.html, last visit 26.08.2021. In the same terms, José Cuenca, said: "Sin perjuicio de la creencia extendida, aunque puede que no interiorizada realmente por los promotores de la Ley, de que una amplia, nueva y democrática amnistía podía suponer una normalización del proceso democrático, autonómico y un argumento para suprimir o disminuir la contestación terrorista (…), fundamentalmente en el País Vasco y navarra; parece que el pronóstico demostró su falta de realismo cuando ETA asesinó, incluso en el período de tramitación de la Ley, el 8 de octubre, al Presidente de la Diputación Foral de Vizcaya y a sus dos escoltas guardia civiles, y poco después aun concejal del Ayuntamiento de Irún y militante de Falange, alcanzado el proceso en escalada la cifra alarmante de alrededor de 90 víctimas mortales en el año 1980", *Cuenca Morales*, "Del indulto general …", op. cit., p. 673.

a) International Perspective

The Spanish political transition is an indisputable model on the international scene. In recent years it has become an example of peaceful transition from a totalitarian and dictatorial regime to a democracy.[40] However, it is true that during this time, different supranational organizations have questioned the way in which the Amnesty was applied in Spain, preventing the prosecution, trial and punishment of war criminals.

The first reference to this issue is found in the Council of Europe in 2006. On that date, the Standing Committee of this important institution approved a report condemning the serious and multiple violations of human rights that occurred during the Civil War and Franco's regime and urged the Spanish government to create a "national commission of inquiry into the human rights violations committed by the Franco regime".[41] On the other hand, the UN Human Rights Committee has been more forceful in this regard in a report approved in 2009 on what happened in the Iberian Peninsula between 1939 and 1975.[42] This document recommends the following to Spain:

– Consider repealing the 1977 Amnesty Law.
– Take the necessary legislative measures to ensure the recognition of the imprescriptibility of crimes against humanity by national courts.
– Provide for the creation of a commission of independent experts charged with reestablishing the historical truth about human rights violations committed during the civil war and dictatorship; and
– Allow families to identify and exhume the bodies of victims and, where appropriate, compensate them.[43]

In response to this recommendation, the Spanish State sent a reply in which it stressed that "the Committee is disqualifying a decision supported by the whole of Spanish society and which contributed to the transition to democracy in Spain. The aforementioned law was a demand of the entire democratic opposition and

[40] About, vid., *Pérez Lópe*, P. (dir.), La Transición española: una perspectiva internacional, Thomson-Aranzadi, Cizur Menor, 2020; and *Fernández Amador*, M./*Quirosa-Cheyrouze y Muñoz*, R. (eds.), La Transición española y sus relaciones con el exterior, Silex, Madrid, 2021.

[41] *Orza*, "Amnistías e indultos durante el Franquismo y la Transición", op. cit., p. 158.

[42] "El Comité, aunque toma nota con satisfacción de las garantías dadas por el Estado parte en el sentido de que la Ley de la memoria histórica prevé que se esclarezca la suerte que corrieron los desaparecidos, toma nota también con preocupación de las informaciones sobre los obstáculos con que han tropezado las familias en sus gestiones judiciales y administrativas para obtener la exhumación de los restos y la identificación de las personas desaparecidas", Naciones Unidas. Informe del Comité de Derechos Humanos, Vol. I, 94, 95 y 96 periodo de sesiones (2008 – 2009), p. 40.

[43] Naciones Unidas. Informe del Comité de Derechos Humanos, Vol. I, 94, 95 y 96 periodo de sesiones (2008 – 2009), p. 40.

was one of the first laws approved by consensus by the same Courts that approved the 1978 Constitution. Moreover, not only Spanish society but also world public opinion is aware of and has always supported the transition process in Spain, which was made possible, in part, thanks to this law".[44]

This has not been the only occasion on which this important UN Committee has reproached Spain. Unfortunately, for reasons of space, we cannot dwell on all of them.

However, we would like to point out the Report of the working Group on Enforced and Involuntary Disappearances of the Human Rights Council that visited our country during the autumn of 2013.[45] In this document they reproach how the application of the 1977 Amnesty Law has prevented the criminal investigation of cases of enforced disappearances during the Civil War, contravening the principles that emerge from Spain's international obligations.[46] In similar terms, another opinion of the

[44] The response of the Government of Spain continues in these terms: "Por estos motivos, el Estado español lamenta la inclusión de este punto en las observaciones del Comité, considerando que se han cometido disfunciones procesales en términos de competencia (ausencia de referencia a la disposición pertinente del Pacto), proceso debido (ausencia de oportunidad de defensa en el procedimiento) y determinación de los hechos (desconocimiento del origen y significación social de la Ley de Amnistía), Naciones Unidas, Pacto Internacional de Derechos civiles y políticos. Comité de Derechos Humanos, Examen de los informes presentados por los Estados partes de conformidad con el Artículo 40 del Paco. España. Adición. Comentarios del Gobierno de España sobre las observaciones finales del Comité de Derechos Humanos (CCPR/C/ESP/CO/5), p. 3.

[45] This document begins with this brief summary: "Por invitación del Gobierno de España, el Grupo de Trabajo sobre las Desapariciones Forzadas o Involuntarias visitó el país del 23 al 30 de septiembre de 2013. Desde el retorno a la democracia se han dado pasos importantes aunque tímidos para asegurar la verdad, la justicia, la reparación y la memoria frente a las desapariciones forzadas cometidas durante la Guerra civil y la dictadura. La adopción de la Ley de Memoria Histórica, los cientos de exhumaciones, el mapa en el que se identifica la ubicación de fosas comunes, las subvenciones a víctimas, las actuaciones aisladas de ciertos tribunales por las que se ordenan diligencias de investigación, búsqueda y exhumación, el proceso penal iniciado en el Juzgado de Instrucción núm. 5 de la Audiencia Nacional, los memoriales construidos, las leyes y protocolos adoptados e instituciones creadas por ciertas comunidades autónomas como Cataluña, el País Vasco o Andalucía, representan avances concretos y valorables", Naciones Unidas, Consejo de Derechos Humanos. Promoción y protección de los derechos humanos, civiles, políticos, económicos, sociales y culturales, incluido el derecho al desarrollo. Informe del grupo de trabajo sobre las desapariciones forzadas e involuntarias. Misión España, p. 1.

[46] "39. El Tribunal Supremo en sus sentencias de absolución y competencias estableció expresamente que no procede la investigación penal por casos de desapariciones forzosas durante la Guerra civil dado que estarían prescritos, los presuntos responsables estarían muertos, el carácter permanente de las desapariciones sería una ficción inaceptable jurídica y, de todas maneras, sería aplicable a ellos la Ley de Amnistía. Esta combinación de factores es contraria a los principios que emergen de las obligaciones internacionales de España, incluida la Declaración", Naciones Unidas, Consejo de Derechos Humanos. Informe del grupo de trabajo sobre las desapariciones forzadas e involuntarias. Misión España, op. cit., p. 12.

United Nations Committee against Torture written in 2015 is expressed.[47] In said report, when referring to the amnesty, the aforementioned international organization expresses its concern about the jurisprudence of the Supreme Court in which it established that "there is no criminal investigation for cases of serious human rights violations that occurred during the Civil war and the Franco regime (1936–1975)".[48]

The gravity and relevance of these accusations has had important repercussions in Spain, questioning the 1977 Amnesty Law in both the judicial and political arenas.

b) Response at the Internal Level

First, following the international reports and recommendations mentioned above, several individuals and associations filed a complaint before the Spanish courts to investigate the possible crimes of illegal detention, without giving a reason for the whereabouts, in the context of crimes against humanity in relation to persons who disappeared during the Civil War. The matter had to be resolved by the highest Spanish judicial body, which in its judgment 101/2012 of February 27, dismissed the petition on the basis of two fundamental arguments. On the one hand, it is stated that the "amnesty law was enacted with the full consensus of the political forces in a constituent period arising from the democratic elections of 1977" and, on the other hand, that "the aforementioned law was the result of a clear and patent claim of the political forces ideologically opposed to Francoism". Thus, the Supreme Court recognizes that the Amnesty was a necessary and indispensable demand, within the operation carried out to dismantle the Franco regime. This purpose "was achieved with very diverse measures of all kinds, one of which, of no small importance, was the aforementioned Amnesty Law". This law "did not contain, as it could not be otherwise, any delimitation of sides". Therefore, it can be concluded, the sentence continues, that "in no case was it a law passed by the victors, the holders of power, to cover up their own crimes". In this sense, the Supreme Court concludes, we are dealing with a rule that reflects the will of the Spanish people articulated in a law passed by the Spanish Parliament and that no judge or Court can in any way question its legitimacy.[49]

However, the jurisprudence of the Supreme Court should not mislead us. Spain has not disregarded the recommendations made by the various international organ-

[47] Naciones Unidas. Comité contra la tortura. Observaciones finales sobre el sexto informe periódico de España, sesiones 1302ª y 1305ª, celebradas los días 28 y 29 de abril de 2015, y aprobó en su sesión 1328ª, celebrada el 15 de mayo de 2015.

[48] "El Comité urge al Estado Parte a adoptar todas las medidas necesarias legislativas y de otro índole para asegurar que los actos de tortura, incluidas las desapariciones forzadas, no sean crímenes sujetos a amnistía o prescripción, y que esta prohibición se cumpla expresamente en la práctica", Comité contra la tortura, Observaciones finales sobre el sexto informe periódico de España, op. cit., p. 4.

[49] Sentencia del Tribunal Supremo, núm. 101/2012, de 27 de febrero, Fundamentos de Derecho, Tercero, Apartado 3. El ponente fue el magistrado Andrés Martínez Arrieta.

izations mentioned above, but rather the desire and the need to recover the memory, to address and repair the damage suffered by the Spanish population during the Francoist period has led to the enactment in our country of a Historical Memory Law which includes many of the observations that both the Council of Europe and the UN made to the Spanish government in relation to the 1977 amnesty law.[50]

Secondly, we found in the Parliamentary Session Journals an abundance of parliamentary activity on the Amnesty Law throughout the various democratic legislatures.[51] However, for the purposes of our intervention we will focus on the proposal presented in 2011 with which it was intended to reform the Amnesty Law by adding a new article excluding genocides and crimes against humanity from the application of this measure of amnesty.[52] The proposal was based on the recommendations that various international organizations had made to the Spanish State for the way in which the Amnesty Law was being applied, preventing the investigation and prosecution of crimes against humanity committed during Franco's regime. There is no doubt that this was a sensitive issue. The promoters of the legal reform themselves stated in the proposal their intention not to "reopen wound" being their will to "repair the victims and repair the memory".[53] However, the majority of the parliamentary groups were against this request, rejecting the reform of the 1977 Amnesty Law by 8 votes in favor, 320 against and 8 abstentions.[54]

[50] Ley 52/2007, de 26 de diciembre, por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la guerra civil y la dictadura, in: Boletín Oficial del Estado, núm. 310, jueves, 27 de diciembre de 2007, pp. 53410–53416.

[51] *Orza*, "Amnistías e indultos durante el Franquismo y la Transición", op. cit., p. 149 en nota al pie núm. 48.

[52] The wording of the new article was as follows: "Primero: Lo dispuesto en esta Ley no será de aplicación a los crímenes de genocidio o de lesa humanidad, a los que será de aplicación lo dispuesto en la normativa internacional que regula los mismos. Segundo: En lo referente a la definición de los actos criminales de genocidio o lesa humanidad, a su ámbito de aplicación universal y en su carácter imprescindible se estará a lo dispuesto en la normativa internacional en materia de derechos humanos y crímenes de lesa humanidad. Tercero: El presente artículo será aplicable retroactivamente a todas las resoluciones administrativas o judiciales que guarden relación con su objeto, pudiendo revisarse o reiniciarse al amparo de lo dispuesto en el mismo", Diario de Sesiones del Congreso, núm. 264, sesión de 19 de julio de 2011, pp. 11–12.

[53] "Señorías, no pretendemos, a la hora de presentar esta proposición de ley, reabrir ninguna herida, presentamos esta proposición de ley precisamente con la intención de contribuir a cerrar heridas, porque además, señorías, los criminales responsables de estos hechos durante el franquismo están todos ellos fallecidos. Tengan ustedes en cuenta que no se pueden cerrar heridas desde el olvido y la impunidad; solo se pueden cerrar heridas conociendo la verdad, reparando a las víctimas, haciendo justicia. Esto es lo que nos preocupa, esa es la intención de esta proposición de ley: reparar a las víctimas, reparar su memoria, y corregir hechos vergonzosos que todos ustedes conocen …", Diario de Sesiones del Congreso, núm. 264, sesión de 19 de julio de 2011, p. 13.

[54] Diario de Sesiones del Congreso, núm. 264, sesión de 19 de julio de 2011, p. 37.

At this point, it is worth noting, briefly, the reasons that led the parliamentary majority to oppose this legislative amendment. Firstly, the importance of Amnesty is highlighted. For a large sector of the Parliament, it had contributed to the reconciliation of all Spaniards and to the normal development of the Transition in Spain.[55] Secondly, the approval of the Amnesty was the result of a popular demand. We must remember, the deputies point out, that "the amnesty was not born in this Congress" but was born from the demands of the streets, in the squares, in the workers' assemblies, in the meetings of intellectuals, in the students' struggle", that is to say, "it was a response to a unanimous demand of the Spanish society, which believed that only with the amnesty a new democratic regime could be founded".[56] The third reason given by the deputies for rejecting the reform of the amnesty law was a technical or legal criterion that prevented it. Allowing the investigation of crimes committed during Franco's regime was unconstitutional because it violated the content of Article 9.3 of the Spanish Constitution of 1978 in two fundamental aspects, namely, the non-retroactivity of unfavorable criminal law and the principle of legal certainty.[57]

In conclusion, the 1977 Amnesty Law followed the spirit of consensus that characterized the Spanish Transition, using the Government's right of pardon with a clear political purpose of national reconciliation. However, over the years certain political sectors have emerged that take a negative view of the aforementioned legal framework, considering the impunity granted to the authorities or law enforcement officials who participated in the political repression of the Franco regime to be contrary to international law. This last position has been refuted by the doctrine since they consider that this critical assessment is ahistorical "because it ignores the context and the political positions of that moment".[58]

[55] The deputy Xuclá i Costa said: "(…) la ley de amnistía en aquel momento y con aquellos constituyentes conformó una de las piezas del pacto de la transición que nos ha permitido durante estos treinta años hacer algunas aportaciones positivas …", Diario de Sesiones del Congreso, núm. 264, sesión de 19 de julio de 2011, p. 16. En términos similares se expresaba el diputado Fernández Díaz al señalar: "(…) que la ley de amnistía de 1977 fue una pieza clave de la transición como lo fue antes la Ley para la Reforma política de 1976 y el referéndum de 1976 …", Diario de Sesiones del Congreso, núm. 264, sesión de 19 de julio de 2011, p. 17.

[56] Diario de Sesiones del Congreso, núm. 264, sesión de 19 de julio de 2011, p. 19.

[57] "Usted propone que se apliquen con retroactividad tipos penales existentes en el momento de la comisión de los hechos – si se cometieron, en cualquier caso deberán ser los tribunales los que lo digan, no el Parlamento – así como que se puedan revisar sin limitación alguna todos los actos derivados de la aplicación de la Ley de Amnistía, lo cual va en contra del principio de irretroactividad y en contra del principio de seguridad jurídica", Diario de Sesiones del Congreso, núm. 264, sesión de 19 de julio de 2011, p. 18.

[58] *Molinero*, "La política de reconciliación nacional …", op. cit., p. 218. Very significant are the words of the professor Santos Juliá in one of his best-known works on this issue. He said: "puede sonar, con la distancia del tiempo, a equidistancia, a reparto de culpas, a olvidar que el origen de todo fue una rebelión contra una república democrática. Puede sonar a todo esto, pero a lo que de ninguna manera suena es a una amnesia colectiva", *Juliá*, "Echar el olvido …", op. cit., pp. 268–269.

Franco's Regime. From Totalitarianism to Authoritarianism in its Repressive Model (April 1936 – November 1975)

By *Antonio Sánchez Aranda*

> "With the Constitution, it is possible to achieve a civil concord called Spain, where citizens who, because they have different opinions, beliefs or convictions, complement each other. Those who kill, kidnap and extort, those who opt for violence as a method of political action, are not our complements. They are only the destroyers of democratic values. The evil they procure and the harm they inflict, they do to us all."
>
> *Adolfo Suárez*, Prime Minister of Spain (1976 – 1981)[1]

With the paper we are presenting at this Symposium From Dictatorship to Democracy by Invitation of the Research Project The Berlin Administration of Justice after 1945, our intention is twofold: on the one hand, to offer some brief but, as we understand, necessary features of the Franco Regime between 1939 – 1975 (after the end of the Civil War, on 1 April 1939, it developed an authoritarian State that had its genesis with the formation of the so-called Technical State Junta of 1 Obtober 1936, which replaced the National Defense Junta – constituted on 24 July 1936 in Burgos and after the failure of the coup d'état by the rebels –, with General Franco as head of the Government); On the other hand, to establish the political-institutional features, particularly of Franco's jurisdiction, in order to address the reasons for the amnesty and its scope in the Spanish Transition.

This period began, with the death of the dictator Francisco Franco on 20 November 1975, practically from the appointment as Head of State, with the title of King, of Juan Carlos I on 22 November 1975: although he swore the Francoist Fundamental Laws, in the face of the misgivings of the Franco's Parliament (Cortes), in a somewhat diffuse speech the new monarch stated that he would seek "a consensus of national concord",[2] and so he did.

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[1] Speech given on the occasion of the presentation of the Human Values Award on 11 April 2002 (Group Correo-Prensa Española).

[2] In application of the Law of Succession to the Head of State of 27 July 1947, this constituted Spain as a Catholic Kingdom and State and established Francisco Franco as the Head of State for life. He was legitimized to propose his successor to the Francoist Cortes. This appointment was made in the person of Juan Carlos with the title of "Prince of Spain", thus

I. Introduction. The Spanish Political Transition

The arrival of King Juan Carlos I as Head of State in November 1975 allowed what is considered in the Transition as the Spanish "political miracle"[3]: the first "peaceful" transition from a dictatorial state in Europe, exhausted and without legitimacy, to a constitutional regime, and always based on the permanent search for consensus among all the political-social-economic actors involved.

Therefore, we have witnessed a political change since the death of the Dictator which was pushed forward from within the state structures themselves and which was also brought about by the far-sightedness of all the political compromisers.

This intense change from "dictatorship to democracy" (as the title of the Symposium puts it) in barely three years had, as we see it, three key moments that we specify in terms of political-legislative activity (in chronological order):

First, the Law of 4 January 1977 for Political Reform. Its author, the jurist and politician Torcuato Fernández Miranda (president of Franco's Congress of Deputies from the end of November 1976) presented to the King, who approved it, the idea of the reform "from within" of the Fundamental Laws – following the traditional way of Spanish politics since the beginning of 19th century constitutionalism of "reformist rupture" or "ruptures reform" using the mechanisms existing in the aforementioned Fundamental Laws –[4]: it established the preliminary political bases of the democratic system by specifying the path along which the Francoist Cortes had to travel (a law considered the eighth and last Fundamental Francoise). Under his hand, the Decree-Law regulating the first democratic general elections in forty-one years and the first regulation of the right to trade union association was passed on 15 March. Elections were called for 18 April. Following the resignation of Torcuato Fernández-Miranda as president of the Parliament (Cortes and of the Council of the Kingdom – in Spanish, Cortes y Consejo del Reino –) on 31 May, the Cortes were democratically elected

bypassing the natural order of succession that corresponded to his father Juan de Borbón under the Law of 22 July 1969 providing for the succession to the Head of State. Juan Carlos was proclaimed successor to the Dictator by Franco's Cortes on 22 July 1969, swearing "loyalty to the principles of the National Movement and other Fundamental Laws of the Kingdom".

[3] Especially if we compare it with the disintegration of Yugoslavia, which claimed 140,000 lives, or with dictatorships that managed to perpetuate themselves by stifling the incipient civil movement for reform (the case of Tiananmen in China).

[4] Franco was reluctant to spell out in detail the powers vested in him, opposing the drafting of a constitution reminiscent of the previous period. The decision to institutionalize his power came in response to a series of external events and, logically, to the need to perpetuate the regime. He would enact seven Fundamental Laws that would be known as "the other Constitution" (in the words of Jorge de Esteban), the eighth dead Franco was attributed to the one for Political Reform. The seven laws were, in chronological order: The *Fuero del Trabajo* (9 March 1938); The *Ley Constitutiva de las Cortes* (17 July 1942); The *Fuero de los Españoles* (17 July 1945); The *Ley de Referéndum* (22 Obtober 1945); The *Ley de Sucesión a la Jefatura del Estado* (26 July 1947); the *Ley de Principios del Movimiento Nacional* (17 May 1958) and the *Ley Orgánica del Estado* (10 January 1967). In this respect, *vid. De Esteban*, J., Las Constituciones de España, Madrid, 1982, pp. 28 – 30.

on 15 June 1977, and Antonio Hernández Gil, professor of civil law, was appointed as the new president until the Constitution came into force (27 December 1978), with Adolfo Suárez being confirmed as president of the Government (17 June 1977).[5]

The Law for Political Reform allowed for further constitutional debate with the intervention of all the political forces present in the Parliament (Congress and Senate). It practically put an end to the Franco regime: on 22 July Juan Carlos I inaugurated the new constituent Cortes, defining himself as a "constitutional king with functions of integration and arbitration in a democratic system".[6] It is worth to point out that, on 28 July the Suárez government submitted its application to join the European Economic Community.

Second, the so-called Moncloa Pacts signed on 25 Obtober 1977 (formally there were two: Agreement on the program of reform of the Spanish economy and Agreement on the program of legal and political action), signed by all the political forces with parliamentary representation, business associations and some trade unions. They laid the foundations for the necessary reforms in the areas of the economy, politics and justice, based on consensus (remember the context of the international economic crisis caused by the oil crisis which, in Spain, was profound, with high unemployment and unemployment rates, and the territorial issue with the Basque-Catalan problem and the strong presence of the terrorist groups ETA and GRAPO). In this context, political normalization was promoted, and on 14 Obtober the Spanish Parliament unanimously approved the Amnesty Bill, and Spain subsequently signed the Convention for the Protection of Human Rights and Fundamental Freedoms on 24 November.

[5] Unión de Centro Democrático (UCD) won the relative majority with 165 seats, followed by Partido Socialista Obrero Español (PSOE), with 118 seats; Partido Comunista de España (PCE), with 20 seats; Alianza Popular (AP) with 16 seats; Pacte Democràtic per Catalunya (PDC), with 11 seats; Partido Nacionalista Vasco (PNV), with 8 seats; Partido Socialista Popular-Unidad Socialista (PSP-US) with 6 seats; Unió del Centro i la Democracia Cristiana de Catalunya (UC-DCC) with 2 seats, and Esquerra de Catalunya-Front Electoral Democràtic (EC-FED), Euskadiko Ezkerra-Izquierda de Euskadi (EE-IE), Candidatura Aragonesa Independiente del Centro (CAIC) and Candidatura Independiente del Centro (CIC), all with one seat.

[6] The King would defend "since popular sovereignty has its highest personification in the Crown, I would like to call upon you to cooperate fully and resolutely to achieve these ends. Democracy has begun, that is undeniable. But you are well aware that much remains to be done, although goals that many were reluctant to imagine have been achieved in a short time. Now we must try to consolidate it (…) The Crown desires – and believes it is interpreting the aspirations of the Cortes – a Constitution that will accommodate all the peculiarities of our people and guarantee their historical and current rights. It wishes to recognize the diverse reality of our regional communities and shares in this sense all those aspirations that do not weaken, but rather enrich and make the indisputable unity of Spain more robust".

Solemn joint opening session of the Congress of Deputies and the Senate, held in the Palacio de las Cortes on Friday, 22 July 1977, in the presence of His Majesty the King, at *Diario de Sesiones de las Cortes*, n° 3, 22 July 1977, pp. 38–41.

Third, with the approval of the Spanish Constitution, following a national referendum held on 6 December 1978, which came into force on 29 December of that year and established the current political system of parliamentary monarchy and the regime of Autonomous Communities.

The Spanish Transition therefore has two features that make a unique model:

1. It was one of the first to take place peacefully till the date (although it is currently questioned from leftist positions in the historical review that is being carried out: not only because of the presence of terrorist groups but also because of the military coup attempts such as the failed one of 23 February 1981). It is followed by numerous examples of democratic transitions in Eastern Europe after the fall of the Berlin Wall, such as the peaceful transition to democracy in Poland, where the Spanish model was studied in some detail, and in Czechoslovakia, Hungary, and Bulgaria, among others (by contrast, Romania was the only Eastern Bloc country to violently overthrow its communist regime and execute its head of state. The case of East Germany, as is well known, is different).

2. The 1978 Constitution is the fruit of consensus: that of all the relevant political parties represented in the Cortes of 1978. In this context, dialogue was sometimes difficult, which led, for example, the politician Gregorio Peces Barba to leave the Constitutional Committee on 7 March 1978 when the PSOE considered that the political conditions that maintained the consensus *facit legem* had been breached. Although there was a broad majority of right-wing political parties, we must highlight the following actions that culminated the Spanish constituent process: that of the "political genius" and commitment of Adolfo Suárez (president of the UCD government); the aforementioned support of Fernández Miranda (president of Congress) and the political vision of other leaders (Manuel Fraga, AP, Felipe González, PSOE, and Santiago Carrillo, PCE, mainly), and, last but not least, the firm commitment to political reform of King Juan Carlos I, even more firmly established in the Crown since his father Don Juan de Borbón renounced his dynastic rights in his favor on 14 May 1977.

This meant that the Constitution was not imposed by one political group against another but, for the first time in our political history since the first nineteenth-century constitutionalism (the Cadiz Constitution of 11812 introduced the principle of Catholic constitutional monarchy); the Constitution of 6 December 1978 was accepted by all the political forces present in the Chambers with few exceptions.

In conclusion, the consensus, far from being an obligation, was deliberately sought and sought, especially by the President Adolfo Suárez. In this 1975 – 1978 framework, what was the political background? Is it possible to consider the Francoist state a repressive regime? What was its nature? What decisions were taken in terms of reconciliation – amnesty, pardons, etc. – that made the great pacts and laws of the Transition possible?

II. The Franco Regime

On 18 July 1936, a military uprising against the Second Republic began but failed, leading to the Civil War.

The initial failure of the "National Uprising" (as described in the abundant archival documentation preserved) made it necessary to establish a new administrative structure for the territories under rebel control. This new government, capable of replacing that of the Second Republic, began to take shape with the formation of the *National Defense Board* (Junta de Defensa Nacional), set up by the military rebels in the city of Burgos on 24 July 1936.[7]

In this war context, it did not take long for a military man, general Francisco Franco Bahamonde, to stand out: on 1 Obtober 1936 he was proclaimed Head of the State Government by the Junta itself (before: on 21 September he had managed to unite the military leadership and was named Generalissimo of all the Armies, holding the sole military command) and, consequently, he assumed "all the powers of the new State".[8]

We are witnessing the genesis of the so-called Francoist State. When Franco was appointed head of the National Government, it was the beginning of a process of concentration of power around him that allowed the bureaucratic structuring of the "new State": after the "Nationals" defeated the Republicans in the Battle of Teruel (December 1937), seeing themselves as the victors of the conflict, a new Administration was promoted with its capital in Burgos, in accordance with the Law on the Organization of the State Administration of 29 January 1938. This is the date of the formation of what it is considered to be Franco's first "centralist" government (a power that he exercised uninterruptedly until his death on 20 November 1975).

Also, together with the new bureaucratic structure, an iron institutional apparatus was developed to repress the enemy and control the population. Prior to this, a purge of civil servants and the seizure of assets of those disaffected with the Popular Front had been carried out.

The end of the Civil War marked the beginning of the long period of the Franco dictatorship (1 April 1939 – 20 November 1975). But what was the nature of the Francoist State? In addition, can it be considered a fascist State?

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[7] Composed of seven military personnel and presided over by Major General Miguel Cabanellas (the most senior), collegially assuming all the "powers of the State". *Vid. Decreto n° 1 por el que se constituye una Junta de Defensa Nacional que asume los Poderes del Estado y representa legítimamente al País ante las potencias extranjeras*, in: Boletín Oficial de la Junta de Defensa Nacional de España – hereinafter BOJDNE – n° 1, 25 July 1936, p. 1.

[8] Decree no. 138, 29 September 1936, appointing His Excellency Major General Francisco Franco Bahamonde as Head of the Government of the Spanish State, who will assume all the powers of the new State (BOJDNE n° 32, 30 September 1936, pp. 125 – 126). In this respect, *Pino Abad*, M., "Apuntes sobre el ceremonial de nombramiento de Franco como jefe del estado", in: REI, vol. 3, n° 4 (2016), pp. 63 – 78.

1. Francoism, a Pseudo-Fascism

It should be made clear that we are not debating its nature, i. e. whether it was totalitarian or authoritarian. The idea that the coup d'état of 18 July, which initially failed, was carried out by the military in order to impose a fascist regime is a later reinvention that is not accepted by historiography.

In this respect, Linz Storch de Gracia considers that in contrast to non-democratic and totalitarian political regimes – characterized by the implementation and imposition of a total political integration between the state and society in which the adherence of the political community was an obligation –, Francoism was an authoritarian regime in which the state controlled political power without the citizens being able to participate in decision-making. This is, a limited political pluralism lacking of an elaborated and guiding ideology. Consequently, without the pretension of controlling social life by means of ideology, it sought, among its objectives, to achieve the passivity of the citizens themselves. The author argues, therefore, that Francoism is ascribed to a non-democratic and non-totalitarian political system that brought together, among its characteristics, a "limited political pluralism, not responsible, lacking an elaborated and leading ideology, but with characteristic mentalities, lacking extensive and intense political mobilization, except at certain moments of its development, and in which a leader or sometimes a small group exercised power within formally ill-defined but in reality predictable limits".[9] If we follow this thesis, we can frame this long Dictatorship, for some "chameleonic", within the non-totalitarian and non-democratic systems far from a specific ideology (unlike the Nazi or Italian fascist parties: in fact the Regime took ideas mainly in social doctrine from the Catholic Church – national Catholicism –, but also from liberal democratic regimes as far as the field of economic policy is concerned – especially after the entry into the OECD, the UN, etc., or including the first measures in defense of consumers in 1957 –; and practically devoid of mobilization insofar as Franco generally used popular rallies on few occasions). Finally, we should bear in mind that Generalissimo Franco, its leader, exercised power with the support of the army from the formation of the Junta Técnica de Estado (constituted, as mentioned above, in October 1936).

Without going into the question of the political nature of the regime, we are interested in the historical-legal sphere of the ways in which power was exercised, par-

[9] *Linz Storch de Gracia*, J. J., "Una interpretación de los Regímenes autoritarios", in: Papers: Revista de Sociología 8 (1978), pp. 11 – 16, the quotation on p. 11, and Sistemas totalitarios y regímenes autoritarios, vol. 3, edited by José Ramón Montero and Thomas Jeffrey Miley, Centro de Estudios Políticos y Constitucionales, Madrid, 2009. His extensive bibliography is analyzed by *Chehabi*, H. E., *A bibliography of Juan J. Linz*, in: Linz, J. J./Michels, R., Political Sociology and the future of Democracy, 2006, pp. 173 – 210; by the same, An Authoritarian Regime: The Case of Spain, in: Erik Nard and Yrjo Littunen (coord.), Cleavages, Ideologies, and Party Systems, Helsinki, 1964 (reprinted with the same title in Erik Allard and Stein Rokhan – comps. –, Mass Politics: Studies in Political Sociology, New York, 1970. Page references are to the latter edition, p. 255).

ticularly in the Administration of Justice. In the jurisdictional sphere, military control of its institutions was evident from the outset, a control which gradually disappeared after the change of the war scenario in 1942 in favor of the Allies during the Second World War. In this sense, we must affirm from the European context that we cannot simply assimilate Francoism to European fascism, especially as it coincided with the profile and period of German and Italian fascism. From a comparative perspective, and following Aróstegui Sánchez, it can be considered a pseudo-fascism when analyzing the actions of Franco and his cronies, the military and civilian support received in the Civil War, the absence of a previous political party to support him – this support would not come until the Spanish Falange was formed as a single party with the Juntas de Ofensiva Nacional Sindicalista (abbreviated as FE de las JONS or FE-JONS), a minority party set up by the so-called Unification Decree of 20 April 1937 and which from 1939 would become the political arm and sole party of the now Glorious National Movement) and, above all, the long evolution of the Regime up to 1975 in terms of its organization and legislation in repressive matters, which we will analyze below.[10] Franco was a survivor who knew how to adapt his regime to changing international circumstances in order to guarantee its continuity (in 1942, after the German setbacks in the war, he made his repressive militarized jurisdictional model more flexible and transferred it to ordinary jurisdiction, as exemplified by the reform of the jurisdiction of political responsibilities in February or by the Law establishing the Cortes, of 17 July, which declared them the highest organ of participation of the Spanish people in the tasks of the State), or in 1945, after the end of World War II, with the approval of the Law of Referendum (17 Obtober), designed for cases of consultation of the Nation on draft laws in the case of public interest or prior approval of the Law of Referendum (17 Obtober); or in 1945, after the end of World War II, with the approval of the Referendum Law (22 Obtober), designed for cases of consultation of the Nation on draft laws in cases of public interest, or the prior approval of the Fuero de los Españoles (17 July), which proclaims respect for the dignity, integrity and freedom of the human person as a guiding principle of State acts, among other moments).

Let us specify the particular features that allow us to describe Franco's regime as pseudo-fascism:

a) It had the pretence of being considered a State of Law, not a revolutionary one, a framework in which it legislated abundantly also for the sake of repression. The of-

[10] In this respect, *vid. Arostegui Sánchez*, J., "Opresión y pseudo-juridicidad, de nuevo sobre la naturaleza del franquismo", in: BHCE 24 (1996), pp. 31–46, la cita es de la p. 37. También, del mismo, Los componentes sociales y políticos, en: *Tuñón De Lara*, M./*Aróstegui*, J./*Viñas*, A./*Cardona*, G. Y./*Brical*, J. M., La Guerra civil española cincuenta años después, Barcelona, 1985; "Una dictadura conservadora", in: La aventura de la Historia 16 (2000), pp. 16–18; y "La oposición al franquismo. Represión y violencia políticas", en *Tusell*, J./*Alted*, A./*Mateos*, A., La oposición al régimen de Franco. Estudio de la cuestión y metodología de la investigación, Actas del Congreso Internacional, t. I, vol. 2, Madrid, UNED, 1990, pp. 235–256.

ficial gazette Official Gazette of the Spanish National Defense Board (Boletín Oficial de la Junta de Defensa Nacional de España – BOJDNE –), published in Burgos (25 July – 2 Obtober 1936), was constituted and replaced by the Official State Gazette (Boletín Oficial del Estado, hereinafter referred as BOE) en on 2 Obtober 1936, in which Franco's ukases were inserted. Consequently, the legislation that has come down to us allows us to assert that it acted from the proclamation of fundamental legal principles of criminal law and legality (non-retroactivity, non bis in idem, proportionality of penalties, among others) which, on the other hand, it never observed. This is why we use the expression "State with law" to refer to Francoism.

b) Unlike national-socialism or Italian fascism, the Franco regime incorporated the "special" repressive jurisdictional institutions throughout the period of its rule within the structures of the State itself.[11] Within this framework, it developed the judicial arbitrariness typical of non-democratic political systems in the absence of independence from political power, with judicial proceedings being characterized by extraordinary speed, brevity and discretion, breaking the fundamental legal principles of the previous constitutional order. Consequently, and as a distinct feature, the new Francoist state incorporated the repressive jurisdictional institutions, among others, arbitrarily designated by the political power within the very fabric of the state, exemplifying a model which legalized violence from its beginnings until its disappearance. As Del Águila has masterfully pointed out, the model of the special jurisdictions exemplified a broad procedural discretionally

> "often assimilated to the most absolute arbitrariness of the proceedings, which empowered the judicial body to dispense with any guarantee, requirement or procedural procedure, however substantive it might appear, favoring an impunity which was even formally consecrated (…), as occurred in the case of monetary crimes, smuggling, political responsibilities and the repression of Freemasonry and communism".[12]

c) The preservation of repressive documentation. Francoism, on the other hand, acted "for the good of Spain", which is why it promoted the Glorious National Uprising – an expression included in the archival documentation –, vindicating the postulates of traditional 19th century liberalism which it understands to have been broken during the Second Republic (1931 – 1936) and which it now wishes to re-establish: traditionalism, national Catholicism and national trade unionism, to which it adds militarism. The slogans of the "Homeland" that we find in the documentation we have worked on summarize his ideology well, a clear nationalist simplification of the concept of Spain: Viva España Única! Viva España Grande! Viva España Libre! Spain, one (indivisible, it denies separatism), great (recalling the Spanish im-

[11] In this respect, *vid. Czeguhn*, I., El Derecho penal político en el Tercer Reich, in: Pérez Juan/Moreno Tejada, Represión y orden público durante la II República, la Guerra Civil y el Franquismo. Una visión comparada, Pamplona, 2019, pp. 339 – 350.

[12] *Del Águila*, J. J., El Top. La represión de la libertad (1963 – 1977), Barcelona, 2001, p. 394. Del mismo, además, "La represión política a través de la jurisdicción de guerra y sucesivas jurisdicciones especiales del franquismo", in: Hispania Nova 1 (2015), pp. 211 – 242.

perial idea of the 16th century that was now to be projected to Africa since the international conference of Algeciras in 1906) and free (without foreign influences, in response to what is considered to be an international Judeo-Masonic-Marxist conspiracy). This action on behalf of Spain has meant that the documentary sources – in particular, those derived from the confiscation of assets, courts martial and special trials, among others in the sphere of the Administration of Justice – have not been expurgated and have been preserved practically in their entirety (with the exception of those relating to the Falange).

2. Repression: Features and Phases

Fundamentally, and in order to understand the scope of the political amnesty laws of the Spanish Transition, there can be no doubt that the Francoist state was a repressive state from the outset and throughout the entire period of its existence. Repression was an instrument of domination and "forced consensus". It created an extensive repressive network, one of its objectives being to physically and ideologically eliminate the "enemy" (Republicans, communists, trade unionists, Freemasons…), and to terrorize the population as a whole, covering all possible fields (social-political, economic, labor, cultural…). Those who could were banished. A significant classification was established, particularly in the field of university repression, by Baldó Lacomba, when he spoke of the exiled, the terrified and the buried.[13]

Having affirmed that repression was inherent to the regime, we can ask ourselves, once the Civil War was over, what was its scope in quantitative terms? How did it develop? What repressive institutions were established?[14]

Let us look at the quantitative sphere: the figures of repression. In the period of more than thirty-six years that the regime lasted (why it lasted so many years is another question, in relation to the international context of the Cold War), the balance sheet leaves no room for doubt:

a) During the Civil War (on both sides): recent demographic studies estimate that the conflict caused some five hundred and forty thousand deaths (540,000).

b) It should be noted that there were approximately 700,000 exiles (700,000), the great exodus. Mainly to France after the occupation of the city of Barcelona on 25 January 1939 (which divided the Republican Zone in two), a territory in which emigration was massive, settling around 60% of the refugees (defeated soldiers, politicians, civil servants, people from all the refugee territories in Catalonia). The first "mass emigrations" of the 20th century and allowed the great humanitarian transports to America, *verbi gratia*, the voyage of the steamship Sinaia that left the French port

[13] In this sense, *Baldó Lacomba*, M., "Represión franquista del profesorado universitario", CIAN 14 (2011), pp. 31–51. En particular, pp. 32 y ss.

[14] In this regard, among others, *Arnabat Mata*, R., "La represión: el ADN del franquismo español", Cuadernos De Historia 39 (2013), pp. 33–59.

of Sète on 25 May, 1939 constituting the first great humanitarian transport of refugees[15]), reaching in this territory the approximate figure of five hundred thousand exiles (500,000 exiles).[16] Other Spanish-American territories (mainly Mexico and Argentina) received around 19%, and Germany approximately 4%. The Franco regime rarely allowed exiles to return.

c) From April 1939 – 1975 it is calculated that there were almost one million political prisoners (1,000,000) and approximately two hundred thousand dead (200,000), including executions, imprisonment, etc., with the creation of two hundred and ninety-six (296) concentration camps in which some 700,000 people were held. War councils, special criminal courts, criminal law, etc. represented the institutional and legal framework for the legalization of repression.

Let us focus on this last section: the legalization of repression and *ad hoc* jurisdictional institutions within state structures. As we have pointed out, this is a feature which differentiates it from totalitarian regimes, particularly Hitler's, in which repressive institutions remained outside bureaucratic structures and did not develop legislation on the matter; in many cases, however, there was an oral transmission of these institutions, which, consequently, lacked such legislation.

On the other hand, far from imposing a penal system that was indulgent towards the defeated, Francoism assumed the need for a procedure of physical and moral extermination of the "enemy". In general, it is stated that "Francoist violence was carried out in a very specific way, by means of repression. Repression will acquire a triple meaning: it will constitute an element of punishment for the disaffected, it will become an element of submission for the undecided, it will become an element of cohesion for the victors', and, consequently, one of the characteristics of the regime is the use of violence throughout the whole of its existence.[17] To this end, as Tussel

[15] *Sherzer*, W.M., "El viaje de Sinaia", BIEG 211 (enero-junio, 2015), pp. 293 – 304.

[16] The situation was aggravated because after the international recognition of the Francoist State by the French and British States on 26 February 1939, they were exiled and defenseless… stateless, without any legal protection (let us not forget the French internment camps). A situation of "alegality" which, thanks mainly to Mexico and the help of its ambassador to France, Nicolas Bassoll, enabled them to obtain a legal status that allowed them to emigrate to America (the first of these was the large humanitarian transport ships, the aforementioned steamship Sinaia, which left the port of Sète on 25 May 1939), and also allowed the Republican political cadres to go to that country to form the Republican Government in Exile. In this respect, *Sánchez Aranda*, A., En Nombre Del Glorioso Alzamiento Nacional. Los procesos de depuración y represión política de Gabriel Bonilla Marín, Catedrático de procedimientos y práctica forense de la Universidad de Granada, Dykinson, Madrid, 2018, pp. 167 et seq.

[17] *Hernández Burgos*, C., "La represión franquista en la Universidad de Granada", in: Gómez Oliver, M./Martínez López, F., Historia y Memoria. Todos los nombres, mapa de fosas y actuaciones de los Tribunales de Responsabilidades Políticas en Andalucía, Universidad de Almería, 2007. I quote from the online work, p. 1. This is a generic quotation from the article in: *Mir Curcó*, C., "El estudio de la represión franquista: una cuestión sin agotar", Ayer 43 (2001), pp. 11 – 35. Also the first, Granada azul. La construcción de la Cultura de la Victoria en el primer franquismo, 1936 – 1951, Granada, 2011.

Gómez pointed out, it developed a unique repressive model which is difficult to find in Western Europe, not even in the aforementioned cases of Fascist Italy or Hitler's Germany, although it is explained in Spain by the existence of military conflict.[18]

With the repressive institutions incorporated into the very structures of the State, Francoism developed an exceptional criminal policy based on three main features:

(A) Instrumentalization of military jurisdiction (mainly, through the Bandos de Guerra from July 1936: thus, for example, the one that declared the state of war in the city of Granada published, finally, on 20 July by the ill-fated commander Miguel Campins Aura, loyal to the Republic and whom Queipo de Llano, declared Chief of the Southern Army at the end of July 1936, territory of Andalusia and Extremadura, ordered to replace and try in summary court martial, being shot on 16 August). The Bando was published in the following terms, exemplifying the extension of the jurisdiction of this "exceptional justice" to the detriment of ordinary criminal jurisdiction[19]:

> BANDO. MIGUEL CAMPINS AURA, Brigadier General and Military Commander of this square. I LET KNOW:
>
> Article one. In view of the state of disorder which has prevailed throughout the nation's territory for the last three days, the absence of action by the central government and in order to save Spain and the Republic from the existing chaos, a STATE OF WAR is hereby declared throughout the territory of the province.
>
> Article 2. All authorities who fail to ensure public order by all the means at their disposal shall be immediately suspended from their posts and held personally responsible.
>
> Article 3. Anyone who, with the aim of disturbing public order, terrorizing the inhabitants of a town or carrying out social revenge, uses explosive or inflammable substances or employs any other means or artifice that is proportionate and sufficient to cause serious damage or cause accidents by rail or other means of land or air transport, shall be punished with the maximum penalties established by the laws in force.
>
> Article 4. Anyone who, without due authorization, manufactures, possesses or transports explosive or inflammable materials, or even if they possess them legitimately, issues or facilitates them without sufficient prior guarantees to those who then use them to commit the offences defined in the previous article, shall be punished with the maximum penalty of major arrest to major imprisonment.
>
> Article 5. Anyone who, without directly inducing others to commit the offence punishable under the first article, publicly provokes others to commit it or advocates this offence or its perpetrator, shall be liable to a maximum term of imprisonment or a minimum term of imprisonment.
>
> Article 6. Robbery with violence or intimidation of persons carried out by two or more criminals, when any of them are carrying weapons and the act results in murder or injury as referred to in number 1 of Article 1 of this Act, shall be punishable by the maximum penalty.

[18] *Tussel*, J., Los grandes procesos penales de la Época de Franco. Desde la Posguerra a Grimau y el Proceso de Burgos, in: Muñoz Machado, S., Los grandes procesos de la Historia de España, Barcelona, 2002, pp. 484–493, mainly p. 485.

[19] Newspaper Ideal of Granada, martes, 21 de julio de 1936.

> Article 7. Any individual in possession of weapons of any kind or explosives shall hand them in before midnight today at the nearest military or Civil Guard post.
>
> Article 8. Groups of more than three people shall be broken up by force with maximum energy.
>
> GRANADINOS: For the disturbed peace, for order, for love of Spain and the Republic, for the re-establishment of the laws of labor, I await your collaboration in the cause of order. Long live Spain. Long live the Republic. Granada, 20 July 1936".

Special military jurisdiction, exceptional justice, endowed with broad powers for the summary application of military criminal law (mainly the Code of Military Justice of September 1890) to citizens by means of summary courts martial. This feature gradually disappeared from 1939 onwards, giving way to a mixed civilian-military jurisdictional model which was generalized until 1945. In order to understand Franco's repressive discourse, which denied charges of rebellion and sedition against those who took up arms, the inverse process by which the defenders of the legitimate Republican regime were turned into rebels is key. What was sarcastically called "justice in reverse": Republicans who supported the Popular Front (remember that Manuel Azaña had been President of the State since May 1936 and that the Popular Front had won the general elections to the Cortes in February of the same year) were accused of "Adherence to the Rebellion, Aid to the Rebellion, Military Rebellion" or sedition. The rebels called themselves defenders of order and the homeland, the raison d'être of the "Glorious National Uprising". Franco himself later stated that "the Glorious National Movement had never been an uprising. The rebels were and are the Reds".[20] As the leader Ramón Serrano Suñer, Minister of the Interior and Franco's brother-in-law, cynically stated a few years later in his memoirs,

> "It was established that the 'rebels' were the populist front, forgetting that the rebellion against a situation that was considered unjust was legally in the National Uprising. As a result, the rebels against the constituted – republican – State Government was, according to the Code of Military Justice, those who rose up, and all of them, in the National Uprising. Those who rose up and all of us who assisted and collaborated with them, and that those who were with the 'constituted' Government could not be legally such (…) On this basis of upside-down justice – an unusual system in the history of political-social upheavals – the War Councils began to function".[21]

Justices that did not seek the truth, but assumed that all the accused were guilty unless proven the contrary, which was almost impossible in the framework of Franco's truculent military judicial system where the right of defense was non-existent. In

[20] *Suárez*, Á., Y Colectivo 36, Libro blanco sobre las cárceles franquistas, 1939–1976, Paris, Ruedo Ibérico, 1976, p. 45. Arnabat Mata points out that in the sentences of the courts martial we see written "again and again: that against the legitimate powers of the State, assumed by the Army from 17 July 1936 in fulfilment of its constitutive function, an armed uprising and tenacious resistance developed, with all kinds of violence being committed in support of it", in "La represión", cit. on line.

[21] *Serrano Suñer*, R., Entre el silencio y la propaganda. La historia como fue. Memorias, Barcelona, 1977, extractos de las pp. 244–248.

this context, a broad amnesty was granted to those who had participated in one way or another in the coup d'état and subsequent war. Extinction of criminal responsibility, withdrawal of criminal records, etc., without analyzing the practice of pardons which, following Orza Linares, with regard to the Franco dictatorship, we should point out the following provisions[22]:

- Law of 23 September 1939 (BOE 27 September 1939), amnestying criminal acts committed from 14 April 1931 to 18 July 1936. This law was a true amnesty, although the word "amnesty" does not appear once, and all supporters of the Popular Front were excluded from it.
- On the other hand, the Decree of the Ministry of Justice of 30 December 1939 (BOE of 10/01/1940) annulled actions taken by officials outside the National Movement (art. 20 declared null and void any general or individual amnesties and pardons granted by "Red bodies or authorities" after 18 July 1936).

(2) Development of the so-called "criminal law of perpetrator" (also known in recent historiography as "criminal law of the enemy").[23] In contrast to criminal law which punishes the facts, the act" – understanding that the concept of action is central to the theory of crime: man does not commit a crime insofar as he is, but insofar as he acts –, the criminal law of the perpetrator punishes man for what he is, for his ideas, thoughts, that is, for his personal characteristics (thus leaving open the criminal route to punish a person for the mere fact of having been a republican, communist, freemason, trade unionist, etc.).

The totalitarian justice system of the time applied the criminal conception of the perpetrator, breaking the basic criminal rights and principles consolidated in Spain since the Criminal Code of 1822, which enshrined, for the first time, the principle of criminal legality.[24] At this time, all legal fictions were possible: among others, the documentation that has led us to confirm the breakdown of the principles of *non bis in idem* (several criminal sentences were imposed for the same circumstance, sometimes up to a quadruple sanction as we shall see); of non-retroactivity in criminal matters unfavorable to the offender (criminal laws were passed that sanctioned

[22] Al respecto, sigo el excepcional trabajo de *Orza Linares*, R., Amnistías e indultos durante el Franquismo y la Transición, in: Pérez Juan/Moreno Tejada, Represión y orden público cit., pp. 115–139, en particular para la etapa de nuestro análisis, pp. 120–127.

[23] With regard to this concept and its application, *vid. Portilla Contreras*, G., La consagración del Derecho penal de autor durante el franquismo. El Tribunal especial para la Represión de la Masonería y el Comunismo, Granada, 2010; and, in relation to the concept of criminal law of the enemy, *Tébar Rubio-Manzanares*, I. J., La representación del enemigo en el Derecho penal del primer franquismo (1938–1944), Universidad de Alicante, 2015; "Derecho penal del enemigo en el primer franquismo. El caso de Julián Besteiro", in: Revista de Historia Actual 11 (2013), pp. 63–78; and "El ‚derecho penal del enemigo': de la teoría actual a la práctica represiva del "Nuevo Estado" franquista", in: Pasado y Memoria 13 (2014), pp. 227–250.

[24] In this respect, *Ruiz Robledo*, A., "El principio de legalidad penal en la Historia Constitucional española", in: RDP 42 (1996), pp. 137–169.

acts committed prior to their entry into force, normally going back to October 1934, the date of the Asturias revolt); of criminal proportionality, developing an arbitration that imposed penalties and economic sanctions according to the subject and his assets for the sake of confiscation of goods; of *nullam poena sine prævia lege*; of presumption of innocence (now presumption of guilt) or, among others, of non-compliance with the principle of extinction of criminal liability by the death of the perpetrator of the crime.

This authoritarian criminal law is to be found, among others, in the legislation on political responsibilities which explicitly recognized in its Preamble the need for judicial discretion to modulate penalties and economic sanctions (introduced with the Law of 9 February 1939 of the same name[25]), which allowed criminal sentences to be passed in "political-social" matters, allowing this expression to be used, establishing criminal and civil responsibilities – its collection purpose was one of its main objectives – for which all fundamental principles were violated, also in some cases imposing post mortem sentences on shot prisoners, as it had a double purpose: To legitimize punitive action from the beginning of the war and to legalize the confiscation of property, generating the "just" title for its incorporation into the State, economic plundering, yet another form of repression developed from the beginning of the conflict[26]) or in the Law of 1 March 1940 on *repression against Freemasonry and communism* which introduced a new law.[27] The very Preamble of the *Law of Political Responsibilities* – hereinafter, LRP – specifies the criminal conception of the perpetrator, recognizing the exceptional nature of the law:

With the total liberation of Spain approaching, the Government, conscious of the duties incumbent upon it with regard to the spiritual and material reconstruction of our homeland, considers that the time has come to pass a Law of Political Responsibilities; The time has come to enact a Law of Political Responsibilities, which will serve to settle the faults of this order contracted by those who contributed with serious acts or omissions to forge the red subversion, to keep it alive for more than two years and to hinder the providential and historically inescapable triumph of the National Movement, which will translate into practical effectiveness the civil responsibilities

[25] BOE n° 44, 13 febrero 1939, pp. 824–847. In this respect, *Álvaro Dueñas*, M., "Por ministerio de la ley y voluntad del Caudillo". La Jurisdicción Especial de Responsabilidades Políticas (1939–1945), Centro de Estudios Políticos y Constitucionales, Madrid, 2006; y *Quesada Morillas*, Y., Notas sobre la historiografía jurídica de la Jurisdicción Especial Franquista de Responsabilidades Políticas, in: *Pérez Juan*, J. A./*Moreno Tejada*, S. (coordinators), Justicia y represión en los Estados Totalitarios. España, Alemania e Italia (1931–1945), Valencia, 2021, pp. 409–451.

[26] We have dealt with economic repression in En Nombre Del Glorioso Alzamiento Nacional cit., pp. 261–293 y en La organización y práctica de la intervención de bienes en la provincia de Granada: de la Oficina de Intervención a la Comisión Provincial de Incautación (septiembre 1936–junio 1939), in: *Serrano*, J., La Guerra Civil a les terres del l'Ebre (1936–1939), Barcelona, 2022, pp. 1–62, en prensa.

[27] BOE n° 62, de 2 de marzo de 1940, pp. 1537–1539. In this respect, *Sánchez Aranda*, En Nombre Del Glorioso Alzamiento Nacional cit., pp. 361–392.

of the guilty persons and which, finally, to allow the Spaniards who have saved our country and our civilization in a tight beam, and those others who erase their past mistakes through the fulfilment of just sanctions and the firm will not to go astray again, to live together in a great Spain and to render to its service all their efforts and all their sacrifices.

The purposes of this Law and its development give it a character that goes beyond the strict concepts of a penal provision fitted into molds that have already expired. The intentional magnitude and the material consequences of the offences inflicted on Spain are such that they prevent punishment and reparation from reaching proportionate dimensions, as these would be repugnant to the deep sense of our National Revolution, which does not wish to punish with cruelty, or to bring misery into homes. This is why this Law, which is not vindictive but constructive, on the one hand mitigates the severity of the punishment and, on the other hand, seeks, within the framework of equity, formulas that allow the sacred interests of the Nation to be harmonized with the desire not to break the economic life of individuals.

A part of legal historiography wonders whether it was necessary to forge this special "author" criminal legislation of an autonomous nature for the atrocious repression initiated from the beginning of the war, on the understanding that other legal instruments were available which could without difficulty accommodate any criminal conduct, such as the Criminal Code in force, the Public Order Law of 1933 and later the State Security Law. There is no doubt that the special criminal legislation allowed the repression to be extended with extraordinary effectiveness in the control and extermination of the "enemy" to all the territories that had escaped repression at the beginning of the war because they were under Republican administration, as in the case of Catalonia.

(C) Establishment of exceptional repressive jurisdictional institutions from the practical end of the war – as we have pointed out, introduced with the aforementioned criminal legislation – which allowed the development of common models of repression throughout the territory of the State: we refer to the so-called special jurisdictions (with the exception of the ordinary jurisdiction) which had the aim of applying criminal offences which reflected the conception of the perpetrator (for example art. 4 of the LRP) and, at the same time, to control the social population. Jurisdictions that were regulated in the same body of law that specified the facts incurring political responsibilities or those of Freemasonry and communism (mixed laws).

Between 1939 – 1975 there were, among others, three special jurisdictional models with totalitarian overtones implemented, which in turn shaped the corresponding repressive phases of varying scope:

First repressive phase, 1939 – 1945: this was the harshest, coinciding with the end of the war and its virtual extinction, in response to the change in the international scene following the Allied victory in World War II and the need to cover up the atrocious repression. It is estimated that around fifty thousand people were shot. A fourfold system of repression was established:

– The intervention of all kinds of enemy property (real estate, etc.) of the defeated from the beginning of the Civil War (also trade unions, political parties, cultural associations, etc.) is legally legitimized and passed on to the State, putting an end to the discriminatory plundering that had been going on since the beginning of the conflict.
– Depuration of "disaffected" civil servants (in particular, school teachers and university professors: in order to introduce the new national-Catholicism, the entire educational system was controlled and instrumentalized by the so-called Depuration Commissions, which began to operate in January 1937 and would continue to operate at the end of the war).
– The first ad hoc repressive institutions were introduced throughout the national territory: special criminal jurisdictions made up of military judges, members of the Falange de las JONS party) and career judges and magistrates, all freely appointed by the State, constituting collegial courts. There were two:

a) The special jurisdiction of Political Responsibility (the aforementioned Law of 9 February 1939 in force, reformed by the *Law of Reform of Political Responsibility* of 19 February 1942, which dismantled this special jurisdiction and transferred it to the ordinary justice system, transferring its competences to territorial and provincial courts. It was abolished in April 1945, although the corresponding Liquidation Commission was maintained until its abolition by Decree 2824/1966, of 10 November, which granted a total pardon for pending sanctions arising from political responsibilities (a pardon which was to be executed by the Commission until 31 December 1966, when it was dissolved). Its jurisdictional action remained, therefore, in the sphere of ordinary criminal justice to finalize cases, hear appeals or execute its sentences until its definitive abolition on that date. It judged, for example, within the framework of criminal law, membership of political parties or trade unions retroactively to October 1934 (the date of the Asturias mining uprising, breaking the non-retroactivity of criminal law) and, in general, all political-social behavior by supporters of the Republic (Article 4, a real catch-all due to its underlying arbitrariness, included seventeen cases of criminalization).

b) The special jurisdiction for the Repression of Freemasonry and Communism (Law of 1 March 1940, in force until its suppression by the Law of 2 December 1963, with its Liquidation Commission functioning until 1971): aimed mainly at repressing Freemasons and Communists who had been able to evade the jurisdiction of political responsibilities.

The intervention and extermination were atrocious, there was no clemency. An example of the ferocious repression of the enemy is given by the cases in which it was possible for a person, because of his political militancy and if, for example, he was a teacher and a Freemason (normally the profile of many intellectuals of the Republic: university professors, etc.), to be declared politically criminally responsible, a Freemason, have his assets seized and be permanently removed from

his teaching post (in other words, a fourfold punishment for the same acts in breach of *non bis in idem* and the non-retroactivity of criminal law).

Second repressive phase, 1945 – 1963. Repression was now in the hands of ordinary civilian judges (who defended the principles of the Glorious National Movement): social control and the imposition of Christian morality were carried out with the introduction of the principle of criminal prevention (they could be arrested before committing a crime). Thus, with the special jurisdiction of *Vagos y Maleantes* (Law approved in September 1933, influenced by the principle of prevention postulated by von List and introduced in Spain by the criminal lawyer Jiménez de Asúa), which the Republic barely had time to apply and develop, establishing its special jurisdiction well defined since 1945 and confirming that violence and repression was not a characteristic aspect of the post-war period but inherent to the whole period of the Francoist state. In 1954, it was suitably reformed and instrumentalized for social control and to persecute homosexuals and prostitutes, among other social sectors, for preventive purposes – let us not forget the prevailing Catholic morality of the time. This special jurisdiction was displaced with the exception also introduced with the Law on Dangerousness and Social Rehabilitation (5 August 1970), which was in force until 23 November 1995.

Third phase, 1963 – 1975. This coincided with the opening up of the regime and the formation of Franco's technocratic governments. In response to the social movements of protest against Francoism, not forgetting that it coincided with generations who had not lived through the war or the post-war period, and the reorganization of the opposition, a special jurisdiction for public order was established with the Law of Public Order (30 July 1959). This was a new legal instrument of exception for repression created by the authorities which, since Law 154/1963, of 2 December 1963, on the creation of Public Order Courts and Tribunals, had at its highest level a Public Order Tribunal (aimed at responding to social protest against the regime in general, and in particular student protests at universities and trade unions) made up of magistrates and prosecutors freely appointed by the Executive. The jurisdiction was abolished on 4 January 1977.

Incidentally, in application of convictions for crimes of terrorism and aggression against the armed forces, the last use of this jurisdiction, on Saturday 27 September 1975 the Regime shot the last five people (José Humberto Francisco Baena Alonso, Ramón García Sanz, José Luis Sánchez-Bravo Solla, Ángel Otaegui Echevarría and Juan Paredes Manot) in El Palancar (Madrid). It was the last service to the National Movement given by the military jurisdiction.

III. By Way of Conclusion

We have already pointed out the changes that Franco's regime underwent from an initial totalitarian model to an authoritarian as the thirty-six years that it lasted progressed, in the sense indicated very early on by Juan Linz.

From that initial pseudo-fascism, it already presented one of its most characteristic features, which was its attempt to subject its political and, above all, its judicial organization to the law.

It was a law, however, particular, repressive, far removed from the principles already established at the time by codified criminal law, and which had no limits on the exercise of power. As it has been pointed out, we are dealing with a State with Law, but not with a State of Law, at least according to the most defining features of the latter, as currently understand it from our democratic point of view.

By way of conclusion, and prior to the considerations regarding the 1977 amnesty laws passed by the Suárez Government during the Political Transition to democracy, which made it possible to promote the consensus characteristic of this period, and which are examined in another chapter of this collective work, we would like to include two final considerations regarding the study of Franco's repression.

The first is the fact that all the documentation of the special jurisdictions was preserved – in particular, from the first seven years, the hardest, such as the aforementioned cases of political responsibilities (remember that, in turn, it included the intervention of assets from the beginning of the war), Masonry and the military – relating to their constitution, aims, composition, judicial processes, etc. The cause …? Francoism, in its attempt to justify "legal" action in defense of the "Homeland" and for a "single, free and great Spain", never carried out an expurgation of the corresponding archives.

This repressive action by the special jurisdictions "in the name of the Glorious National Uprising" – later the war ended as the "Glorious Movement" – and "for the good of Spain" – as stated in the documentation, claiming to defend the neo-liberal political, economic and religious ideals of the 19th century "which the Popular Front had displaced" with its popular revolution –, together with the instrumentalization of history as a weapon to legitimize political change and the military uprising, consequently has another derivative: Being the main cause of preservation of documentary collections that allows the extent of repression to be addressed.

This was helped by the fact that the Regime, from the end of 1937, had the collaboration of a Gestapo Commission (headed by Heinz Jost) which was integrated into the Internal Security, Public Order and Frontiers Service (based in Valladolid and directed by the military officer Martínez Anido, reporting directly to the Head of State). One of the legacies of this collaboration was the creation of a political and social "information warehouse" in Salamanca, the city to which all the documentation produced by the Information Services themselves or seized from the enemy during the war was sent. In April 1938, a further step was taken by creating the

State Delegation for the Recovery of Documents in the city of Salamanca, with the aim of collecting, storing and classifying all the documentation of political parties, organizations and individuals hostile and disaffected to the National Movement with the clear purpose of facilitating their location and punishment, as well as carrying out a wide-ranging and effective confiscation of all their assets. The Delegation would create a documentary base (made up of millions of political and social records of disaffected persons), being the institutional predecessor of the National Delegation of Documentary Services (Salamanca, 1944), which inherited its functions and collected the aforementioned funds. These have now reached us and are deposited in the Centro Documental de la Memoria Histórica (Salamanca, June 2007), which brings together practically all the documentary series from the period 1936 – 1978 – the aforementioned files and political-social records, Freemasonry, political responsibilities, etc. – and which, by the way, is doing an extraordinary job of locating, classifying and divulging them.

Other archives, such as that of the Royal Court and Chancery of Granada, which preserves the collections of the intervention of assets and the jurisdiction of political responsibilities in Andalusia (of the eight Regional Courts established), are also doing an extraordinary job of diffusion and making the corresponding documentary sources available to researchers. Finally, we should point out the recent opening of general military archives such as the Guadalajara archive for the study of courts martial, together with the important work of the National Historical Archive in political-social matters and, especially, in the field of exile by compiling and incorporating documentary sources from other national archives such as that of Mexico.

The second consideration leads us to specify, however, that the Spanish Political Transition rests on the decisive choice of the main political actors of the time not to use the confrontations present since the war, including repression and exile, as an excuse for not reaching agreements aimed at establishing in Spain a democratic political system perfectly comparable to that which existed in other Western European countries. Although one sector of the doctrine alludes to a tacit "pact of forgetting" and a calculated "impunity" in relation to the preceding regime and, at the same time, equidistant from the Second Republic (1931 – 1936), the truth is that the idea of "forgetting" does not seem to be the most precise (you just have to look at the newspaper archives and doctrinal articles of the time). What should be emphasized, however, is the determination not to use the past to boycott the agreements necessary for the construction of a democratic system and the approval of the 1978 Constitution. There are also numerous testimonies of this determined will in other documentary sources: those emanating from the debates contained in the Session Journals of the Congress and the Senate, since the aforementioned first democratic elections of 15 June 1977.

However, we should point out that it is possible that the urgencies and needs of Spain in the 1980s including the complicated negotiations for its necessary integration into NATO and the European Union (whose incorporation did not materialize until 1986 – eleven years after Franco's death) did not allow the necessary research

to be carried out in order to understand the scope of Franco's repression and the political-institutional system that generated it from April 1939, when the war ended.

At the same time, there was not enough chronological distance for historians to begin to deal with these issues with certain objectivity. In recent years, through what has come to be called the Historical Memory of the period 1936–1978, proposed by the Socialist government with Law 52/2007, of 26 December, which recognizes and extends rights and establishes measures in favor of those who suffered persecution or violence during the Civil War and the dictatorship, a certain and controversial rewriting has been promoted, not of Franco's repression but of recent Spanish history, of the Transition itself, putting forward the fallacious idea of a forced and imposed consensus.

This regulation, however, also recognizes the need for an individual right "to the personal and family memory of each citizen" (art. 2). 2), and declaring unjust "all convictions, sanctions and expressions of personal violence produced for unequivocally political or ideological reasons", sanctioning "the illegitimacy of courts, juries or bodies of any administrative nature created in violation of the most elementary guarantees of the right to a fair process, as well as the illegitimacy of sanctions and sentences of a personal nature imposed for political, ideological or religious beliefs".

Finally, there is no doubt that the last decade has seen the promotion of a necessary heritage of research which has arisen at a time of consolidated constitutional maturity. For this reason, this contribution aims to collaborate in the necessary knowledge of the period of our history, which of the Francoist regime, far removed from polemics and from the attempt at an essential objectivity, exclusively supported by an archival documentary base which, as we have indicated, is becoming increasingly accessible to researchers.

La transición a la democracia en los países de América Central

Por *Ramón M. Orza Linares*

I. Introducción[1]

Antes de comenzar, deseo mostrar mi agradecimiento al Prof. Dr. Ignacio Czeguhn, por su invitación a participar en este Symposium. Asimismo, también deseo mostrar mi agradecimiento a todos los asistentes a este encuentro por su interés y atención, en un tema complejo, pero a la vez, muy interesante. También deseo mostrar mi especial agradecimiento a Dª. Mónica Díaz Casariego que se encargó de la traducción simultánea.

También debo señalar que la limitación de tiempo de la intervención me ha obligado a eliminar muchos de los matices que este tema presenta, lo que probablemente me lleve a algunas generalizaciones e imprecisiones que ruego que me disculpen.

Aunque no vamos a analizar con detalle muchos países que han vivido esta dinámica, sí me ha parecido necesario hacer algunas puntualizaciones iniciales sobre qué podemos entender por transición a la democracia y cuáles pueden ser las características propias de las transiciones en América, que las distinguen claramente de las transiciones que pudimos vivir en Europa del Sur, primero, y en la Europa del Este, después.

En cualquier caso, este trabajo cuenta con muchas limitaciones, ya que los fenómenos de transición son complejos en todos los casos, pero mucho más cuando se intentar analizar globalmente y en una zona tan amplia como Centroamérica y América del Sur.

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Decía Alain Touraine que en América Latina la palabra democracia aparecía como "sinónimo de conservadurismo, de mecanismo de defensa de una clase media limitada o incluso de una oligarquía". Mientras que el tema de la revolución

[1] Esta comunicación es una adaptación de la intervención oral efectuada en el marco del Symposium celebrado en Berlín entre el 13 y el 14 de septiembre de 2021, titulado "From Dictatorship to Democracy" dentro del proyecto de investigación "The Berlin Administration of Justice after 1945", dirigido por el Prof. Dr. Ignacio Czeguhn y el Prof. Dr. Jan Thiessen.

"apelaba al país real, a las fuerzas sociales que estaban al margen del sistema político o se hallaban excluidas por éste". Revolución que con su nombre "abarcaba tanto unos regímenes de inspiración castrista como unos movimientos populistas, tanto la acción de las guerrillas como los sindicatos de masa o las denuncias por parte de intelectuales del orden establecido", Así, "en todas partes no se hablaba en los años sesenta más que de revolución".[2]

Mirando a la historia, siguiendo el acertado análisis efectuado por Alejandro Arratia, una vez que se rompió el vínculo colonial "casi ningún país tuvo capacidad de reorganizarse y estabilizar las instituciones republicanas". Para este autor "los siglos XIX y XX se caracterizaron por Constituciones de corta duración, caudillismo, golpes de estado, dictaduras y, en general, gobiernos autoritarios". Aunque "los guías intelectuales de la independencia conocían muy bien los modelos constitucionales y de organización social de Europa y los Estados Unidos, eran críticos y atentos admiradores de sus virtudes y se propusieron trasladar aquellos contenidos a las naciones en formación, … mientras la sociedad concreta seguía su propio camino".[3]

De hecho, para este autor, "el caudillismo resultó ser una forma de gobierno negadora del ideal de las Repúblicas Constitucionales diseñadas por los pensadores republicanos y nos legó hábitos políticos suficientes para que prosperaran dictaduras de todo signo".[4]

El siglo XX fue testigo de los políticos populistas que utilizaron los nuevos medios de comunicación, pero "a casi todos los demagogos les llegó el momento en el cual perdieron el apoyo de las fuerzas armadas" y éstas procedieron a sustituirlos por "dictaduras que sí conocían la solución de los problemas". Para Alejandro Arratia, "las juntas militares terminaron profundizando las crisis en el continente". Hasta ahora, nos encontramos con una historia de hombres providenciales, de autoritarismo y demagogia.[5]

Las Juntas militares, guiados por la Doctrina de la Seguridad Nacional, si bien intentaron reestructurar el Estado y superar los problemas económicos, también fueron acompañados de una represión muy violenta dirigida a eliminar partidos y cualquier tipo de organización social.

Así, "países como Chile, Argentina, Bolivia, Brasil y Uruguay, sufrieron una importante represión que tenía como finalidad sembrar el miedo en toda la población". El terror desde el Estado "dejó miles de asesinados, desaparecidos, torturados, presos y exiliados". Además, "la represión contó con coordinación

[2] *Touraine*, A. (1989), América Latina, política y sociedad, Madrid, Espasa Calpe, p. 405.

[3] *Arratia*, A. (2010), "Dictaduras latinoamericanas". Revista Venezolana de Análisis de Coyuntura, vol. XVI, enero–junio 2010, p. 34. En línea; https://www.redalyc.org/pdf/364/36415689004.pdf [Consulta: 10 de septiembre de 2021].

[4] Ibídem, p. 35.

[5] Ibídem, p. 36.

internacional, el tristemente conocido y temido *Plan Cóndor*, un programa para el intercambio de información, eliminación o prisión de personas consideradas enemigas de los regímenes autoritarios de la región". Reinó en aquellos años "una doctrina de violación sistemática de los derechos humanos". Así, "los militares aseguraron desde el poder ejecutivo el dominio sin cortapisas del poder judicial y el parlamentario, también el control absoluto de los gobiernos locales, eliminaron la vida política y suspendieron las garantías individuales".[6] Desde los años 80, también Nicaragua, El Salvador o Guatemala fueron testigos de insurrecciones y fuertes represiones de las Fuerzas Armadas. También en Colombia la guerrilla se mantenía activa.

De ahí que, la democratización de las instituciones políticas y sociales haya sido un proceso de avances y retrocesos, de construcción y destrucción, y jamás un ascenso lineal e ininterrumpido hacia estadios de mayor profundización democrática.[7]

Ello nos lleva a concluir que nunca podemos considerar el proceso hacia la democracia como irreversible. Buenos ejemplos son los dos países en los que me detendré un poco más adelante.

No obstante, Freedom House, en su publicación anual de 2021, del total de países americanos, sólo 11 son clasificados como parcialmente libres y tres, Cuba, Venezuela y Nicaragua, son clasificadas como no libres.[8]

[6] Ibídem, p. 37.

[7] *Huneeus*, C. (1982), "La transición a la democracia en América del sur. Una aproximación a su estudio,·Revista Española de Investigaciones Sociológicas, núm. 20 (1982), p. 65. En línea: https://acortar.link/V2XdCr [Consulta: 10 de septiembre de 2021]. En el mismo sentido, Rovira Mas considera que "completar el proceso de transición a la democracia representativa no garantiza la consolidación de este régimen político … no debe entenderse como inevitable, pues pueden darse en él progresos, retrocesos y estancamientos", más aún, "puede llegarse, bajo ciertas circunstancias, a un colapso de la democracia y a un retorno a regímenes autoritarios o semiautoritarios" (Rovira Más, J. (2009), "Nicaragua 1979–2007. Transición a la democracia y perspectivas de su consolidación", Encuentros, núm. 82, p. 10).

[8] El Informe se puede consultar, en línea, en la página web: https://freedomhouse.org/report/freedom-world/2021/democracy-under-siege [Consulta: 10 de septiembre de 2021].

	Valoración
América del Norte	
México	Parcialmente libre
Estados Unidos	Libre
Canadá	Libre
Centroamérica	
Belice	Libre
Costa Rica	Libre
El Salvador	Parcialmente libre
Guatemala	Parcialmente libre
Honduras	Parcialmente libre
Nicaragua	No libre
Panamá	Libre
América del Sur	
Argentina	Libre
Bolivia	Parcialmente libre
Brasil	Libre
Chile	Libre
Colombia	Parcialmente libre
Ecuador	Parcialmente libre
Guyana	Libre
Guyana Francesa	Libre
Paraguay	Parcialmente libre
Perú	Parcialmente libre
Suriname	Libre
Uruguay	Libre
Venezuela	No Libre

El Caribe	
Antigua y Barbuda	Libre
Aruba	
Bahamas	Libre
Barbados	Libre
Cuba	No libre
Dominica	Libre
Grenada	Libre
Guadalupe	
Haití	Parcialmente libre
Islas Caimán	
Islas Turcas y Caicos	
Islas Vírgenes	Libre
Jamaica	Libre
Martinica	
Puerto Rico	Libre
República Dominicana	Parcialmente libre
San Bartolomé	
San Cristóbal y Nieves	
San Vicente y las Granadinas	Libre
Santa Lucía	Libre
Trinidad y Tobago	Libre

Fuente: Elaboración propia a partir de las valoraciones contenidas en el Informe de 3 de marzo de 2021 de Freedom House, en línea, en https://freedomhouse.org/es/node/183[9]

Figura 1: Freedom House Report 2021

La clasificación de "libre" se refiere a un régimen electoral de tipo democrático donde el derecho al voto es universal, el acceso a las principales posiciones del gobierno se logra mediante elecciones, que son a la vez competitivas e institucionalizadas, y existen durante y entre esas elecciones diversas libertades políticas, tales como las de asociación, expresión, movimiento y de disponibilidad de información no monopolizada por el Estado o por un agente privado.[10]

[9] En el último informe de Freedom House, publicado en marzo de 2023, Ecuador y Colombia han pasado de "parcialmente libre" a "libre". y Haití de "parcialmente libre" a "no libre". Por lo tanto, sólo 8 países serían considerados "parcialmente libres" y 4, "no libres". No obstante, para mantener lo indicado en la intervención oral, no cambiamos el texto. Véase: https://freedomhouse.org/countries/freedom-world/scores [Consulta: 27 de septiembre de 2023].

[10] *Bonometti*, P./*Ruiz Seisdedos*, S. (2010), "La democracia en América Latina y la constante amenaza de la desigualdad", Andamios, vol. 7, núm. 13 mayo–agosto 2010, p. 3. En línea: http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1870-00632010000200002 [Consulta: 12 de septiembre de 2021]. Véase también *O'Donell*, G. (2004), "Acerca del Estado en América Latina contemporánea", en: PNUD, La democracia en América Latina. Hacia una democracia de ciudadanas y ciudadanos. Washington, D.C.: Naciones Unidas, pp. 175–195. En línea; https://www2.ohchr.org/spanish/issues/democracy/costarica/docs/pnud-seminario.pdf [Consulta: 12 de septiembre de 2021].

De hecho, en la actualidad, en todos los países de la región se reconoce el derecho universal al voto, pese a la permanencia de algunos problemas como el subregistro, las dificultades para la obtención de documentos de identidad o restricciones de voto a ciudadanos que viven en el extranjero o, en los casos más graves de falta de libertad, candidaturas únicas.[11] En la mayoría de las elecciones, desde 1980, no se verificaron irregularidades que influyeran de manera decisiva en el resultado, con excepción de República Dominicana en 1994 y Perú en 2000 o en 2021 (aún en discusión), o Bolivia en 2019. Caso aparte son los de Venezuela, Nicaragua y, sobre todo, Cuba.[12]

Para José Miguel Vivanco, director de HRW (Human Rights Watch) para las Américas, "la consolidación de las 'dictadura' en Cuba, Venezuela y Nicaragua y la ausencia de liderazgo en materia de derechos humanos en Latinoamérica", contribuyeron a que el 2020 fuera "probablemente, uno de los peores años para los derechos humanos".[13]

II. Qué entendemos por transición a la democracia

Desde este punto de vista, también tenemos que precisar que no todos los procesos de transición son iguales. Siguiendo a Manuel Antonio Garretón, podemos distinguir tres tipos de democratizaciones políticas en América Latina en las últimas décadas:

1. El primer tipo se refiere a fenómenos de instauración democrática que provienen de las luchas contra dictaduras oligárquicas o tradicionales, a veces con carácter patrimonialista, y donde las transiciones democráticas suceden a momentos

[11] *Bonometti*, P./*Ruiz Seisdedos*, S. (2010), "La democracia en América Latina …", op. cit. p. 3.

[12] Concretamente para el Informe sobre la Democracia en América Latina, publicado en 2002, bajo la dirección de Dante Caputo, "en general, las elecciones fueron limpias entre 1990 y 2002. En ese mismo período se dieron restricciones importantes a la libertad electoral en 10 de 70 elecciones nacionales, pero la tendencia general fue positiva. Se avanzó en la cuestión de que las elecciones sean un medio de acceso a cargos públicos: el traspaso del mando presidencial se convirtió en una práctica común, aunque en algunos casos se haya dado en medio de complejas crisis constitucionales". *Dante Caputo* (dir,), Informe sobre la democracia en América Latina, 2002, p. 81. En línea: https://www2.ohchr.org/spanish/issues/democracy/costarica/docs/PNUD-seminario.pdf [Consulta: 10 de septiembre de 2021].

[13] Estas declaraciones se realizaron el 13 de enero de 2021, con motivo de la presentación del Informe anual de 2020 de Human Rights Watch. Véase https://web.archive.org/web/20210113183601/https://efe.com/efe/america/sociedad/hrw-alerta-de-la-consolidacion-las-dictaduras-en-cuba-venezuela-y-nicaragua/20000013-4439478 [Consulta: 27 de septiembre de 2023]. El informe completo de esta organización para 2021 se puede consultar, en pdf, en: https://www.hrw.org/sites/default/files/media_2021/01/hrw_world_report_2021.pdf [Consulta: 10 de septiembre de 2021]. El último informe publicado por HRW, correspondiente al año 2021, se puede obtener, en pdf, en: https://www.hrw.org/sites/default/files/media_2022/01/World%20Report%202022%20web%20pdf_0.pdf [Consulta: 10 de marzo de 2022].

revolucionarios o de guerra civil. Esta situación correspondería sobre todo a casos centroamericanos. Ejemplos claros serían las dictaduras de los Somoza en Nicaragua, de Noriega en Panamá o de Trujillo en la República Dominicana.

2. Un segundo tipo de democratización es el que llamaremos propiamente transiciones. Se refiere al paso de regímenes autoritarios modernos, especialmente militares, a fórmulas democráticas en las que están ausentes los modelos revolucionarios, pero donde hay algún tipo de ruptura, que no es de corte insurreccional, entre ambos regímenes. Ello se dio especialmente en el Cono Sur, aunque también se podrían incluir en esta categoría los procesos paraguayo o boliviano.
3. Un tercer tipo de democratización política se refiere a aquellos casos en que, sin tener un momento formal de cambio de régimen o de inauguración democrática, hay un proceso de extensión o profundización democrática desde un régimen de democracia restringida o semiautoritario. Este proceso implica la transformación institucional, ya sea para incorporar a sectores excluidos del juego democrático, ya para configurar un sistema efectivamente poliárquico y pluripartidario, ya para eliminar trabas al ejercicio de la voluntad popular, o para combinar todas estas dimensiones. El caso de México y, quizá, de Colombia ilustran este tercer tipo.[14]

En algunos países, además, podemos encontrarnos con tipos de transición que mezclan algunos de los tipos anteriores. Así podemos encontrarnos los casos argentino y boliviano, antes de la presidencia de Evo Morales. También el caso paraguayo combina varias dimensiones, en la medida que se pone término a varias décadas de sistema autoritario. El caso uruguayo es un caso de transición típica, en tanto el caso chileno, siendo básicamente una democratización vía transición, al ser ésta incompleta, vive con posterioridad un proceso de extensión o profundización.

El caso mexicano es el que más exactamente se refiere a un caso de extensión, una vez que el PRI fue derrotado por primera vez en una elección presidencial, desde su fundación (en las elecciones de 2000, Vicente Fox – del Partido Acción Nacional – venció por primera vez al candidato del PRI, poniendo fin a 71 años de gobierno ininterrumpido del PRI).

El caso peruano pasó de una transición típica a una regresión autoritaria civil que lo hace vivir con posterioridad un proceso básicamente de extensión (Presidencia de Fujimori).

En todas estas transiciones siempre existió una combinación de negociación y movilizaciones. El marco institucional, podía incluso haber sido creados por el régimen mismo, como en el caso brasileño o en el chileno, donde la dictadura de Pinochet creó su propia Constitución, condicionó la negociación de transición que

[14] *Garrentó*, M. A., "Revisando las transiciones democráticas en América Latina", Nueva Sociedad, núm. 148, 1997, pp. 21 y ss. En línea: 2575_1.pdf (nuso.org) [Consulta: 10 de septiembre de 2021].

se convirtió en un proceso muy complejo y dónde el margen de maniobra del régimen militar era muy alto. De hecho, para Juan J. Linz, en las transiciones, generalmente son los miembros del régimen autoritario los que dirigen el cambio.[15]

Este marco institucional también podía existir con anterioridad al régimen, como en el caso argentino, en cuyo caso la negociación era simplemente técnica sobre fechas y procedimientos. O podía gestarse en momentos terminales del régimen militar, como en el caso peruano, en el que era la oposición la generadora de la nueva forma constitucional para la democracia futura.

Salvo en el caso argentino, en la que el ejército impulsó una guerra, la de las Malvinas, que luego perdió, no se encuentran casos en los que los militares sufran derrotas internas o externas que les invaliden para gobernar. El peso de los ejércitos se mantiene en los procesos de transición y su vuelta a los cuarteles responde exclusivamente a una decisión institucional de sus mandos. De hecho, como señala Manuel Alcántara, "no hay un modelo uniforme de transición política en América Latina", aunque en todos los casos, en la dictadura precedentes del periodo 1964 a 1976, "las Fuerzas Armadas intervinieron, según su terminología propia, en un esfuerzo para 'salvar al país' … [y] no sirvieron intereses particulares de un líder o caudillo, como sucedió en épocas anteriores", salvo en el caso del Chile de Pinochet.[16]

Este aspecto dificulta la tarea de los primeros gobiernos democráticos o postransición. Estos gobiernos también deben afrontar, en casi todas las ocasiones, la modernización y democratización social, acompañadas de ajustes y reformas económicas, que suelen provocar disensiones entre las diferentes fuerzas políticas presentes y malestar entre la población. Salvo en el caso chileno, en el que la salud económica del país estaba garantizada, el resto de los países tuvieron que consolidar al poder civil en medio de dificultades económicas.

Así, García Covarrubias alude, en esta línea, a la dificultad de impulsar en las sociedades democratizadas la valoración positiva de la democracia "sin aceptar a

[15] *Linz*, J.J. (1990), Transiciones hacia la democracia. Washington, Editorial de The Washington Quarterly. Muy interesante, aunque exceden el propósito de estas páginas, son sus diez vías para la democracia, ya apuntadas también en: Linz, J.J. (1990), "Transiciones a la Democracia", Revista Española de Investigaciones Sociológicas, núm. 51 (1990), pp. 7–33. En línea: https://cutt.ly/HDpKN7E [Consulta: 12 de septiembre de 2021].

[16] *Alcántara Sáez*, M. (1992), "Las Transiciones a la Democracia en España, América Latina y Europa Oriental. Elementos de aproximación a un estudio comparativo", Revista del Centro de Estudios Constitucionales, núm. 11, 1992, p. 18. En línea: https://dialnet.unirioja.es/descarga/articulo/1051074.pdf [Consulta: 10 de septiembre de 2021]. Un resumen de las distintas transiciones que se han producido en el periodo que va desde 1828 hasta 1990, se puede consultar en los cuadros 1 y 2 que recoge *Martín Riquelme*, M.R. (2017), "Una mirada teórica a las transiciones a la democracia en América Latina". En línea: Una mirada teórica a las transi ciones a la democracia en América Latina. Manuel Ramón Martín Riquelme - PDF Free Down load (docplayer.es) [Consulta: 12 de septiembre de 2021]. Asimismo, *Martz Fernández*, F. (2017), "Transición política: un mapeo teórico en medio de la dispersión bibliográfica", Cuestiones Políticas, vol. 33, núm. 59, pp. 58–84.

ésta como un mal menor o sentir nostalgia de un régimen autoritario". Esta tarea, en su opinión, "en muchos de nuestros países aún está en desarrollo y todavía falta mucho debido a que gran parte de la juventud no se inscribe en los registros electorales marginándose de la decisión democrática por simple apatía o desconfianza".[17]

La no participación de los jóvenes lleva a que las democracias sean débiles y aparezcan amplios sectores de la población que se ven fuera del juego político, además de generar frustración y violencia, lo que junto a la pobreza endémica, les llevan a que en su desesperación comiencen a anhelar que un gobierno autoritario les resuelva sus problemas aunque les restrinja sus libertades.

De esto último, emergen los líderes militares reivindicacionistas tales como el teniente coronel Hugo Chávez en Venezuela (presidente de Venezuela desde 1998 hasta 2013), el coronel Lucio Gutiérrez en Ecuador (que protagonizó un golpe de estado en 2000 y fue elegido presiente en 2002 hasta 2005), o, desde fuera de las Fuerzas Armadas, líderes sociales como Evo Morales en Bolivia (presidente de Bolivia desde 2006 hasta 2019).[18]

No obstante, para tener un marco de referencia, aunque sea aproximado, se pueden señalar como las últimas transiciones producidas en Centro y Sudamérica, las que tuvieron lugar en Ecuador (1979), aunque en 1997 hubo un intento de golpe de estado y en 2000 hubo otro que acabó con el derrocamiento del presidente Jamil Mahuad; Perú (1980), aunque desde 1992 hasta 2000 hubo un autogolpe de Alberto Fujimori; Honduras (1982), aunque con el golpe que propició Roberto Micheletti en 2009, Bolivia (1982), aunque en noviembre de 2019 se produjeron importantes revueltas contra Evo Morales, presidente desde 2006, que había resultado vencedor en unas elecciones presidenciales fraudulentas celebradas el 20 de octubre de ese año, que culminaron con la presidencia interina de la segunda Vicepresidenta del Senado, Jeanine Áñez; Argentina (1983); El Salvador y Uruguay (1984); Brasil (1985); Guatemala (1986), aunque sufrió conflictos con la guerrilla hasta 1996; Paraguay (1989), con intento de golpe de estado en 1996; Panamá (1989), tras la invasión estadounidense producida entre el 20 de diciembre de 1989 y el 3 de enero

[17] *García Covarrubias*, J. (2016), Las transiciones a la Democracia en América Latina: Las variables más importantes, Instituto Universitario General Gutiérrez Mellado. En línea: https://iugm.es/wp-content/uploads/2016/07/TransicionesAL.pdf [Consulta: 12 de septiembre de 2021].

[18] Para Esther del Campo, aunque las transiciones a la democracia en América Latina supusieron importantes transformaciones políticas, económicas y sociales, no parecen haber resuelto algunas cuestiones fundamentales de la democracia. *Campo*, E. del (2013), "Transiciones inacabadas, reformas estructurales e incertidumbres institucionales: el caso de América Latina". Res Pública: Revista de Filosofía Política, núm. 30 (2013), pp. 93 – 114. En línea: Transiciones inacabadas, reformas estructurales e incertidumbres institucionales: el caso de América Latina (ucm.es) [Consulta: 20 de marzo de 2022].

de 1990; Chile (1990), Nicaragua (1991), aunque actualmente ostenta la presidencia Daniel Ortega de modo no democrático.[19]

III. Características propias de las transiciones en Centro y Sudamérica

Así, aun cuando desde el principio se intentó buscar similitudes entre las transiciones que protagonizaron los países del sur de Europa a finales de los años sentencia y las transiciones que pudieran producirse en América a finales de los ochenta (y de las que son testigos los seminarios de la Woodrow Wilson Seminarios en 1980 y 1981 bajo el título "Perspectivas de la democracia y transiciones desde un régimen autoritario en América Latina y Europa del Sur. Temas transnacionales" (Prospects for Democracy and Transitions from Authoritarian Rule in Latin America and Southern Europe: Cross-National Themes), o los encuentros impulsados por el Centro de Investigaciones Sociológicas que están recogidos en la compilación que publicó Julián Santamaría en 1982,[20] lo cierto que es que hay sustanciales diferencias entre unos y otros procesos.

1. La realidad política en América del Centro y del Sur se caracteriza, como apunta Carlos Huneeus, por la heterogeneidad *de sistemas políticos*, aunque todos puedan englobarse bajo la rúbrica de repúblicas presidencialistas.[21] De ahí que el análisis politológico, lejos de pretender buscar las similitudes, deba buscar las

[19] Datos de elaboración propia, a partir de lo recogido en la nota 1 de *García Covarrubias*, J. (2016), Las transiciones a la Democracia en América Latina …", op. cit. p. 1.

[20] *Santamaria*, J. (compilador) (1982), Transición a la democracia en el sur de Europa y América Latina, Madrid, Centro de Investigaciones Sociológicas.

[21] Son clásicos, sobre los regímenes presidencialistas, los estudios de *Linz*, J.J. (1996), "Los peligros del presidencialismo", en: Diamon, L./Plattner, M.F., "El resurgimiento global de la democracia", México, Instituto de Investigaciones Sociales, Universidad Nacional Autónoma de México, 1996, pp. 103 – 119 (en línea: https://www.liderazgos-sxxi.com.ar/bibliografia/Los-peligros-del-presidencialismo_linz.pdf [Consulta: 5 de marzo de 2022]); actualizado en *Linz*, J.J. (1996), "Los peligros del presidencialismo", Revista Latinoamericana de Política Comparada 07: 11 – 31, también en: https://repositorio.flacsoandes.edu.ec/bitstream/10469/14220/1/REXTN-RLPC07-01-Linz.pdf [Consulta: 27 de septiembre de 2023]. También *Nohlen*, D. (1991), "Presidencialismos vs. Parlamentarismo en América Latina". Revista de Estudios Políticos, núm. 74 (1991), pp. 43 – 54. En línea: https://dialnet.unirioja.es/descarga/articulo/27142.pdf [Consulta: 12 de septiembre de 2021]. Un análisis más extenso, en: *Lanzaro*, J. (ed.) (2012), Presidencialismo y parlamentarismo. América Latina y Europa Meridional, Madrid, Centro de Estudios Políticos y Constitucionales, 2012.

Más recientemente, véase un análisis del significado del presidencialismo en contraste con la democracia participativa, se puede consultar en la tesis doctoral de *Ramírez Nárdiz*, A. (2009), Democracia participativa. La experiencia española contemporánea. Alicante, Universidad de Alicante, 2009, en especial el Capítulo III de la Segunda Parte "Regulación y práctica americana de la democracia participativa". En línea: https://rua.ua.es/dspace/bitstream/10045/14215/1/Tesis_ramirez.pdf [Consulta: 12 de septiembre de 2021].

variaciones existentes, sin sobredimensionarla existencia de algunos elementos comunes, sean de tipo cultural, social o económico.[22]

Como ha señalado O'Donell, "en toda América Latina la fórmula política está centrada en la figura del presidente constitucional y la institución presidencial suele tener poderes formales relativamente altos", lo que no siempre se traduce en eficacia en la acción gubernativa, lo que crea otra fuente de descontento de la ciudadanía y frustración para los políticos". Además, el Parlamento "carece de prestigio entre la masa ciudadana y se considera que es una instancia poco eficaz para representar y defender los intereses de la mayoría". Y el poder judicial, aunque "goza de independencia formal, en varios países subsisten severas limitaciones para su cabal desempeño cotidiano".[23]

2. *Los procesos de transición son complejos y no han sucedido de la misma forma en todos los países.* En los extremos tenemos diferentes casos. Como apunta García Covarrubias, "en unos casos fue rupturista (Argentina) en otros institucionalizada y programada (Chile). En otros países como Paraguay fue el resultado final de otro golpe de estado. Brasil, Uruguay y Bolivia también tienen sus rasgos propios".[24] Como afirma Carlos Huneeus, "en Ecuador, Perú y Brasil lo constituye el hecho de que se trata de cambios políticos iniciados por el régimen autoritario, que lleva, mediante un procedimiento fijado por éste y en un calendario más o menos claro, al retorno del poder a los civiles. No hay en estos casos golpes militares, como lo hubo en Venezuela en 1957/58 para el restablecimiento del orden democrático o en Argentina en 1955 cuando fue derrocado Perón.[25]

   Para Fernández García, y por lo que respecta concretamente a Centroamérica, nos encontramos con los países que afrontan la transición en condiciones de guerra abierta, que serían El Salvador, Guatemala, Nicaragua y Panamá, y aquellos que lo afrontan en condiciones de paz, Honduras, ya que Costa Rica no vivió proceso de transición interno, al contar con una larga tradición de democracia liberal y pacifismo. De entre los primeros, en Nicaragua, El Salvador y Guatemala se produce intervención extranjera de forma indirecta, a través de grupos armados por las dos grandes potencias. Así, El Salvador y Guatemala serían apoyados por EEUU y el resto de países capitalistas, y Nicaragua, que sería apoyado por bloque socialista, especialmente Cuba y la URSS. Panamá, por su lado, tiene una intervención directa por parte de los

[22] *Huneeus*, C. (1982), "La transición a la democracia en América del sur …", op. cit. pp. 62–63. También *Huneeus*, C./*Nohlen*, D. (1982), "Eine Vielfalt politischer Systeme", en: Der Bürger im Staat, marzo, 1982.

[23] *O'Donell*, G. (2004), "Acerca del Estado en América Latina …", op. cit, p. 177.

[24] *García Covarrubias* (2016), Las transiciones a la Democracia en América Latina …", op. cit. p. 1.

[25] *Huneeus*, C. (1982), "La transición a la democracia en América del sur …", op. cit. p. 69.

EEUU, que invade el país en 1989 y detiene a su presidente, el general Manuel Noriega.[26]

3. Si bien la característica principal que presidió el proceso de transición en España fue *el acuerdo entre las distintas fuerzas políticas (el «consenso»)*, la reforma pactada del régimen autoritario, lo cierto es que este aspecto no estuvo presente ni en Portugal ni en Grecia.[27]

   Tampoco los acuerdos son frecuentes en América Latina. En primer lugar, porque, como señala Carmen Ninou, "la tradición de la práctica política dificulta llevar a buen término los pactos iniciados al comienzo de la transición". Suelen ser pactos que surgen al inicio de la misma, pero que no llegan a cuajar. Tal fue el caso de la Multipartidaria en Argentina (en 1981, integrando a los peronistas – Partido justicialista – y a los radicales – Unión Cívica Radical – junto a otros partidos más pequeños) o, a otros niveles, de los Acuerdos del Club Naval en Uruguay, en 1982, entre altos militares y representantes de los principales partidos.[28]

   Y cuando se dan, tienen características muy diferentes a la española. Como apunta Jesús Fernández, "en Centroamérica, concretamente en El Salvador, Guatemala y Nicaragua, la negociación se produce, no ya entre gobierno y oposición, sino entre los contendientes de una guerra, el gobierno y el ejército regular por una parte, acompañado en ocasiones de grupos paramilitares y por otra parte los grupos armados opositores al gobierno, el Frente Farabundo Martí para la Liberación Nacional (FMLN) en El Salvador, la Unidad Revolucionaria Nacional Guatemalteca (URNG) en Guatemala y la Contra en Nicaragua".[29]

4. *La rigidez de las constituciones, fuertemente presidencialistas*, que predominan en esta región, privan al régimen democrático de la flexibilidad y capacidad adaptativa requeridas para sortear exitosamente los sucesivos desafíos que lo asedian. En esas condiciones, una crisis de gobierno puede paralizar al Estado, y

[26] *Fernández García*, J. (2008), "El modelo centroamericano de transición política: Definición y análisis". Diálogos, Revista Electrónica de Historia, Número especial 2008, pp. 1640 – 1661. En especial, p. 1641 – 1642.

[27] Por todas, *Oñate Rubalcaba*, P. (1998), "Consenso e ideología en la transición política española" Madrid, Centro de Estudios Políticos y Constitucionales, 1998; o *Esteban Alonso*, J. de (1999), "Transición, consenso y constitución, ¿por qué fue posible y por qué fue necesaria la transición?", Sociedad y utopía: Revista de Ciencias Sociales, núm. 13 (1999), pp. 65 – 74. Un análisis más cercano a cuando sucedieron los hechos, lo podemos encontrar en: *Maravall*, J. M. (1982), La política de la transición 1975 – 1980, Madrid, Taurus, 1982.

[28] *Ninou Guinot*, C. (1993), "Transición y consolidación democrática en América Latina", Revista de Estudios Políticos, núm. 82, pp. 127. En línea: https://dialnet.unirioja.es/descarga/articulo/27235.pdf [Consulta: 12 de septiembre de 2021].

Se puede citar también como un insólito caso de consenso, los acuerdos llevados a cabo entre los sandinistas y Violeta Barrios de Chamorro tras su victoria en las elecciones de febrero de 1990.

[29] *Fernández García*, J. (2008), "El modelo centroamericano de transición política …", op. cit. p. 1651.

lo que en un régimen parlamentario daría lugar a un rutinario recambio gubernamental –como ocurre con frecuencia en Europa– suele desembocar, en América Latina, en una crisis estatal "resuelta" por la vía del golpe de estado y la dictadura. Además observamos el hecho de que las Constituciones de la mayoría de los países latinoamericanos, de corte presidencialista, no suelen sufrir modificaciones en el paso del régimen democrático al autoritario o al revés (excepto algunos casos, como Guatemala y Brasil, o Chile desde 1980) aunque sí se suele suspender las aplicación de las Constituciones.[30] De hecho, ahora se está procediendo a la elaboración de una nueva constitución en Chile que sustituya la aprobada durante la dictadura del general Augusto Pinochet, en 1980, por una Convención Constitucional que pretende acabar sus trabajos antes de julio de 2022.[31]

5. *La importante presencia pública de las Fuerzas Armadas.* En efecto, desde los años sesenta los militares asumen institucionalmente, y no por actuaciones personales, el poder y lo dejan también mediante una decisión que los compromete institucionalmente. El retorno de los militares a los cuarteles no significa el comienzo de un proceso de democratización irreversible.

   Así, puede ocurrir que, debido a las difíciles condiciones económicas en que ha quedado el país, los grupos civiles tengan que enfrentarse con severas dificultades para establecer un orden democrático, creándose con ello el germen de una inestabilidad política que conduzca a nuevos golpes militares.

   De ahí que, como señaló Carlos Huneeus, "los actores políticos adopten como táctica la de presionar a los militares con el fin de que ese alejamiento del poder sea clarísimo, sin respaldar ellos mismos el proceso de democratización hasta que no quede enteramente claro que se van a realizar las elecciones generales y que se va a establecer un régimen democrático". Para este autor, "ésta fue la

[30] Cfr. *Gil Lavedra*, R. (2002), "Un vistazo a las Reformas Constitucionales en Latinoamérica". En: Seminario en Latinoamérica de Teoría Constitucional y Política (SELA 2002). En línea: https://biblioteca.cejamericas.org/bitstream/handle/2015/389/lavedras.pdf?sequence=1&isAllowed=y [Consulta: 12 de septiembre de 2021]. También *Brewer-Carías*, A. R. (2007), "La reforma constitucional en América Latina y el control de constitucionalidad", en: Reforma constitucional y control de constitucionalidad, Bogotá, Pontificia Universidad Javeriana, 2007 (en línea: https://allanbrewercarias.com/wp-content/uploads/2007/08/505.-482.-La-reforma-Constitucional-en-Am%C3%A9rica-latina-y-el-control-de-constitucionalidad.-Bogot%C3%A1.pdf y (2008), "Modelos de revisión constitucional en América Latina". En: *Carnota*, W./*Marianello*, P. (dir.), Derechos Fundamentales, Derecho Constitucional y Procesal Constitucional, Editorial San Marcos, Lima, 2008. pp. 210–251. (en línea: https://allanbrewercarias.com/wp-content/uploads/2009/06/II-4-594.-Modelos-de-revisio%CC%81n-constitucional-en-Ame%CC%81rica-latina.-Definitivo.doc.pdf [Consulta: 12 de septiembre de 2021]).

Una relación de reformas de constituciones americanas se puede consultar en: https://reformaspoliticas.org/normativa/temas/constitucion/ [Consulta: 12 de septiembre de 2021].

[31] No obstante, la Constitución de 1980, en sus cuarenta y dos años de vigencia, tiene más de 50 reformas, desde la primera, en 1989. El 4 de septiembre de 2022 se rechazó la aprobación de esta nueva constitución por referéndum (el 61,89 por ciento de los votantes la rechazaron, mientras que el 38,11 por ciento, la aprobaron).

política seguida por el ex Presidente Fernando Belaúnde en Perú, cuando se negó a participar en las elecciones de junio de 1978 destinadas a elegir una asamblea constituyente, pues no ‚era todavía claro' que se estaba comenzando un proceso de democratización".[32]

Debemos recordar que, en España, tras el intento de golpe de Estado de 1981, la integración en la OTAN, en 1982, alejó definitivamente a las Fuerzas Armadas de su implicación en la política interior, produciéndose una importante modernización de sus estructuras y de sus objetivos estratégicos. En América no existe ninguna estructura militar parecida a la OTAN y sus ejércitos cumplen funciones exclusivamente nacionales.[33]

6. *No basta con organizar elecciones.* En muchos casos las elecciones son manipuladas y sus resultados no resultan convincentes, pero no hay cauce jurídico válido para su impugnación y anulación (Bolivia, Venezuela, Perú, Ecuador …). También existe un fuerte desprestigio de los partidos políticos tradicionales (Bolivia con el MAS – Movimiento al Socialismo –, Méjico con el PRI).

   Como apuntó en su momento Carlos Huneeus, es necesario que las elecciones sean competitivas ya que éstas generan "un efecto político que se multiplica en cadena: legalización de los partidos políticos, reconocimiento del pluralismo ideológico, libertad de prensa y de movimiento, existencia de grupos de interés".[34]

7. *Influencia de las dictaduras en la población.* Muchos de los procesos de transición tienen lugar después de prolongadas dictaduras, sobre todo militares,

[32] *Huneeus*, C. (1982), "La transición a la democracia en América del sur …"., op. cit. p. 70.

[33] Aunque la bibliografía es abundante sobre estos aspectos, podemos destacar, no obstante, a *Salas López*, F. de (1982), "El proceso de integración de España en la OTAN", Revista de Estudios Internacionales, vol. 3, núm. 1. Enero–marzo de 1982, pp 137–72, que resume muy bien todos los aspectos de la integración inicial en ese Tratado (en línea: https://dialnet.unirioja.es/descarga/articulo/2496579.pdf [Consulta: 12 de marzo de 2022]) y, para los análisis posteriores al referéndum de 1985, *Almerich Simo*, F. M. (1995), "España en la OTAN: contribución a su doble dimensión de seguridad y defensa" Boletín de Información, núm. 241, 1995, pp. 63–89 (en línea: https://dialnet.unirioja.es/descarga/articulo/4768636.pdf [Consulta: 12 de marzo de 2022]); *Pardo De Santayana/Coloma*, J. (2010), "La integración de España en la OTAN", Boletín de Información, núm. 314, 2010, pp. 4–18 (en línea: https://dialnet.unirioja.es/descarga/articulo/3346785.pdf [Consulta: 12 de marzo de 2022]); *Barbé*, E. (2022), "España y la OTAN: una historia en tres etapas", Vanguardia dossier, núm. 82 (2022), pp. 80–84 o, en fin, la página web del Ministerio de Asuntos Exteriores: https://www.exteriores.gob.es/es/PoliticaExterior/Paginas/EspanaOTAN.aspx con información actualizada de la participación de España en la Organización, o del Ministerio de Defensa.

[34] *Huneeus*, C. (1982), "La transición a la democracia en América del sur …", op. cit. p. 72. Como podemos observar en Bolivia, o Venezuela sobre todo, la mera existencia de elecciones no impide que el proceso político suponga la persecución de partidos políticos rivales, el control de la prensa, etc.

o con fuerte apoyo de los mismos. Como indica Carlos Huneeus, "en esa fase autoritaria se han utilizado los modernos recursos de control social y de comunicaciones para desmovilizar a la población, o para socializar a la población sobre las posturas ideológicas de los gobernantes («doctrina de la seguridad nacional»), para estabilizar una dominación a mediano y tal vez largo plazo, sin que falte el propósito de hacer un "hombre nuevo". Así, "tales acciones producen efectos políticos en la población, especialmente, en países en los cuales la cultura política no se ha consolidado debido a la inexistencia de una fase relativamente larga de política democrática".[35]

8. *Las crisis económicas, y en particular el problema de la deuda externa han sido factores desestabilizantes en la región.* La deuda externa y la descapitalización "unido a las frustradas expectativas de mejoras sociales en la población, han generado una situación de insatisfacción económica que se ha reflejado en el terreno político".[36]

   También ha llevado a que la desigualdad sea más evidente, pues los mayores niveles de concentración de la riqueza mundial se encuentran en esa región. Las implicaciones son muy relevantes, pues la desigualdad que caracteriza a los países latinoamericanos se relaciona con la subsistencia de bolsas de pobreza e indigencia que chocan con los valores medios de riqueza de los países, siendo la mayoría de ellos de renta media y, en algunos casos, alta.

   Se trata de una pobreza y de una desigualdad multidimensionales, como señalan Petra Bonometti y Susana Ruiz Seisdedos, "que a la escasez económica agregan la falta de acceso a las necesidades y a los servicios básicos, la falta de oportunidad, la exclusión social y la discriminación. La discriminación social afecta a una pluralidad de grupos sociales (pobres, indígenas, campesinos, mujeres), creando así una masa enorme de excluidos".[37]

   De hecho, como apunta Marcelo Cavarozzi, "durante la década de 1980, la mayoría de los nuevos Gobiernos democráticos de América Latina, ha sufrido un deterioro drástico en la efectividad de las políticas económicas", por lo que éstos "no logran alimentar la esperanza". Como consecuencia "la mayoría de la población se repliega de la política".[38]

   Y aunque ya no esté tan claro la correlación entre democracia y desarrollo económico que se aseguraba durante los años sesenta "en sociedades pluralistas,

[35] *Huneeus*, C. (1982), "La transición a la democracia en América del sur …", op. cit. p. 73.

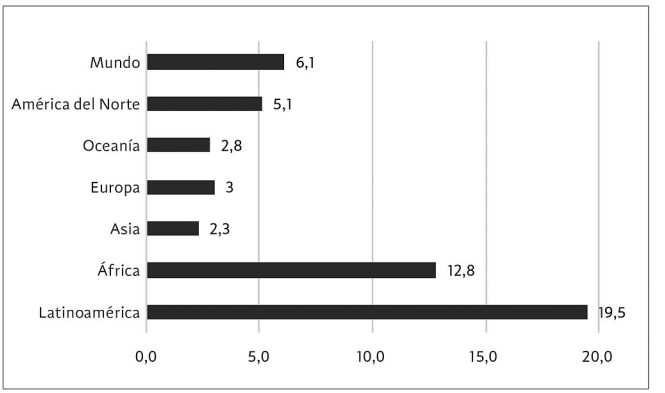
[36] *Ninou Guinot*, C. (1993), "Transición y consolidación …", op. cit. p. 132.

[37] *Bonometti y Ruiz Seisdedos*, S. (2010), "La democracia en América Latina …", op. cit. p. 2.

[38] *Cavarozzi*, M. (1991), "Más allá de las transiciones a la democracia en América Latina", Revista de Estudios Políticos, núm. 74, pp. 90–91.

con ausencias de desigualdades extremas, es más fácil la estabilidad democrática".[39]

9. *La violencia* es una de las mayores preocupaciones de la población latinoamericana, que además desconfía de la capacidad del Estado de desempeñar su función clave de protección.



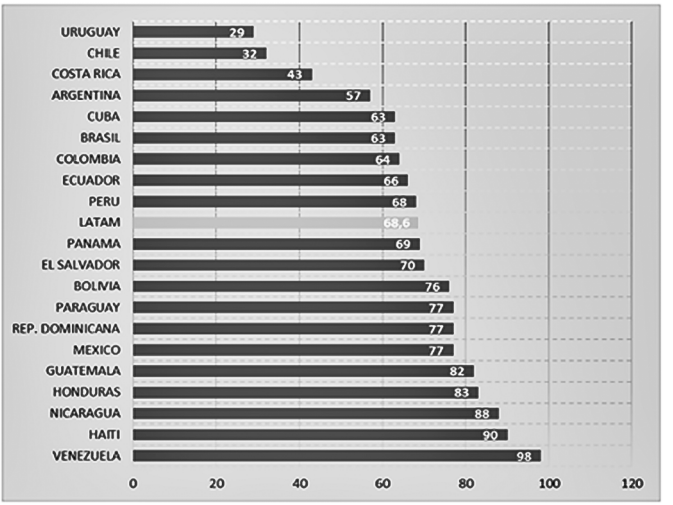
Nota: para África se usó la tasa de homicidio del último año disponible (2015).

Fuente: *Rettberg*, Angelika (2020), "Violencia en América Latina hoy: manifestaciones e impactos". Revista de Estudios Sociales, 73, julio 2020, pp. 2 – 17

Figura 2: Tasas de homicidios (víctimas de homicidios intencionales por cada 100.000 habitantes) por región, 2017

10. *La corrupción* debilita la cohesión social y reduce la posibilidad de construir un pacto social sólido entre la población. Aunque sus efectos son muy importantes en relación a la desafección de la población de las instituciones, democráticas o no, en todos los países, creemos que su análisis más detallado escapa al objetivo de estas páginas.

[39] *Ninou Guinot*, C. (1993), "Transición y consolidación…", op. cit. p. 109.



Fuente: Círculo de Estudios Latinoamericanos "Indicador de corrupción para América Latina – Julio 2021". En: https://www.cesla.com/pdfs/Informe-de-corrupcion-en-Latinoamerica.pdf

Figura 3: Indicador de corrupción para América cesla – Julio 2021

11. Y por último, *el impacto de la política norteamericana en relación a los procesos de democratización* actuales y pasados en América Latina. Sin remontarnos a los inicios de la "doctrina Monroe", el apoyo a las multinacionales bananeras en Guatemala (United Fruit Company), Honduras (invadido 7 veces a principios del Siglo XX) o Colombia o Panamá, el apoyo a las Fuerzas Armadas del cono sur con la Operación Cóndor, la injerencia directa como la invasión de Panamá para detener al General Noriega (1989) o en la isla de Granada (1983), el apoyo a las dictaduras de Brasil, Chile y Argentina o Paraguay, la creación por la administración Reagan de la contra nicaragüense, la desestabilización permanente en El Salvador y en Guatemala, etc. O, de modo continuado, la intervención indirecta en Venezuela o Colombia con la justificación de la lucha contra el narcotráfico o la guerrilla; no cabe duda de que son factores desestabilizantes en la región.[40]

También se ha destacado en ocasiones, la influencia norteamericana para favorecer los procesos de transición de dictaduras a democracias. Así, como apunta Carlos Huneeus, "se subraya por los analistas norteamericanos la

[40] Para un análisis detallado de la política exterior estadounidense para América Latina, puede consultarse a *Montobbio*, M. (1999), La metamorfosis de pulgarcito. Transición política y proceso de paz en El Salvador", Barcelona, Icaria-Antrazyt-FLACSO, pp. 74 y ss.

influencia decisiva [de la política de derechos humanos de la administración del Presidente Jimmy Carter] como causa determinante en la generación de los procesos de democratización", aunque el autor cree que tal afirmación es exagerada, "pues había diversos factores internos que estaban creando un clima necesario en esa dirección" y tampoco "la política de Carter … afectó las relaciones económicas entre Estados Unidos y América Latina, especialmente el flujo de créditos norteamericanos a las dictaduras, con lo cual su discurso políticos estaba en contradicción con las relaciones económicas".[41]

La evolución de la política norteamericana en la región, pone de manifiesto un aumento de la preocupación por otros problemas, además de la consolidación democrática, como es el caso del aumento del narcotráfico en la región, o el problema de la inmigración ilegal, y su utilización política por parte de los estadounidenses.[42] Por lo demás, durante la Administración Obama, los aspectos más destacados de su gestión pueden ser la normalización de las relaciones con Cuba y los esfuerzos desplegados para conseguir el acuerdo entre la FARC y el gobierno de Colombia. La administración Trump no supuso avances significativos en estos asuntos, más bien supuso un paso atrás tanto en las relaciones con Cuba, como con México y el resto de los países centroamericanos (suspendiendo tratados preferencias con Honduras, Nicaragua o El Salvador) o sudamericanos (especialmente graves eran los enfrentamientos con Venezuela).[43]

En todo caso, como apunta Wolf Grabendorff, las "enormes diferencias entre las culturas políticas de las dos Américas", ha convertido a las relaciones intercontinentales "en un terreno particularmente complicado". Así, para este autor, "los enfoques políticos sobre cuestiones internas siempre se han entremezclado con estrategias sobre asuntos exteriores y de seguridad y esto ha provocado, por ende, efectos … difíciles de regular en sociedades tan diferentes". Además, "estos efectos se acentuaron aún más por la dualidad presente en las cúpulas políticas de los países latinoamericanos: algunas aceptan el liderazgo estadounidense mientras que otras quieren reducir esa influencia",[44]

[41] *Huneeus*, C. (1982), "La transición a la democracia en América del sur …", op. cit. p. 76–77.

[42] *Véase Ramos*, M. (1991), "América latina y la política exterior de Estados Unidos*", Revista de Estudios Políticos,* núm. 74, 1991, pp. 639 a 644. En línea: https://dialnet.unirioja.es/descarga/articulo/2138278.pdf [Consulta: 6 de marzo de 2022].

[43] *Romero*, S. (2019), "Donald Trump y la Democracia en América Latina". En línea: https://puedjs.unam.mx/puedjs-demo/wp-content/uploads/2019/05/Sergio-Romero-OPTIMIZADO.pdf [Consulta: 10 de marzo de 2022]. El autor se refiere como "broche de oro" de la opinión del Presidente Trump sobre algunos países centroamericanos, a unas declaraciones en las que se refería a El Salvador y Haití, junto con países africanos, de "hoyos de mierda" y que prefería que llegaran a su país inmigrantes de Noruega.

[44] *Grabendorf*, W. (2018), "América Latina en la era Trump. ¿Una región en disputa entre Estados Unidos y China?", Nueva sociedad, núm. 275 (2018), pp. 47–50. En línea: https://static.nuso.org/media/articles/downloads/2.TC_Grabendorff_275.pdf [Consulta: 10 de marzo de 2022].

lo que ha llevado tradicionalmente a la administración estadounidense a una política nacional recelosa frente a los vecinos del sur. También apunta Manuel Montobbio una cierta diferencia de trato a los países de Centroamérica en relación con los de Sudamérica. Para este autor, los países de la cuenca del Caribe son percibidos "como una zona vital para la seguridad nacional de Estados Unidos, así como escenario natural para su presencia hegemónica en su desarrollo económico y político".[45]

Aunque algunos analistas esperan un cambio positivo para la cooperación entre la nueva administración Biden y los países americanos,[46] parece pronto para analizar con mayor detalle su política exterior con la región, sobre todo en estos momentos en los que estamos viviendo todavía la emergencia sanitaria provocada por el COVID-19, y en el que el ataque y la invasión de Ucrania por parte de la Federación Rusa, el pasado 24 de febrero, nos va a obligar a replantear muchas de las posiciones internacionales sostenidas por los distintos países, hasta ahora.

IV. Algunos ejemplos centroamericanos

Por último, vamos a detenernos en dos países que pueden ser buenos ejemplos de las oscilaciones de la política hispanoamericana y que, además, plantean vueltas a regímenes autoritarios muy recientemente.

Nicaragua

Sin remontarnos más atrás,[47] en 1912 Estados Unidos ocupó militarmente Nicaragua para la defensa de sus multinacionales y de sus intereses comerciales en el país. Desde 1926 se inició una guerra de guerrillas contra la ocupación estadounidense dirigida por Augusto César Sandino. Esta lucha logró que las tropas de los Estados Unidos salieran del país, en 1933, pero antes, crearon la Guardia Nacional como embrión del Ejército que luego apoyaría las dictaduras de la familia Somoza. En 1934, Sandino fue asesinado, pero su legado se integró desde 1961 en

[45] *Montobbio*, M. (1999), La metamorfosis de pulgarcito …, op. cit. p. 81.

[46] Un análisis detallado de estas políticas de la nueva administración Biden, pero posiblemente muy inicial, se puede consultar en: https://www.wola.org/es/analisis/las-politicas-del-primer-ano-de-biden-hacia-america-latina/ [Consulta: 10 de marzo de 2022].

[47] Narra Sergio Ramírez que ningún otro país de América Latina "había sido víctima, como Nicaragua, de tantos abusos en intervenciones militares de Estados Unidos", desde que William Walker "un aventurero de Tennessee" se proclamó presidente del país en 1855, "amparado por una falange de filibusteros". Walker decretó la esclavitud y estableció el inglés como idioma oficial. *Ramírez Mercado*, S. (1999), Adiós Muchachos. Una memoria de la revolución sandinista, Madrid, Aguilar, 1999, p. 127, Sergio Ramírez fue galardonado en 2017 con el Premio Miguel de Cervantes.

el Frente Sandinista de Liberación Nacional que surgió como un movimiento de oposición armada a la dictadura de los Somoza.[48]

El 19 de julio de 1979 el FSLN, que contaba con un importante apoyo popular, logra derrotar al Gobierno de Anastasio Somoza Debayle, dando comienzo a un periodo conocido como la Revolución Sandinista.[49] Tras la toma del gobierno, sin embargo, este nuevo régimen se convierte en un nuevo autoritarismo, con una ideología que para González Marrero sería de "marxismo-lenilismo difuso",[50] que no convocaría elecciones hasta 1984. Tras esos comicios, se procedió a la elaboración y aprobación de la que sería la Constitución de 1987, que para este autor, se enmarcaría "dentro de la tradición liberal-democrática, socialmente avanzada, aunque no socialista … y apenas posee … nada que exprese voluntad hegemónica o excluyente", consagrando un régimen político de democracia representativa, por medio de partidos "abandonando precedentes tentaciones corporativas", estableciendo una división atenuada de poderes y garantizando una amplia gama de derechos políticos, sociales y económicos, además de concesiones especiales a los grupo étnicos minoritarios.[51] Sin embargo, el recién elegido presidente Daniel Ortega, decretó el estado de emergencia tras el acto de promulgación del texto.

Sin embargo, en el contexto de una guerra fría todavía activa, el gobierno norteamericano, desde 1979, pero especialmente durante la administración de Ronald Reagan (que comenzó en 1981), organizó y financió una serie de grupos armados para que combatieran al Gobierno Sandinista (fueron conocidos como "la contra"), llegando en su momento más álgido a movilizar a más de 20.000 combatientes. No obstante, esta lucha no logró derrocar a los gobiernos sandinistas.[52]

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[48] *González Marrero*, S. (1991), "La transición a la democracia en Nicaragua", Revista de Estudios Políticos, núm. 74, 1991, pp. 449–469.

[49] Resulta imprescindible, para un conocimiento exacto de la revolución sandinista y de sus momentos posteriores, leer a *Ramírez Mercado*, S. (1999), Adiós Muchachos …, op. cit.

[50] *González Marrero*, S. (1991), "La transición a la democracia en Nicaragua", op. cit. p. 452.

[51] *González Marrero*, S. (1991), "La transición a la democracia en Nicaragua", op. cit. p. 456.

[52] La Corte Internacional de Justicia, sede en La Haya, en su sentencia de 27 de noviembre de 1986, falló contra Estados Unidos, obligando a indemnizar a Nicaragua, aunque no detalló la cantidad de la indemnización, que se calculó, no obstante, en una cantidad aproximada a los 17.000 millones de dólares. Bajo la presidencia de Violeta Barrios de Chamorro, Nicaragua perdonó la deuda del gobierno norteamericano con el país. Recientemente, el Gobierno de Daniel Ortega ha comunicado que reabrirían de nuevo el caso. Véase la sentencia del caso "Concerning military and paramilitary activities in and against Nicaragua", en francés: 070-19860627-JUD-01-00-FR.pdf (icj-cij.org) y, en inglés: 070-19860627-JUD-01-00-BI.pdf (icj-cij.org)[Consulta: 20 de marzo de 2022].

Para un análisis de esta sentencia se puede consultar: *Piñol I Rull*, J. (1987), "Los asuntos de las actividades militares y paramilitares en Nicaragua y en contra de este Estado (Nicaragua

Por la presión internacional, una vez finalizada la actividad de "los contra", en febrero de 1990 se celebraron unas nuevas elecciones, en las que venció la Unión Nacional Opositora, contraria a los sandinistas, y en las que fue elegida Violeta Barrios de Chamorro, de esa coalición de partidos, como presidenta del país.[53]

Desde ese momento, se sucedieron en el poder, otros presidentes también opuestos al sandinismo. Concretamente, nos referimos a las elecciones de noviembre de 1996, 2001 y 2006. En 1997 subió al poder Arnoldo Alemán Lacayo, de la Alianza Liberal, y en 2002, Enrique Bolaños Geyer, también liberal.

Parecía que desde ese momento el país entraba en una etapa de normalidad democrática con sucesivos relevos pacíficos en la presidencia del país, aunque no sin numerosos problemas derivados de los desastres naturales, terremotos (especialmente grave el de Managua en 1972), huracanes, que periódicamente asolan su territorio. De hecho, existen numerosas denuncias de corrupción derivadas de la gestión de las ayudas humanitarias internacionales.

Así, para Rovira Mas, "la grave situación socioeconómica que padece la inmensa mayoría de la población del país" es un problema que no debería subestimarse para la consolidación de la democracia, ya que puede incidir sobre la legitimidad del régimen político.[54]

De hecho, en 1999, Sergio Ramírez, que fue vicepresidente de Nicaragua entre 1985 y 1990, señaló que: "El nuestro fue un régimen muy democrático, en un sentido nuevo, y muy autoritario, en un sentido viejo. Pasados los años, lo que se llamó el proyecto táctico terminó imponiéndose, como ya dije, y la democracia, ya sin apellidos, ni burguesa, ni proletaria, vino a ser el fruto más visible de la Revolución. La gran paradoja fue que, al fin y al cabo, el sandinismo dejó en herencia lo que no se propuso: la democracia, y no pudo heredar lo que se propuso: el fin del atraso, la pobreza y la marginación".[55]

En 2006, el Frente Sandinista de Liberación Popular vuelve al poder al ganar las elecciones celebradas en ese año y, desde 2007, es nombrado Presidente Daniel Ortega Saavedra. Daniel Ortega ya lo fue anteriormente entre 1985 y 1990, y ha comenzado su quinto mandato, que le mantendrá en el poder hasta 2027.[56] Para

contra Estados Unidos de América)." Revista Española de Derecho Internacional, vol. 39, núm. 1, 1987, pp. 99–119.

[53] Para Rovira Mas, "una peculiaridad de la transición a la democracia en Nicaragua consiste en que se compone de dos procesos diferentes: el desplazamiento (la expulsión de Somoza en 1979) y el traspaso que se concretó en el acuerdo entre la cúpula sandinista y el gobierno de Violeta Barrios tras la victoria de la segunda en 1990 (*Rovira Mas*, J. (2009), "Nicaragua 1979–2007 …", op. cit. p. 7).

[54] *Rovira Mas*, J. (2009), "Nicaragua 1979–2007 …", op. cit. p. 19.

[55] *Ramírez Mercado*, S. (1999), Adiós Muchachos …, op. cit. p. 107.

[56] Esta última elección es la más cuestionada, por las detenciones de aspirantes y candidatos opositores y la falta de trasparencia en su celebración (Véase: La comunidad internacio

Osorio Mercado y Rodríguez-Ramírez, este periodo que comprende desde 2006 hasta 2017 se ha caracterizado por "un sistema político corporativista autoritario, el capitalismo neoliberal y la justicia de mercado, en el que tuvo un rol central el apoyo de la cooperación venezolana" y tomó la forma "de una alianza tripartita entre el gobierno, la empresa privada y los trabajadores allegados al partido sandinista".[57] Así, desde el gobierno, se ha controlado, no sólo a la Asamblea Nacional, sino también a la Corte Suprema de Justicia y al Consejo Supremo Electoral, bloqueando también la autonomía de las regiones de la Costa del Caribe y anulando la autonomía municipal. Declaró ilegales a otros partidos, incluyendo al Movimiento Renovador Sandinista,[58] y empezó a controlar los canales de televisión y radio. En lo que respecta a las relaciones internacionales, durante este primer periodo, Nicaragua se sumó a la política exterior estadounidense "en materia de seguridad – como el combate del terrorismo, el narcotráfico y la migración en tránsito hacia EE. UU. – y de apertura a las inversiones de las empresas estadounidenses". Y ello "a cambio del compromiso de Estados Unidos de mantener el crédito internacional de los organismos financieros y de continuar figurando como el principal socio comercial de Nicaragua".[59]

A partir de este periodo, que comenzó en enero de 2017, es cuando se ha observado una mayor tendencia hacia el autoritarismo y el caudillismo.[60] En efecto, tras las protestas de abril de 2018 por una serie de reformas sociales, que afectaron al Instituto Nicaragüense de Seguridad Social, el gobierno impuso la censura a numerosos medios de comunicación opositores. También se aprobó una «ley antiterrorismo» para poder prohibir las manifestaciones.[61] Tras ello, diversos

nal no reconoce la victoria sin oposición de Ortega | Política | Edición América | Agencia EFE [Consulta: 20 de marzo de 2022]).

Para Osorio y Rodríguez-Ramírez, en las elecciones de 2011 Daniel Ortega fue reelegido Presidente "gracias a que el poder judicial estableció que la prohibición de la reelección presidencial por periodos sucesivos, instituido en el artículo 147 de la Constitución Política de Nicaragua de 1987 (con reformas de 1995) violaba el principio constitucional de la igualdad individual". Para las sucesivas reelecciones, en 2014, una reforma constitucional consagró la posibilidad de reelecciones sucesivas e indefinidas. *Osorio Mercado*, H./*Rodríguez-Ramírez*, R. (2020), "Crítica y crisis en Nicaragua: la tensión entre democracia y capitalismo", Anuario de Estudios Centroamericanos, Universidad de Costa Rica, núm. 46, p. 7.

[57] *Osorio Mercado*, H./*Rodríguez-Ramírez*, R. (2020), "Crítica y crisis en Nicaragua …", op. cit. p. 2.

[58] Fundado en 1995 por disidentes del Frente Sandinista de Liberación Nacional, encabezados por Sergio Ramírez y Dora María Téllez.

[59] *Osorio Mercado*, H./*Rodríguez-Ramírez*, R. (2020), "Crítica y crisis en Nicaragua …", op. cit. p. 10.

[60] Sobre la continuidad histórica del autoritarismo en Nicaragua, véase *Monte*, A./*Gómez*, J.P. (2020), "Autoritarismo, violencia y élites en Nicaragua. Reflexiones sobre la crisis (2018–2019)". Anuario de Estudios Centroamericanos, Universidad de Costa Rica, núm. 46, pp. 1–29.

[61] Decreto presidencial 03–2018. En línea: DECRETO PRESIDENCIAL No. 03–2018 NI CARAGUA.pdf (ilo.org) [Consulta: 20 de marzo de 2022]. Ley núm. 977 contra el Lavado de

organismos como la OEA y la Corte Internacional de Derechos Humanos han condenado en reiteradas ocasiones al gobierno de Ortega, por represión "brutal" y acciones en contra de la libertad de expresión. Dichos organismos responsabilizan al gobierno por la muerte de más 325 ciudadanos, la Comisión de la Verdad, Justicia y Paz, creada por la Asamblea Nacional nicaragüense, reconoce a 269 víctimas,[62] incluyendo 22 oficiales de la Policía Nacional, asesinados en el contexto de las protestas antigubernamentales, calificadas de «violentas» por la comisión.[63] Desde noviembre de 2018, bajo la presidencia de Donald Trump, Estados Unidos ha aprobado diversas sanciones con el gobierno nicaragüense,[64] que han continuado aplicándose bajo la administración Biden,[65] y han sido secundados por otros países

Activos, el Financiamiento al Terrorismos y el Financiamientos a la Proliferación de Armas de Destrucción Masiva. Especialmente el artículo 44 que reforma los artículos 394 y 395 del Código Penal. En línea: Ley_N._977_Ley_Contra_el_LA-FT-FPADM.PDF (uaf.gob.ni) [Consulta: 20 de marzo de 2022].

[62] Este número se redujo a 253 en un informe de esta Comisión publicado en febrero de 2019 y a 251 fallecidos en el Informe de 10 de julio de 2020. Comisión de la Verdad, Justicia y Paz, «III Informe de la Comisión de la Verdad, Justicia y Paz a la Honorable Asamblea Nacional», 5 de febrero de 2019. A hora de redactar estas páginas, la página web oficial de esta Comisión (https://cvjp.org.ni/) no está disponible.

[63] Sobre estas protestas, véase Consejo de Derechos Humanos (2019), Situación de los derechos humanos en Nicaragua. En línea: A/HRC/42/18 (un.org) [Consulta: 20 de marzo de 2022]. En este informe se señala que más de 300 personas murieron en el marco de las protestas y su represión, mientras que 2.000 resultaron heridas. La crisis también provocó la huida de Nicaragua de más de 80.000 personas.

También el examen de Nicaragua que realiza la Federación Internacional de Derechos Humanos y el Centro Nicaragüense de Derechos Humanos. En línea: INT_CCPR_CSS_NIC_43267_S.pdf (ohchr.org) [Consulta: 20 de marzo de 2022]. Y los informes de la Comisión Interamericana de Derechos Humanos, en 2018, en línea: primer informe: http://scm.oas.org/doc_public/spanish/hist_18/CP39694S03.doc y el segundo informe: http://scm.oas.org/doc_public/spanish/hist_18/CP39880S03.doc [Consulta: 20 de marzo de 2022].

[64] La Ley Global Magnitski (*Global Magnitsky Human Rights Accountability Act)*, Text – S. 284 – 114th Congress (2015 – 2016): Global Magnitsky Human Rights Accountability Act | Congress.gov | Library of Congress [Consulta: 20 de marzo de 2022], ha sancionado funcionarios del gobierno nicaragüense por violación de los derechos humanos y corrupción; todavía el pasado 15 de noviembre de 2021 el Tesoro Estadounidense amplía el listado de personas de la administración nicaragüense sancionadas. Con estas sanciones se podría expulsar a Nicaragua del Tratado de Libre Comercio con Centroamérica y República Dominicana (DR-CAFTA, por sus siglas en inglés).

[65] Para el gobierno estadounidense, entre 2020 y 2021, Nicaragua aprobó seis leyes que facilitaron la represión del gobierno contra la oposición e influyeron en los resultados de las elecciones de noviembre de 2021. El encarcelamiento injusto de casi 40 figuras de la oposición desde mayo, incluidos siete posibles candidatos presidenciales, y el bloqueo de la participación de los partidos políticos amañaron el resultado mucho antes del día de las elecciones. Véase, en línea: Treasury Sanctions Public Ministry of Nicaragua and Nine Government Officials Following Sham November Elections | U.S. Department of the Treasury [Consulta: 20 de marzo de 2021].

como Canadá, Reino Unido, México o Argentina. Desde las protestas, más de cien mil ciudadanos han huido del país por ese motivo.[66]

Desde el 2 de agosto de 2021 la Unión Europea ha establecido también sanciones a 14 funcionarios nicaragüenses. Josep Borrell ya advertía a primeros de julio, durante una intervención en el pleno del Parlamento Europeo, de que "Nicaragua ha entrado en una espiral represiva" cuyo objetivo sería "la eliminación de los competidores para el 7 de noviembre", fecha en la que están previstas las elecciones presidenciales y parlamentarias.

Estas sospechas se confirmaron cuando Daniel Ortega fue reelegido con el 75 por ciento de los votos, tras acusar de traición a la patria y detener a siete candidatos opositores, entre las que se encuentra Cristina Chamorro, hija de la expresidenta Violeta Barrios de Chamorro.[67]

Por ello, en la actualidad Daniel Ortega está siendo comparado con el último de los Somoza y señalado de autoritario por diversos medios y expertos; también ha sido acusado de caudillismo, oportunismo ideológico, enriquecimiento personal y ejercer un control familiar sobre las instituciones del Estado asignando incluso, a su esposa como vicepresidenta. Las críticas provienen incluso de antiguas figuras destacadas de la Revolución Sandinista, algunas de ellas integradas dentro del partido Movimiento Renovador Sandinista.

En el plano nacional e internacional, analistas políticos y medios, también se refieren a él como un "dictador" y, este país, como ya se recoge al principio, en los Informes de Freedom House de 2021 y 2022, aparece bajo la etiqueta de "No libre".

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[66] La crítica de Estados Unidos y la Unión Europea a la deriva autoritaria de la presidencia de Ortega ya comenzó a partir de las primeras protestas campesinas contra la concesión de la construcción de un canal la empresa china Hong Kong Nicaragua Canal Development Investment que los amenazó con despojarles de sus tierras y las concesiones mineras a empresas colombianas y canadienses. La OEA también criticó el deterioro de la democracia y recomendó una reforma electoral integral. Véase *Osorio Mercado*, H./*Rodríguez-Ramírez*, R. (2020), "Crítica y crisis en Nicaragua …", op. cit. p. 14 y ss.

La Comisión Interamericana de Derechos Humanos también recomendó que se establecieran medidas de protección a favor de las comunidades indígenas del Caribe. Véase Comisión Interamericana de Derechos Humanos (2016). Resolución 2/2016. Washington, D.C., Recomendaciones reiteradas en 2018 y 2019, sobre todo en relación a los nicaragüenses que se vieron forzados a huir a Costa Rica. Comisión Interamericana de Derechos Humanos (20187). Observaciones preliminares sobre la visita de trabajo para monitorear la situación de personas nicaragüenses que se vieron forzadas a huir a Costa Rica. Comunicado de Prensa, 2018. En línea: http://www.oas.org/es/cidh/prensa/comunicados/2018/233.asp [Consulta: 20 de febrero de 2022]. Y Comisión Interamericana de Derechos Humanos (2019). Migración forzada de personas nicaragüenses a Costa Rica. Washington, D.C., 2019. En línea: MigracionForzada-Nicaragua-CostaRica.pdf (oas.org) [Consulta: 20 de febrero de 2022].

[67] También fueron encarcelados, Arturo Cruz, Juan Sebastián Chamorro y Noel Vidaurre, de la alianza Ciudadanos por la Libertad, Félix Maradiaga, de la Unidad Nacional Azul y Blanco, Miguel Mora, del partido Restauración Democrática, Medardo Mairena, del Movimiento Campesino. También el Consejo Supremo Electoral inhabilitó a la alianza Ciudadanos por la Libertad.

El Salvador

Por centrarnos en lo ocurrido desde el siglo XX, en 1931 el General Maximiliano Hernández Martínez llegó al poder tras un golpe de Estado contra el presidente civil Arturo Araujo. Este General estableció un gobierno ultraconservador y autoritario, siendo depuesto por una huelga general en 1944, la llamada «huelga de los Brazos Caídos». Pero su gobierno marcó el inicio de una serie de gobiernos militares autoritarios sucesivos,[68] que finalizarían en 1979 con un golpe de Estado militar al general Carlos Humberto Romero y la instauración de una Junta Revolucionaria de Gobierno.[69] En 1982 se eligió una Asamblea Constituyente a la que la Junta entregó el poder y posteriormente en 1984 se celebraron las primeras elecciones presidenciales de la era democrática.

Durante este periodo, El Salvador sufrió una guerra civil, un conflicto bélico interno, que se mantuvo desde 1979 hasta 1992, consecuencia de los acontecimientos de Nicaragua. Así, las fuerzas armadas salvadoreñas se enfrentaron a las fuerzas insurgentes del Frente Farabundo Martí para la Liberación Nacional (FMLN), apoyados por Cuba y por el resto de los países comunistas. Este conflicto terminó con la firma de los Acuerdos de Paz de Chapultepec, en 1992, que permitió la desmovilización de las fuerzas rebeldes y su incorporación a la vida política del país.[70] Durante este conflicto, destacan los asesinatos del arzobispo de San Salvador, Óscar Arnulfo Romero, y Fray Cosme Spessotto Zamuner, ambos en 1980.

De hecho, como afirma Roberto Rubio-Fabián, "desde su independencia en 1821 hasta la firma de los Acuerdos de Paz en enero de 1992, El Salvador no había conocido un sistema democrático, salvo en algunos esporádicos y efímeros momentos de su historia".[71]

Para este autor, "Un balance de ese proceso de democratización permite destacar entre sus principales logros los siguientes: la disolución de los represivos Cuerpos de Seguridad; un ejército profesional y apolítico desligado de las funciones de seguridad interna y obediente al poder civil; una Policía Nacional Civil (PNC) más

[68] Apoyados en todos los casos por el gobierno de Estados Unidos (Véase *Montobbio*, M. (1999), La metamorfosis de pulgarcito …, op. cit. p. 83).

[69] Bajo la Administración Carter, se apoyaron decisivamente los intentos de democratizar El Salvador. Véase Montobbio, M. (1999), La metamorfosis de pulgarcito …, op. cit. pp. 108–110.

[70] Un análisis detallado de los Acuerdos de Paz y de los cambios que motivaron en la organización política del país, especialmente entre 1992 y 1994, se puede consultar en: *Córdova Macías*, R. (2009), "El Salvador en transición: el proceso de paz". América Latina Hoy, núm. 10, pp. 63–70, En línea: https://revistas.usal.es/index.php/1130-2887/article/view/2337/2386 [Consulta: 21 de marzo de 2022].

[71] *Rubio-Fabian*, R. (2012), "El Salvador: la transición inconclusa", Entorno, núm. 50, Marzo 2012, núm. 50, Marzo 2012, p. 36, Esos momentos se corresponden a las presidencias de Manuel Enrique Araujo (1911–1913), Arturo Araujo (de marzo a diciembre de 1931) y al periodo de la Junta Revolucionaria de Gobierno (octubre de 1979 a diciembre de 1980).

calificada y respetada; nuevas instituciones democráticas, como la Procuraduría de Derechos Humanos, la Academia de la PNC, o el Consejo Nacional de la Judicatura; la instauración de un verdadero pluralismo político con la participación del Frente Farabundo Martí para la Liberación Nacional (FMLN) en los procesos electorales, y su presencia relevante en la Asamblea Legislativa y gobiernos locales; un sistema político que, a pesar de su poco desarrollo y madurez, es relativamente estable; elecciones libres y creíbles" y, finalmente el triunfo del Presidente Mauricio Funes y del Frente Farabundo Martí para la Liberación Nacional (FMLN) en las elecciones de 2009, después de 20 años de gobierno de la derecha representada por el partido Alianza Republicana Nacionalista (ARENA).[72]

El 3 de febrero de 2019, el político, empresario y exalcalde (FMLN) de San Salvador, Nayib Bukele, del partido Gran Alianza por la Unidad Nacional (GANA) y en alianza con Nuevas Ideas, ganó la elección presidencial en primera vuelta, para el período presidencial que comenzó el 1 de junio de 2019 y concluirá el 1 de junio de 2024. Es el primer presidente, desde el final de la guerra civil, que no representa a ninguno de los dos partidos principales (Alianza Republicana Nacionalista – ARENA – o el Frente Farabundo Martí para la Liberación Nacional – FMLN –) que habían gobernado desde 1984.

A pesar de las esperanzas puesta en su elección, al margen de las tradicionales enfrentamientos entre la derecha de ARENA y la izquierda del FMLN, en febrero de 2020, Bukele irrumpe en la Asamblea Legislativa acompañado de cuarenta militares, para exigir la aprobación de la solicitud de un préstamo a los Estados Unidos con la finalidad de garantizar la continuidad del Plan Control Territorial contra la violencia de las pandillas. El acto crea un choque entre los poderes Ejecutivo y Legislativo. La Asamblea Legislativa decide crear comisiones especiales e interpelar a funcionarios del gabinete de seguridad.

El 1 de mayo de 2021, la nueva Asamblea Legislativa, donde tiene la mayoría de los escaños el partido del Presidente Nuevas Ideas, el mismo día que comenzaba la legislatura, tomó la decisión de destituir a los cinco magistrados de la Sala de lo Constitucional de la Corte Suprema de Justicia y al fiscal general, con los que el presidente Bukele había tenido enfrentamientos durante el último año.[73] Tras conocerse la destitución, la Sala de lo Constitucional emitió un fallo declarando inconstitucional la votación en su contra, acción que diversos abogados consideran que anula la votación.[74]

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[72] *Rubio-Fabian*, R. (2012), "El Salvador: la transición inconclusa …", op. cit. p. 36.

[73] La destitución del Fiscal General Raúl Melara se justificó con el argumento de sus vinculaciones con el partido opositor ARENA. En línea: https://www.bbc.com/mundo/noticias-america-latina-56974280 [Consulta: 5 de septiembre de 2021].

[74] Un análisis de esta destitución masiva de jueces constitucionales lo podemos encontrar en: *Hernández*, J.I. (2021), "La destitución masiva de jueces constitucionales en El Salvador. Un nuevo caso de derecho constitucional arbitrario-populista (Parte I)", Ibericonnect. Blog de la Revista Internacional de Derecho Constitucional en español, 17 de junio de 2021. En línea: https://www.ibericonnect.blog/2021/06/la-destitucion-masiva-de-jueces-constitucionales-en-el-

Estas decisiones han sido consideradas como un "autogolpe" por la oposición y la comunidad internacional, que amenaza con sanciones económicas a el país. Además, en septiembre del pasado año la Sala de lo Constitucional del Tribunal Supremo salvadoreño, compuesta por nuevos Magistrados tras la destitución de los anteriores, ha fallado a favor de permitir la reelección inmediata del Presidente,[75] lo que ha abierto la puerta a la continuidad del presidente Bukele, una vez que acabe su primer mandato.[76]

Pero no ha sido la única decisión controvertida que ha adoptado el Presidente Bukele. Así, desde el 7 de septiembre de 2021, El Salvador se convirtió en el primer país del mundo en aceptar el bitcoin como moneda legal, poniendo en marcha un acuerdo aprobado en junio de 2021 por la Asamblea Legislativa.[77] Para poner en

salvador-un-nuevo-caso-de-derecho-constitucional-autoritario-populista-primera-parte/; y en: "La destitución masiva de jueces constitucionales en El Salvador: Un nuevo caso de derecho constitucional arbitrario-populista (Parte II)", Ibericonnect. Blog de la Revista Internacional de Derecho Constitucional en español, 18 de junio de 2021. En línea: https://www.ibericonnect.blog/2021/06/la-destitucion-masiva-de-jueces-constitucionales-en-el-salvador-un-nuevo-caso-de-derecho-constitucional-autoritario-populista-parte-ii/ [Consulta: 20 de marzo de 2022].

[75] El artículo 152 de la Constitución señala que "No podrán ser candidatos a Presidente de la República: 1° El que haya desempeñado la Presidencia de la República por más de seis meses consecutivos o no, durante el período inmediato anterior, o dentro de los últimos seis meses anteriores al inicio del período presidencial". En línea: https://www.asamblea.gob.sv/sites/default/files/documents/decretos/171117_072857074_archivo_documento_legislativo.pdf [Consulta: 20 de marzo de 2022].

[76] Sentencia 1–2021, de 3 de septiembre de 2021. En línea: https://www.jurisprudencia.gob.sv/busqueda/showFile.php?bd=1&data=DocumentosBoveda%2FD%2F1%2F2020-2029%2F2021%2F09%2FEADB0.PDF&number=961968&fecha=03/09/2021&numero=1-2021&cesta=0&singlePage=false%27 [Consulta: 20 de marzo de 2022].

Esta sentencia corrige la interpretación realizada por la misma Sala de lo Constitucional del Tribunal Supremo en su Sentencia 163–2013, de 25 de junio de 2014 que señalaba que el artículo 152,1° de la Constitución impedía la reelección presidencial inmediata. La nueva interpretación de la Sala de lo Constitucional del Tribunal Supremo obligaría al Presidente a dejar su cargo antes de 6 meses del final de su mandato, para no contravenir lo dispuesto por la Constitución, entre otras consideraciones sobre la igualdad y las decisiones de los ciudadanos (En línea: https://archivo.tse.gob.sv/laip_tse/documentos/Amparos/163-2013-Inc.pdf [Consulta: 20 de marzo de 2022].

Esta opinión fue corroborada por la Opinión Consultiva de la Corte Iberoamericana de Derechos Humanos, núm. 28, de 7 de junio de 2021, al incluir a El Salvador entre los países que limitaban la reelección presidencial inmediata, especialmente en sus páginas 22 y ss. En línea:.https://www.corteidh.or.cr/docs/opiniones/seriea_28_esp.pdf [Consulta: 20 de marzo de 2022].

Un análisis de esta decisión de la Sala de lo Constitucional del Tribunal Supremo de El Salvador lo podemos encontrar en: *Hernández*, J.I. (2021), "La relección presidencial en El Salvador: otro caso de derecho constitucional arbitrario-populista". Ibericonnect. Blog de la Revista Internacional de Derecho Constitucional en español, 27 de septiembre de 2021. En línea: https://www.ibericonnect.blog/2021/09/la-reeleccion-presidencial-en-el-salvador-otro-caso-de-derecho-constitucional-autoritario-populista/ [Consulta: 20 de marzo de 2022].

[77] Decreto 57: Ley Bitcoin. En línea: https://www.asamblea.gob.sv/sites/default/files/documents/decretos/8EE85A5B-A420-4826-ABD0-463380E2603B.pdf [Consulta: 5 de septiembre de 2021].

marcha estas decisiones, El Salvador desarrolló una billetera electrónica propia[78] y procedió a la compra de 400 bitcoins[79] que servirán para dar a cada ciudadano un bono en bitcoins equivalente a 30 dólares, para que las utilicen en sus transacciones económicas en el país. No obstante, esa decisión ha generado numerosas críticas entre los expertos[80] y el Fondo Monetario Internacional ha instado al gobierno salvadoreño a eliminar el bitcoin como moneda de curso legal.[81]

Y, en fin, el incremento de homicidios y la creciente actividad de las pandilla que sufre el país, ha llevado a que el Presidente Bukele haya decretado el Régimen de Excepción, que entró en vigor, con el acuerdo de la Asamblea, el 27 de marzo de 2022 y tiene una duración prevista de 30 días, "derivado de las graves perturbaciones al orden público por grupos delincuenciales que atentan contra la vida, la paz y la seguridad de la población", y fue aprobado por 67 diputados de un total de 84 presentes.[82] Los derechos suspendidos son, entre otros, la libertad de asociación, derecho de defensa o inviolabilidad de la correspondencia, así como permitir la intervención de las telecomunicaciones sin autorización judicial y extender el plazo de la detención a 15 días, en vez de las 72 horas.[83]

En diciembre de 2021, el gobierno de los Estados Unidos impuso sanciones a Osiris Luna, jefe del Sistema Penal Salvadoreño y viceministro de Justicia y Seguridad Pública y Carlos Amílcar Marroquín, presidente de la Unidad de Reconstrucción del Tejido Social, funcionarios salvadoreños, por negociaciones

Con fecha 31 de agosto de 2021, la Asamblea también adoptó el Decreto 137: Ley de Creación del fideicomiso Bitcoin. En línea: https://www.asamblea.gob.sv/sites/default/files/documents/decretos/91A41A63-1796-4BA0-B969-9C16E505304F.pdf [Consulta: 5 de septiembre de 2021].

[78] Denominada Chivo Wallet. Su página web es: https://chivowallet.com/ [Consulta: 5 de septiembre de 2021]. También el gobierno ha instalado unos 200 cajeros automáticos Chivo para poder operar en criptomonedas y realizar cambios.

[79] A fecha de la compra, 400 bitcoins suponían 17,3 millones de euros, al cambio.

[80] Para Ricardo Castaneda, economista senior del Instituto Centroamericano de Estudios Fiscales (ICEFI), la decisión de establecer el bitcoin como moneda oficial, "puede haber sido para superar las sanciones de los Estados Unidos a funcionarios del gobierno salvadoreño. En línea: https://www.elsalvador.com/noticias/negocios/implementacion-bitcoin-superar-sanciones-estados-unidos-ricardo-castaneda/908263/2021/ [Consulta: 20 de marzo de 2022].

[81] Véase, en línea, a: https://www.france24.com/es/programas/econom%C3%ADa/20220326-bitcoin-salvador-riesgo-nayib-bukele y https://www.bbc.com/mundo/noticias-america-latina-60135521 [Consulta: 10 de marzo de 2022]. También: https://www.eleconomista.es/mercados-cotizaciones/noticias/11568265/01/22/La-arriesgada-apuesta-de-El-Salvador-por-el-bitcoin-pone-en-riesgo-sus-bonos-y-las-arcas-del-Estado.html [Consulta: 12 de marzo de 2022].

[82] Decreto 333: Régimen de Excepción. En línea: https://www.asamblea.gob.sv/sites/default/files/documents/decretos/4214B3CA-A3AA-4435-8229-49C097CAB14D.pdf [Consulta: 29 de marzo de 2022].

[83] Hay que recordar que El Salvador es uno de los países más violentos por las actividades de las pandillas, cuyos integrantes se dedican principalmente al narcotráfico. Entre las más violentas, se pueden mencionar a La Mara Salvatrucha y a Barrio 18, estimándose que, entre todas, sumarán más de 70.000 integrantes.

"secretas" con pandillas salvadoreñas, incluida la Mara Salvatrucha (MS-13).[84] También a Martha Carolina Recinos de Bernal, jefa de Gabinete del Presidente Bukele, por corrupción.[85]

[84] Las acusaciones concretas fueron que estos funcionarios negociaron dar incentivos financieros a las principales pandillas para que la violencia y los homicidios no aumentaran, también pidieron que líderes de estas pandillas dieran apoyo político al partido Nuevas Ideas.

[85] U.S. Department of the Treasury "Treasury Issues Sanctions on International Anti-Corruption Day", 9 de diciembre de 2021. En línea: https://home.treasury.gov/news/press-releases/jy0523 [Consulta: 20 de marzo de 2022].

From Apartheid to Democracy in South Africa

By *Gerhard Kemp*

I. Introduction and Historical Background

South Africa's transition to democracy in the early 1990s can be described as a complex transition. It was not only a transition from a dictatorship and an oppressive regime to a democratic dispensation. It was, first and foremost, a transition from apartheid (a deeply entrenched system of racial oppression) to a democratic system based on universal rights, the rule of law, and freedom. It was also a transition which was, in a sense, South Africa's long overdue joining of the process of decolonisation that began several decades earlier for the rest of the African continent. On top of that, the transition also coincided with the end of the Cold War and the fall of the Berlin Wall, thus prompting a repositioning of the liberation movements, notably the African National Congress (ANC) and its alliance partners, the South African Communist Party (SACP) and the Congress of South African Trade Unions (COSATU). In short, the end of apartheid brought not only democracy to South Africa, it also required this new democracy to find its place in a fast-changing international dispensation that was no longer a somewhat simple binary of "East" and "West".[1]

It is perhaps because of the fact that South Africa managed a relatively peaceful transition, in a complex world in flux, and with little outside assistance, that the South African transitional model is still celebrated internationally, even while there is growing domestic (and international) scepticism about the viability and integrity of this transition and the fledgling "New" South Africa.[2] There was also the remarkable contrast between South Africa's year of liberation, 1994, when the country's first democratic elections were held and Nelson Mandela was sworn in as the country's first Black president, and fellow African country Rwanda, which was almost destroyed by a horrific genocide in the same year (and month) of South Africa's celebrated first democratic elections.

The complexities of South Africa's transition must also be analysed against the backdrop of the internal debates in the broader anti-apartheid movement (and the

[1] *Peter Bouckaert*, "The negotiated revolution: South Africa's transition to a multiracial democracy" (1997), Stanford Journal of International Law 375, pp. 378–380.

[2] For a critical assessment, see: *Heinz Klug*, "Decolonisation, compensation and constitutionalism: Land, wealth and the sustainability of constitutionalism in post-apartheid South Africa" (2018), South African Journal on Human Rights, pp. 469–491.

ANC in particular) regarding the various peace and justice options that would bring a formal end to apartheid and help usher in the new democratic order. While the address by F. W. de Klerk, apartheid South Africa's last president, to the "tricameral" parliament on 2 February 1990 constituted a dramatic moment, the end of apartheid was at that stage a long time coming. This is not to say that De Klerk's speech on that day was not a hugely symbolic and practical matter that would grab the attention of the world, energise domestic political forces, and help to cement De Klerk's personal role as an indispensable negotiating partner and architect of the new post-apartheid order. Together with Nelson Mandela, the undisputed moral and political leader of the liberation struggle, De Klerk would later receive the Nobel Peace Prize for his efforts, but in his twilight years the last apartheid president largely destroyed his transitional legacy by questioning the status of apartheid as a crime against humanity.[3] But South Africa's transition from apartheid to democracy was not primarily driven by personalities, even if one might want to think of the transition story as that of the major *dramatis personae* such as Mandela, De Klerk and others. In reality, the transition was a political process directed and facilitated by the liberation movements, the National Party (NP) government, the military- and state security clusters, civil society, the religious groups, academics, and the business community. The political processes were guided by legal understandings, agreements, and frameworks that would ultimately result in a democratic constitution with a justiciable Bill of Rights.

South Africa, a nation state formed from four British colonies in 1910 as one of the so-called "white dominions" (the other being Canada, Australia, and New Zealand) missed all the opportunities to follow the route of decolonisation and democratization. The white minority rulers of the Union of South Africa (1910 to 1961) and later the Republic of South Africa (since 1961) essentially transformed the settler-colonial entities that existed since 1652 in the geographical area now known as South Africa into a state founded on white minority rule and entrenched and systemic racism.[4] This culminated in the system of apartheid which became official government policy after the election victory of the NP in 1948. The NP would govern South Africa in the face of increasing domestic and international opposition to apartheid, until the first democratic election of 1994, when it lost decisively to the ANC. The latter has governed democratic South Africa ever since.

It is important to understand that apartheid was not an autocratic derivative from other autocratic and totalitarian racist movements in Europe and elsewhere. It was an autocratic and criminal system in its own right.[5] Apartheid certainly shared many of the segregationist features of the American South, and there were indeed superficial

[3] De Klerk later apologised for his questioning of apartheid's status as a crime against humanity, but the damage to his reputation was done. For a report, see: https://www.bbc.co.uk/news/world-africa-51532829, last visit 05. 06. 2022.

[4] For an historical overview, see: *Rodney Davenport/Christopher Saunders*, South Africa – A modern history (2000), pp. 233 – 424.

[5] *Stephen Skinner* (ed.), Ideology and criminal law – Fascist, national socialist and authoritarian regimes (2019), pp. 125 – 143.

similarities between the race laws of Nazi Germany and apartheid South Africa. In order to understand apartheid, it is necessary to view it first and foremost as a home-grown settler-colonial system with deep socio-cultural, political, and even theological roots, premised on an ideology of white supremacy and with the aim to dominate all non-white inhabitants of South Africa and, for a time, also Namibia. Racism and white supremacist movements are, of course, not unique to South Africa, but the systemic, law-based, and entrenched nature of apartheid prompted international condemnation that intensified as the apartheid state became increasingly violent in its oppression of any resistance to the apartheid policies. The international condemnation[6] concretised in the adoption of the Apartheid Convention in 1973. This Convention is not only a political statement; it is indeed a clear declaration that apartheid is a crime against humanity, punishable under international law.[7] The Convention never resulted in any criminal prosecutions, though.[8] The Truth and Reconciliation Commission (TRC) that was created as part of the transition, recognised apartheid as a crime against humanity.[9] It would only be in 2021 that individuals were for the first time indicted in South Africa for the crime against humanity of apartheid.

The transition from apartheid to democracy must be understood as more than just a change in political culture from autocracy to democracy; the transition was (and in many ways continues to be) a dismantling of the system of settler-colonial oppression that culminated in apartheid. It is against this background, then, that the sequencing and complexities of South Africa's transition to democracy will now be discussed in more detail, starting with the domestic and international efforts to end apartheid and to negotiate the framework for a new, democratic dispensation.

In 1983 a constitution was adopted under the leadership of then President PW Botha.[10] It replaced the republican constitution of 1961 and was supposed to be a "reform constitution". In reality, the 1983 constitution, which provided for a tricameral parliament, with legislative chambers for white, coloured, and Indian South Africans (but not for black South Africans, the majority of the population) did nothing to move the country towards greater democracy. Rather, it sent the clear signal to black South Africans that they were not regarded as full citizens, and even coloured and Indian citizens were still marginalised and without the same rights as their white compatriots. As a result, the domestic opposition to apartheid took on a new form with the establishment of the United Democratic Front (UDF) in 1983, an umbrella movement

[6] Various declarations by the UN General Assembly and the UN Security Council. For an overview, see: *Carola Lingaas*, The concept of race in international law (2020), pp. 146–152.

[7] Article 1 of the International Convention of the Suppression and Punishment of the Crime of Apartheid, UN General Assembly, 1973. For analysis, see: *Lingaas*, The concept of race (supra), pp. 153–160.

[8] *Christopher Gevers*, "Prosecuting the crime against humanity of apartheid: Never, again" (2018), African Yearbook on International Humanitarian Law, pp. 25–49.

[9] TRC Report, Appendix to Vol. I, Chapter 4, para 1.

[10] For background, see: *Gretchen Carpenter*, "Republic of South Africa Constitution Act 110 of 1983" (1983), South African Yearbook of International Law, pp. 96–104.

consisting of several hundred civic organisations, trade unions, student organisations, churches and other religious groups.[11] While the ANC and the other liberation movements such as the Pan Africanist Congress (PAC) were fighting apartheid from their positions in exile, the domestic resistance prompted the government of PW Botha to declare a series of national states of emergency.[12] The apartheid state was now a securocratic police state with power concentrated in the hands of the president and a few ministers and bureaucrats in the so-called "security cluster". The security state's response to the increased domestic opposition against apartheid, led by the UDF, resulted in an increase in human rights violations and a systematic curtailment of what was left of the rule of law in South Africa. Detention without trial, kidnappings, torture, and extrajudicial killings became a feature of the apartheid state's response to the mass democratic movement. The incidences of gross human rights violations were later recorded in the reports of the TRC.

The 1980s, then, saw high levels of domestic violence and opposition to apartheid policies and increased international isolation. The apartheid state faced an existential crisis. By 1989, with the President Botha in ill health and the country facing a financial crisis, the end of the Cold War and the election of a new leader of the NP in the person of F. W. de Klerk, seemed like an opportune window for a political settlement of sorts. In reality, there have been some clandestine talks between the apartheid government and the main liberation movement, the ANC in exile, a few years before the dramatic speech by President De Klerk on 2 February 1990[13] when the ANC and the other liberation movements were unbanned, and that marked the beginning of the process that led to the democratic dispensation. The secretive talks between apartheid officials and members of the ANC coincided with public outreaches of academics, student organisations, and other influential Afrikaner establishment figures to the ANC in exile. A high-profile meeting in 1987 in Dakar, Senegal, between senior members of the ANC and a group of mainly Afrikaner and establishment academics, writers, and other opinion makers was ostensibly criticised yet tolerated by the apartheid government. The purpose of the meeting was to explore mutual strategies for political, social and economic change in South Africa. An important outcome of this meeting was the mutual understanding that there had to be a negotiated resolution of the liberation struggle. Many commentators regarded this meeting as a significant breakthrough, not only in symbolic terms, but indeed in terms of practical politics. It would, however, take a few more years (culminating in De Klerk's speech of February 1990) before substantive negotiations started.[14]

[11] For more background, see: https://www.sahistory.org.za/article/united-democratic-front-udf, last visit 05. 06. 2022.

[12] *Graham Dyson*, "South Africa: The state of emergency" (1985), 3 Mennesker og Rettigheter, pp. 30–34.

[13] For context and analysis, see: https://theconversation.com/fw-de-klerk-made-a-speech-31-years-ago-that-ended-apartheid-why-he-did-it-130803, last visit 05. 06. 2022.

[14] For background, see: https://www.sahistory.org.za/dated-event/dr-federik-van-zyl-slabbert-leads-delegation-meet-anc, last visit 05. 06. 2022.

The opening up of tentative channels for negotiation between the apartheid government and the liberation movements in the late 1980s caused the ANC to consider its options in terms of the best way forward in dealing with the apartheid state, the negotiation process, and the need for justice and redress in the post-apartheid dispensation. The starting point for the ANC has been the Freedom Charter, adopted at the historic Congress of the People in 1955. The democratic and transformative significance of the Freedom Charter were described by Nelson Mandela, as follows:

> "For the first time in the history of our country the democratic forces, irrespective of race, ideological conviction, party affiliation or religious belief, have renounced and discarded racialism in all its ramifications, clearly defined their aims and objects and united in a common programme of action. The Charter is more than a mere list of demands for democratic reforms. It is a revolutionary document precisely because the changes it envisages cannot be won without breaking up the economic and social political set-up of present South Africa … Whilst the Charter proclaims democratic changes of a far-reaching nature, it is by no means a blueprint for a socialist state but a programme of the unification of various classes and groupings amongst the people on a democratic basis … Its declaration, 'The People Shall Govern!' visualises the transfer of power not to any single social class but to all the people of this country, be they workers, peasants, professional, or petty-bourgeoisie."[15]

Throughout the struggle against apartheid, the Freedom Charter remained a guiding framework, but as Mandela acknowledged in the above quote, it was not a blueprint, but rather an enabling guide for the dismantling of the oppressive state, and then onwards toward freedom and equality for all South Africans. The legal-technical complexities regarding the drafting of a new post-apartheid constitution would come later, but first some fundamental questions concerning the nature and prerequisites for negotiating with the apartheid government had to be settled by the ANC in their internal debates about the way forward. Underlying the question of how best to take advantage of an opportunity to find a negotiated settlement that would give meaning to the aspirations reflected in the Freedom Charter, was the fact that the situation in South Africa was not a conflict between equals; it was not a war that could be settled by a peace treaty and then life could go on. There was a violent conflict, of course, but it was a conflict brought about by the struggle against an oppressive system.[16] Thus, any agreement that would focus only on the restoration of peace, without a reckoning with the past, would not be acceptable. In short, peace without justice was a non-starter for senior ANC leaders. For their part, the apartheid government, the military and security establishment, and the NP leaders were concerned about any reprisals or Nuremberg-style trials of apartheid leaders. There were also concerns about minority (read: *white* minority) rights and interests, notably language, cultural, and property rights. None of these concerns were removed by De Klerk's speech; indeed, the political energy released by the speech and its implications only accentuated the vast differences between

[15] *Nelson Mandela*, quoted in: Ismail Vadi, The Congress of the People and Freedom Charter – A People's History (2015), pp. 145–146.

[16] *Kader Asmal/Louise Asmal/Ronald Suresh Roberts*, Reconciliation through Truth – A reckoning of apartheid's criminal governance (1997), pp. 41–45.

the various factions, political formations, and racial groups in South Africa. It would take sustained political commitment, leadership, and the South African population's hunger for peace, justice, and progress to enable the negotiations of 1990 to 1993 and the adoption of the Interim Constitution. The same factors were again put to the test in the years of transition and transformation that followed the first democratic elections that were held in terms of the interim constitution in 1994. In this sense it can be said that the transformative spirit of the Freedom Charter lives on in the political, socio-economic, legal, and constitutional discourses of present-day South Africa; the post-apartheid democracy that is still dealing with the legacies of the past.

No options for ending apartheid, dealing with the past, and moving the country towards democracy were obvious or easy in the years of negotiations between 1990 and 1993. Given the criminality of apartheid and the gross human rights violations that were committed in the course of the apartheid state's suppression of opposition to the apartheid system, accountability was a key issue for the ANC. Initially, the idea was that criminal trials according to the Nuremberg model would be the appropriate way to deal with apartheid criminals. However, by 1992 ANC policy documents no longer mentioned any criminal trials for apartheid leaders. The ANC position changed to accountability based on five principles: historical discovery of the past, public dialogue on the best way to discover the past, the possibility of amnesty (except for crimes against humanity), the exclusion of torturers and apartheid murderers from employment in the civil service, and, reparations for the victims of apartheid and their families.[17]

II. The Chronology and Main Features of the Political Negotiations Between 1990 and 1993

It was noted that F. W. de Klerk's speech on 2 February 1990 should not be considered as a cataclysmic event, but rather as a dramatic public culmination of processes and dynamics that started in the late 1980s. While De Klerk's speech can certainly be marked as a milestone in the politics of transition, it was by no means the beginning. What follows is a brief chronology and overview of the processes that led to the adoption of the interim constitution of 1993 in terms of which South Africa's first democratic elections were held. Those same elections in 1994 produced the Constitutional Assembly that drafted the "final" constitution of 1996, which is in operation to this day.

1. The Pre-1990 Processes and Initiatives

De Klerk's February 1990 speech was the culmination of the informal processes and initiatives mentioned above. It also occurred against the backdrop of a more fa-

[17] *Luc Huyse*, Alles gaat voorbij, behalve het verleden (2006), p. 140.

vourable geopolitical context. Indeed, insider accounts of the events leading up to 2 February 1990 confirmed that the apartheid government was in contact with certain foreign governments to alert them to the steps that were announced by De Klerk in his speech (notably the unbanning of the liberation movements and the release of prominent political prisoners, including Nelson Mandela). The most important outcomes of the pre-1990 informal processes were extensive discussions around three key aspects: negotiation, settlement, and compromise. While all of the pre-1990 discussions and outreaches concerned some or other concrete political, socio-economic, and cultural topics, the main benefit of these processes was the creation of a climate of mutual trust between erstwhile enemies. After all, the liberation movements were at that stage still banned and in exile and technically locked in an armed struggle with the apartheid state. It was also an important pre-liminary process to identify the main leaders who would ultimately partake in more formal discussions and negotiations.[18]

2. The 2 February 1990 Speech and the Start of official Negotiations

The unbanning of the liberation movements and the release from prison of their leaders paved the way for official negotiations between the various political formations and the apartheid government to start. The first milestone was the Groote Schuur Summit in Cape Town in May 1990. The Groote Schuur Summit was followed by the Pretoria Summit in August 1990. These summits led to the crucial National Peace Accord of 14 September 1991. The various summits and mini-summits were held amidst ongoing tensions and sporadic political violence in the country. Nevertheless, by December 1991 enough progress was made for the first official multiparty Congress for a Democratic South Africa (CODESA I) to be held. This important event was attended by 19 political groups and governments (the apartheid government and the governments of the so-called "independent homelands"). Some parties on the right and the left did not attend, notably the Conservative Party (CP) and the PAC. Four working groups were established at CODESA I, namely:

- Working Group I: responsible for the creation of a climate for free political participation and for international engagement.
- Working Group II: facilitation and generation of proposals concerning general constitutional principles as well as a constitution writing structure and process.
- Working Group III: provincial arrangement and an interim government.
- Working Group IV: the future of the "independent homelands".
- Working Group V: timetables and implementation of decisions taken at CODESA.

It should be kept in mind that while progress was made at CODESA, South Africa was still governed by a white minority government supported by the dominant white

[18] *Willem de Klerk*, "The process of political negotiation: 1990 – 1993" in: Bertus de Villiers (ed.), Birth of a Constitution (1994), pp. 1 – 2.

chamber of the Tricameral Parliament. There was growing opposition from the white rightwing and the CP was actively opposing the negotiation process. In a political gamble that paid off handily, F. W. de Klerk called the right's bluff with a referendum for white voters that was held on 17 March 1992. Voters were asked to answer the following question with a "Yes" or "No": "*Do you support continuation of the reform process which the State President began on February 2, 1990 and which is aimed at a new constitution through negotiation?*" The pro-negotiation "Yes" won the referendum with more than 65 percent of the vote.[19] De Klerk took this as a mandate for further negotiations with the liberation movements and the other parties at CODESA.

3. The Referendum's Aftermath

The referendum result was a big relief for the ANC, the NP and the other pro-negotiation parties, but there was a growing gulf between the negotiating positions of the ANC and the NP/apartheid government. While the ANC was still guided by the fundamental principles contained in the Freedom Charter, the NP was growing increasingly concerned about four issues in particular: (i) the risk of "domination" and "abuse of power" by a simple majority form of government; (ii) the need for maximum devolution of power as a mechanism to dilute the risk of "tyranny of the majority"; (iii) the need for a "phased approach" during the transition, coupled with the abolishment of unrealistic time scales; and, (iv) the need to entrench the foundational principles of the final constitution already in the interim constitution.[20] The ANC was naturally not willing to cede too much ground, and accused the NP of negotiating in bad faith with a view to entrench minority power at the expense of true democratic reform and majority rule. The ANC consequently threatened to withdraw from the negotiating process and CODESA II, which started on 16 May 1992, seemed to be in serious trouble. Mass protests by the ANC and its alliance partners ensued in the period June to August 1992. A real crisis moment occurred on 17 June 1992 as a result of the Boipatong massacre when 38 people were killed in the township south of Johannesburg. It was widely believed that the apartheid government was complicit in the killings.[21] The growing lack of trust between the ANC and the NP/apartheid government, the sense that the government lost control, and the NP's perception that the ANC was only interested in taking over power, brought CODESA II and the negotiating process to a crisis moment. Under international pressure, and with the help of behind-the-scenes discussions, talks between the ANC and

[19] For more detail, see: *A. Strauss*, "The 1992 Referendum in South Africa" (1993), The Journal of Modern African Studies 31(2), pp. 339–360; and here: https://www.sahistory.org.za/article/1992-whites-only-referendum-or-against-negotiated-constitution, last visit 08.08.2022.

[20] *De Klerk*, in: Birth of a Constitution (supra) 7.

[21] For background and analysis, see: *James Simpson*, "Boipatong: The politic of a massacre and the South African transition" (2012), Journal of Southern African Studies, 38(3), pp. 623–647.

the NP/apartheid government resumed. This led to the "Record of Understanding" which was adopted on 26 September 1992. A key outcome of this was that Nelson Mandela and F. W. de Klerk had agreed publicly on the need for a democratically elected body to draft and adopt the "final" constitution. The constitution drafting body would be bound by agreed constitutional principles, would work within a fixed timeframe, and would operate democratically and with deadlock-breaking mechanisms. For the transitional period, there would be an interim government of national unity and other transitional structures.[22]

4. The Multi-Party Negotiating Process

The Record of Understanding helped to restart the negotiating process, but it was not quite "CODESA III". In March 1993 a multi-party conference was held at the World Trade Centre in Kempton Park, near Johannesburg. The meeting was more inclusive compared to either CODESA I or II. Importantly, the main rghtwing party, the CP, was now part of the process. On the left, the PAC also decided to partake. The formalisation of the restarted negotiating process became known as the Multi-Party Negotiating Process (MPNP). Although the proceeds of the two CODESA processes served as a basis for the negotiations at the MPNP, the consolidated CODESA report had no formal status at the MPNP and the emphasis was really on the dynamics between the ANC and the NP/apartheid government. An early crisis for the MPNP came when Chris Hani, the popular leader of the South African Communist Party (SACP), was assassinated on 10 April 1993 by a rightwing Polish immigrant. The country was on the brink, but largely due to cool heads within the ANC leadership the country as a whole was guided through the crisis and the focus remained on the goal of finding a negotiated constitutional framework for a democratic South Africa. Crucially, progress was made towards a decision on a date for South Africa's first democratic elections (which would also serve as an election for the constitutional assembly, tasked with the drafting of the final constitution). This is not to say that everything was going smoothly in the period immediately following the averted crisis due to the assassination of Chris Hani. On the right, a group of generals joined forces with a group of conservative Afrikaners to form the Afrikaner Volksfront (AVF). This group wanted all negotiations stopped till violence in the country was under control, a goal that was neither feasible nor realistic. The MPNP's Negotiating Council in the meantime reported some progress which turned out to be a decisive and disciplining milestone. On 7 May 1993 the Council adopted a Declaration of Intent, stating that South Africa's first democratic elections had to be held no later than 30 April 1994. Later, on 1 June 1993, the Council finally agreed that the elections would be held on 27 April 1994. The fixed date of the elections brought a sense of urgency to adopt the necessary laws and constitutional framework in terms of which the election would be held. There was also a need for clear transitional mech-

[22] *Richard Spitz/Matthew Chaskalson*, The politics of transition – A hidden history of South Africa's negotiated settlement (2000), p. 30.

anisms. The picture became clearer with some key agreements between the ANC and the NP/apartheid government:

- The elections on 27 April 1994 would be according to a system of proportional representation.
- The MPNP decision on the powers and functions of provinces would be binding on the Constitutional Assembly (to be elected on 27 April 1994).
- A demarcation commission would determine the provincial boundaries for the purpose of the elections and for the interim phase.
- A legislative framework for the creation of a Transitional Executive Council, an Independent Electoral Commission, and an Independent Media Commission would be recommended by the MPNP and adopted by the tricameral (apartheid) parliament.
- MPNP negotiators would agree on a list of apartheid-era legislation to be repealed as a priority before the elections of 27 April 1994.

In July 1993 intensive work started on the drafting of the interim constitution and the transitional package. The Negotiating Council produced a first draft of the interim constitution by 26 July and by 7 August a draft Transitional Executive Council Bill was produced. The Transitional Executive Council would become the de facto government of South Africa for the transitional period and till after the first elections. By December 1993 South Africa had a transitional government in the form of the Transitional Executive Council (TEC). The main task of the TEC was to create conditions on the ground conducive to free and fair elections, and to guide the country through the transition. There was one delicate issue that could pose a significant risk to the transition: the large number of apartheid-era public and security officials who would be in a position to make or break the functioning of the state during the transition. An agreement was therefore reached between the ANC and the NP/apartheid government in terms of which security of tenure was provided for the public and security services. This brought a sense of calm and stability. In addition, agreement was reached that the interim constitution would provide for eleven official languages (including Afrikaans), thus mollifying the nervous Afrikaner minority that their cultural rights would be respected.

By 17 November 1993 the MPNP was in a position to consider the final draft of the interim constitution. The draft text was supplemented by a "six-pack" deal between Mandela and De Klerk. This last-minute deal proved to be crucial in clinching the political deal on the interim constitution. The six components of the deal were the following:

- The NP no longer insisted on a veto power in the cabinet of the government of national unity.
- The government of national unity would last for five years.

- A single ballot paper would be used in the first democratic elections that were to be held on 27 April 1994.
- The Constitutional assembly (elected on 27 April 1994) would be able to adopt the final constitution by a 60 percent majority (this was a compromise between the ANC's initial proposal for a deadlock-breaking mechanism of a simple majority and the NP's position that a threshold higher than 60 percent would be needed for deadlock breaking).
- Provisions in the final constitution relating to the boundaries, powers, and functions of provinces, and any subsequent amendments to. such provisions, would require the approval of the upper house (the senate), by a two-thirds majority.
- Provinces would be empowered to adopt provincial constitutions, subject to compliance with the agreed constitutional principles, the national constitution, and certification by the Constitutional Court.[23]

5. Adoption of an Interim Constitution

On 17 November 1993, a plenary of the MPNP adopted the text of the interim constitution. This text was given legal status as an act of parliament. The interim constitution was thus adopted as Act 200 of 1993 and was signed into law by President De Klerk on 28 January 1994.[24] The fact that the last apartheid parliament adopted South Africa's first non-racial, democratic constitution underscored the fact that South Africa's transition was, indeed, a negotiated constitutional revolution. The adoption of the interim constitution paved the way for the first democratic elections on 27 April 1994. South Africa would be governed in terms of the interim constitution till the drafting and adoption of the final constitution, however that process would not be done by an unelected MPNP, but rather by the democratically elected Constitutional Assembly.

III. The Role of the Transitional Executive Council

One of the remarkable features of South Africa's transition from apartheid to democracy, was how power gradually slipped away from the NP/apartheid government without causing too much alarm among the white voters, the military/security cluster and the reactionary far right. At the same time, meaningful power sharing, even during the negotiation and early transition phase, gave the process legitimacy. For the

[23] *De Klerk*, in: Birth of a Constitution (supra), pp. 8–11.

[24] For an overview of the MPNP leading up to the adoption of the interim constitution, see: *Spitz/Chaskalson*, Politics of Transition (supra), pp. 34–44; *De Klerk*, in: Birth of a Constitution (supra) 8–11. See also: *Heinz Klug*, The Constitution of South Africa – A contextual analysis (2010), pp. 29–33.

first time, black South Africans not only had a real voice in the halls of power, but also real input and governing responsibility. The Transitional Executive Council (TEC) was therefore a crucial aspect of the transition.[25]

The idea of a TEC was mooted at CODESA II in 1992 and was later ratified by the MPNP. The legal basis for the TEC was the Transitional Executive Council Act 151 of 1993. The first meeting of the TEC was held in December 1993. The TEC's essential task was to prepare South Africa for the first democratic elections that were due in April 1994.[26] The TEC was assisted by seven sub-councils, which had responsibilities for the following areas:

- Regional and local government and traditional authorities
- Law and order
- Stability and security
- Defence
- Finance
- Foreign affairs
- Status of women
- Intelligence

It is important to keep in mind that the TEC did not replace the government of the day; it did not operate as a shadow government but rather as a complementary structure with very specific aims. There were, of course, significant potential hurdles, especially given the fact that the TEC relied on the apartheid bureaucracy to achieve its goals. It is easy to imagine an obstructive bureaucracy hindering the work of the TEC towards a free and fair election. To assist the TEC in providing oversight and guidance in the eight specific areas and in terms of the general task of preparing South Africa for free and fair elections, the TEC Act, 1993, provided that a member of TEC or one of the sub-councils could require access to government information or documents, as long as it could be shown that the request was linked to the overarching goals of TEC or one of the specific areas outlined above.[27]

The number of TEC members were not predetermined since the composition of the TEC depended on the participating political parties and governments that have committed themselves to the aims and objectives of the TEC. All participants also had to renounce violence as a means of achieving political aims. The TEC appointed the members of the sub-councils. Since the main task of the TEC was to prepare South Africa for the first democratic elections, a Special Electoral Court[28] was cre-

[25] For an overview, see: *Jan Heunis*, "The Transitional Executive Council", in: Bertus de Villiers (ed.), Birth of a Constitution (1994), pp. 20–28.

[26] Section 3, Transitional Executive Council Act 151 of 1993.

[27] Section 22, Transitional Executive Council Act 151 of 1993.

[28] Independent Electoral Commission Act 150 of 1993.

ated to deal with any disputes involving the TEC or a sub-council and any political party, organisation or government.

Apartheid, as a racist and oppressive system, had a particularly detrimental impact on black women. The transition to democracy therefore also required a gender perspective and work to address the needs of women, specifically black and rural women. The work of the sub-council on the status of women was tasked to deal with these issues.[29]

The TEC played an important function in the transition from apartheid, through the negotiation process towards the first democratic elections in 1994. It was obviously not perfect and received criticism from all quarters. The purpose of the TEC was described by the then Minister of Constitutional Development, as follows:

> "The concept of the TEC acknowledges the need for constitutional continuity. In essence this means that another system will ultimately have to be substituted for the present constitutional system by Parliament, but that the present executive, legislative and judicial authorities will have to remain in force until that juncture. In the interim there is a need for multiparty structures to facilitate the process of transition from the old dispensation to the new and to ensure that the substance of the new dispensation and the process that is utilized to establish it will be generally acceptable. It is precisely in regard to this process that the TEC must play an essential role. In other words, it will be able to provide the transitional process with the necessary acceptability and legitimacy."[30]

Looking back, one can see that the TEC was more than just a technocratic solution to the problem of continuity in transitional contexts. The TEC played a crucial role to guide South Africa towards the first democratic elections. A failure in this crucial phase of the transition would have had catastrophic consequences for the democratic project and could very well have plunged the country into serious instability or, worse, civil war. That did not happen, and on 27 April 1994 the world was able to witness how South Africans of all races and genders participated in peaceful elections. The scene was set for the next phase of the transition to full democracy and for the transformation of the post-apartheid society.

IV. Democratic Elections and the Constitutional Assembly

The elections of 27 April 1994 produced South Africa's first democratic parliament, consisting of two chambers – the National Assembly and the Senate. The two chambers also functioned jointly as the Constitutional Assembly that was tasked to draft the "final" constitution within a period of two years. The Constitutional Assembly did not have complete freedom, but was rather bound by the constitutional

[29] Section 19, Transitional Executive Council Act 151 of 1993.

[30] Minister of Constitutional Development response in parliament, *Hansard*, Monday 20 September 1993 col 13219.

principles annexed to the interim constitution. There were 34 principles. The significance of these principles can be summarised as follows:

- As mentioned, the Constitutional Assembly was bound by the principles.
- During the drafting process for the final constitution, any provision could be referred to the Constitutional Court at the request of one-third of the members of the Constitutional Assembly to ascertain whether the provision in question complied with the constitutional principles.
- The Constitutional Court had to certify that the final constitution was in compliance with the constitutional principles before the final constitution could become operational.
- If provinces adopted provincial constitutions, they would also have to comply with the constitutional principles.
- No amendment aimed at qualifying, limiting, or reducing the binding nature of the constitutional principles in the constitution drafting process would be permissible.

It is not necessary to reproduce the full text of all 34 principles here, suffice to note the essential content of the principles by way of themes. The *first theme* related to the sovereignty of the constitution; of post-apartheid South Africa as a democracy that adheres to the rule of law and the *rechtstaat* idea. Flowing from this theme is the notion that the new South Africa would acknowledge the role of the courts, especially the Constitutional Court, as guardians of the constitutional order. The *second theme* relates to the nature of the post-apartheid state as a democracy based on the separation of powers, with an executive, legislative, and judicial branch. The independence of the judiciary must be guaranteed. The *third theme* concerned the nature of the post-apartheid state as a democracy with representative and responsible government which must be established through general elections on the basis of proportional representation with minority parties guaranteed effective participation and with special majorities required for specific matters (such as the adoption of constitutional amendments). The *fourth theme* concerned arguably the most important aspect of South Africa's transition from an oppressive apartheid state to a democracy based on respect for and advancement of human rights. This theme required any final constitution to contain a bill of fundamental rights and that language and cultural diversity would also specifically be recognised and acknowledged. The *fifth theme* related to the three levels of government, namely national, provincial, and local. *Theme six* required there to be a constitutionally defined fiscal relationship between the three levels of government, with the Financial and Fiscal Commission being responsible for the making of allocations between the various levels. *Theme seven* stipulated that the independence of the Commission for Administration, the central bank (Reserve Bank), Ombudsman, and Auditor-General must be guaranteed. *The eighth theme* concerned the professionalism of the security forces and required these forces to always act in the national interest and not in any partisan political way. Finally, *theme*

nine related to certain transitional arrangements including the duration of the interim constitution.[31]

The 34 principles guided the drafting process of the Constitutional Assembly. This process led to the adoption of a final constitutional text on 8 May 1996. As required, the text was then submitted to the Constitutional Court for a comprehensive review to determine whether the "final" constitutional text was in compliance with the 34 principles. The Constitutional Assembly's first attempt to get the constitutional text certified by the Constitutional Court, failed. In the First Certification[32] judgment, the Constitutional Court declined to certify the constitutional text, mainly because the text was not in compliance with the constitutional principles pertaining to provincial powers, local government, entrenchment of the Bill of Rights, and the Public Service Commission. The Constitutional Assembly had to make several changes to the constitutional text. The amended text was again submitted to the Constitutional Court which proceeded to certify the constitutional text in the Second Certification[33] judgment. The constitutional text was thus ready to be adopted as South Africa's "final" post-apartheid constitution, heralding an important milestone in the transition.[34] The Constitution, 1996, was signed into law by President Nelson Mandela on 10 December 1996 (it entered into force on 4 February 1997).[35]

V. The Government of National Unity

The interim constitution of 1993 had to achieve many different and difficult, even contradictory, things. It had to acknowledge the divisions and conflict of the past (an aspect that is dealt with in the next section), while looking to a democratic future built on national unity. The interim constitution provided for a government of national unity and the underlying idea was to balance the need for a government based on popular will with the need to bring the major political factions in the country together for at least a few in years. The results of the first democratic elections of 1994 were helpful. As expected, the ANC under the leadership of Nelson Mandela came out on top with 60% of the popular vote, which made the ANC the biggest party in the National

[31] For an overview and assessment of the constitutional principles, see: *Bertus de Villiers*, "The constitutional principles: Content and significance", in: Bertus de Villiers (ed.), Birth of a Constitution (1994), pp. 37–49.

[32] Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 ("First Certification judgment"), 1996 (4) SA 744 (CC).

[33] Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 ("Second Certification judgment"), 1997 (2) SA 97 (CC).

[34] For more on this, see: *Christina Murray*, "A constitutional beginning: Making South Africa's final constitution" (2001), University of Arkansas at Little Rock Law Review, pp. 809–838.

[35] See further: *Iain Currie/Johan de Waal*, The Bill of Rights Handbook 6 ed. (2013), pp. 6–7.

Assembly (and in the Constitutional Assembly). F. W. de Klerk's NP came in second with about 20% of the vote, with the Zulu traditionalist IFP third, with just over 10%. None of the other parties managed to get the minimum 20 seats (5%) of the vote that would give them the right to participate in the government of national unity (GNU). The interim constitution provided that any party that won more than 20 seats in the national Assembly could appoint at least one minister in the GNU. Given the outcome of the election, only the ANC, NP, and IFP were entitled to cabinet positions in the GNU. Nelson Mandela became South Africa's first democratically elected head of state, with Thabo Mbeki (ANC) and F. W. de Klerk (NP) as deputy presidents. The interim constitution empowered the president to appoint ministers in the cabinet "after consultation with the executive deputy presidents and the leaders of the participating parties." The president furthermore had the power to establish deputy ministerial positions, to be allocated "in the same proportion and according to the same formula" used for the ministerial positions. Of course, not all cabinet positions are of equal importance, and there was a fair degree of negotiation for the "main" areas, notably security, economy, social, and administrative. Given the decades of violence, civil unrest, and the abuse by the apartheid state, appointments to the security and defence clusters were particularly sensitive. Mandela could clearly not leave the country's security and defence in the hands of the same people who were responsible for gross human rights violations during apartheid, and he therefore appointed ANC members to the key security and defence positions in the cabinet. De Klerk was however given the position of chair of the cabinet committee on security and intelligence, and in that way there was even a degree of "national unity" in these crucial areas. On the other hand, the concerns of the (mainly white) business sector prompted Mandela to retain the outgoing NP minister of finance in the GNU as minister responsible for finance and economic affairs. This reassured the nervous business community and calmed the markets, not unimportant matters in a transitional situation. When the NP-minister of finance resigned a few months into the first term of the GNU, Mandela and De Klerk decided to replace him with a politically unaffiliated businessman.

The GNU, South Africa's first democratically elected government, was sworn in 11 May 1994, two weeks after the elections. Although Mandela was an executive president, as stipulated in the interim constitution, and not a ceremonial head of state, he nevertheless decided to leave the practical operation and functioning of the cabinet to his two deputies. This decision served two purposes. First, it allowed Mandela to stay above the day-to-day political fray and to focus on matters of national unity and reconciliation, which were crucial for the transition. Second, it gave executive prominence to De Klerk (and the NP), thus underscoring the symbolic and practical importance of unity governance.[36]

[36] For background based on interviews with key members of the first GNU, see: https://successfulsocieties.princeton.edu/sites/successfulsocieties/files/LS_POWERSHARING_South%20Africa_FORMATTED_19Dec2016_USIPLogo_ToU_1.pdf, last visit 09. 08. 2022.

VI. The Adoption of the "Final" Constitution

As noted, the first democratic elections of 27 April 1994 not only produced South Africa's first non-racial parliament, but also served as the constituting election of the Constitutional Assembly which had to draft the "final" constitution. Throughout this phase of the transition, South Africa was governed in terms of a supreme constitution (the interim constitution) with a justiciable Bill of Rights. The interim constitution was in operation till 3 February 1997 when it was replaced by the "final" constitution of 1996. Some of the most significant judgments by the Constitutional Court were delivered under the interim constitution, thus establishing South Africa as a constitutional democracy based on the rule of law and respect for human rights, notably the rights to dignity, freedom, and equality.[37] In a sense, then, the drafting of the "final" constitution was less challenging than the process that produced the interim constitution. The broad framework and even much of the detail were in place. It was a matter of finetuning, recalibrating, and rethinking rather than drafting from scratch. Of course, the 34 constitutional principles also provided a basic political and legal structure for South Africa as a constitutional democracy with certain negotiated features. On the other hand, the political dynamics have changed since the MPNP that produced the interim constitution. The elections of 1994 confirmed the ANC as the dominant political force in South Africa, and this was reflected in the Constitutional Assembly. The ANC thus had the opportunity to give effect to this mandate in the draft-

[37] The Constitutional Court delivered some of its most judgments under the interim constitution, thus providing a firm jurisprudential foundation for South Africa's transition from apartheid to democracy and the rule of law. For instance, on human dignity: *S v Williams* 1995 (3) SA 632 (CC), a case concerning the abolishment of corporal punishment, the Constitutional Court noted (at para 58) that the constitution of 1993 required that "measures that assail the dignity and self-esteem of an individual will have to be justified; there is no place for brutal and dehumanising treatment and punishment. The Constitution has allocated to the State and its organs a role as the protectors and guarantors of those rights to ensure that they are available to all. In the process, it sets the State up as a model for society as it endeavours to move away from a violent past. It is therefore reasonable to expect that the State must be the foremost in upholding those values which are the guiding light of civilised societies. Respect for human dignity is one such value; acknowledging it includes an acceptance by society that … even the vilest criminal remains a human being possessed of common human dignity." Regarding the constitutionality of the death penalty (frequently imposed under apartheid), the Constitutional Court interpreted the right to life in the interim constitution and held in *S v Makwanyane* 1995 (3) SA 391 (CC) as follows, at paras. 326–327: "[T]he right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society. The right to life thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity."

ing of the "final" constitution. Ultimately, though, it is remarkable, and perhaps testament to the negotiating wisdom of the MPNP, that the interim constitution and the "final" constitution compared are not fundamentally different in spirit and in letter. There are differences, of course. For instance, the upper house of parliament, the senate, was replaced by a national council of provinces. This was not merely a name change but indeed a reflection of a new role for the provinces in the national legislative process. Another area of difference is the judiciary, where the "final" constitution integrated the high court (with its various provincial divisions), the Supreme Court of Appeal, and the Constitutional Court into one court system. The Constitutional Court would later also be established as the apex court in all matters with the chief justice as head of the judiciary and of the Constitutional Court. A comparison between the interim and "final" constitutions also show that provinces had a few more powers under the interim constitution and less so under the "final" constitution, thus reflecting the ANC's general dislike of federalism. As for the Bill of Rights, arguably the most important part of the constitution, it has been observed by commentators that the differences between the two constitutions are differences of nuance and not fundamental in nature.[38] For example, the right to equality was protected as a fundamental right under the interim constitution[39] and is also protected under the "final" constitution.[40] But the right, as formulated in the two texts, is not verbatim the same. The listed grounds of unfair discrimination[41] in the "final" constitution are more extensive than those in the interim constitution.[42] Pregnancy, marital status, and birth were added to the grounds of unfair discrimination in the "final" constitution.

VII. The Truth and Reconciliation Commission (TRC)

Arguably the most prominent (and most contentious) facet of South Africa's transition from apartheid to democracy was the Truth and Reconciliation Commission (TRC). While the other transitional mechanisms, and most notably the constitution drafting processes, were designed to look to the future, the TRC was tasked to deal with South Africa's violent, oppressive, and racist past. There was a moral imperative to record the truth about the past, to provide reparations for victims, and to bring justice to perpetrators. But there was also a need for reconciliation, to move the country forward and to build trust and a sense of common belonging. It was mentioned in the introduction above that by 1992 the ANC had abandoned the notion of Nuremberg-style trials for apartheid criminals even though apartheid is a crime under international law. Blanket amnesty was out of the question from a moral point of view, and there was a need to break with the lawlessness of the apartheid state and to establish the

[38] *Spitz/Chaskalson*, The politics of transition *(*supra), p. 423.

[39] Section 8 of the interim constitution of 1993.

[40] Section 9 of the constitution of 1996.

[41] Section 9(3) in the constitution of 1996.

[42] Section 8(2) in the interim constitution of 1993.

new, democratic South Africa on a foundation of respect for human rights, the rule of law, and truth. Indeed, there is an emerging view that there is a right to truth in international law,[43] and countries across the world have adopted various mechanisms to use the establishment of truth about a violent past as a way to dismantle oppressive systems. For instance, Tunisia's "Organic Law on Establishing and Organizing Transitional Justice"[44] articulates the role of truth in transitional contexts, as follows:

> "Revealing the truth shall consist of a series of methods, procedures and research used to dismantle the authoritarian system by identifying and determining all the violations as well as determining their causes, conditions, sources, surrounding circumstances, and repercussions. In cases of death, missing persons, and enforced disappearance, [truth finding] shall uncover the fate and whereabouts of the victims as well as the identity of the perpetrators and those responsible for such acts."[45]

Decades before the adoption of Tunisia's transitional justice law, the major protagonists in South Africa's transitional justice negotiations realised that the post-apartheid democracy had to deal in some way with the past, and that truth about the past would have to be at the centre of that process. But truth on its own can be a destructive force, hence the argument by some scholars that in order to achieve peace and to move beyond the conflict and injustices of the past, one may very well ask whether truth should trump all other considerations.[46] But it is inconceivable that a society transitioning from three centuries of settler-colonial and apartheid violence and oppression to democracy, peace, and the rule of law, should just "forget and move on". The negotiators that drafted the interim constitution realised that the new democratic dispensation had to deal with the past, but without risking the fragile transition. The interim constitution thus contained, under the heading "national unity and reconciliation", the following postscript, which enjoyed the same status[47] as the provisions of the main text of the interim constitution itself:

> "This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.
>
> The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.
>
> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

[43] See, in general: *Melanie Klinkner/Howard Davis*, The right to the truth in international law – Victims' rights in human rights and international criminal law (2020).

[44] Organic Law No 2013–53 Establishing and Organising Transitional Justice, 24 December 2013.

[45] Organic Law (supra) article 4.

[46] *David Rieff*, In praise of forgetting – Historical memory and its ironies (2016), p. 89.

[47] *Dion Basson*, South Africa's Interim Constitution – Text and notes (1995), p. 339.

> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.
>
> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.
>
> With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.
>
> *Nkosi sikelel' iAfrika. God seën Suid-Afrika. Morena boloka Sechaba sa heso. May God bless our country. Mudzimu fhatutshedza Afrika. Hosi katekisa Afrika.*"

The interim constitution's postscript provided the imperative and the broad rationale, but it was up to the newly elected parliament after the 1994 elections to provide legal and institutional content. It was a difficult debate with significant consultations and negotiations, but ultimately the Promotion of National Unity and Reconciliation Act 34 of 1995 ("TRC Act") was passed by parliament. This provided the legal framework for and establishment of the TRC. There is a considerable body of literature on the TRC.[48] Virtually all the individuals who have served as TRC commissioners had their own impressions of their work on the commission published.[49] And, of course, the TRC itself published a seven-volume report on its main findings and recommendations.[50] What follows is a brief description and assessment of the TRC as a transitional mechanism.

The TRC was not primarily created to deal with the whole of South Africa's history of settler-colonialism and apartheid, although the TRC Report did reached some conclusions as to the status of apartheid as a crime against humanity. Rather, the

[48] This includes numerous journal articles, surveys, academic dissertations, comparative studies, books, monographs, and critical assessments, too numerous to list here. A few suggestions are in order. For a brief historical and legal overview, see: *Johnny de Lange*, "The historical context, legal origins and philosophical foundation of the South African Truth and Reconciliation Commission", in: Charles Villa-Vicencio/Wilhelm Verwoerd (eds.), Looking back reaching forward – Reflections on the Truth and Reconciliation Commission of South Africa (2000), pp. 14 – 31. For the TRC in international and comparative context, see: *Gerhard Werle/Moritz Vormbaum* (eds.), Transitional Justice (2018), pp. 184 – 189. For a comprehensive analysis, see: *Afshin Ellian*, Een onderzoek naar de Waarheids- en Verzoeningscommissie van Zuid-Afrika (2003). For an eyewitness account of the TRC's hearings, see: *Antjie Krog*, Country of my skull (1999).

[49] A representative sample of personal reflections by former TRC commissioners: *Wendy Orr*, From Biko to Basson – Wendy Orr's search for the soul of South Africa as a commissioner of the TRC (2000); *Alex Boraine*, A country unmasked – Inside South Africa's Truth and Reconciliation Commission (2000); *Piet Meiring*, Kroniek van die Waarheidskommissie – Op reis deur die verlede en die hede na die toekoms van Suid-Afrika (1999).

[50] TRC Report (1998).

TRC's mandate focussed on "gross human rights violations" (by all sides) perpetrated in the period of increased violence by the apartheid state and liberation movement resistance (1960 to 1994). In historical terms, it covers the period following the Sharpeville massacre up to the first democratic elections in 1994. The main acts covered were killings, abductions, and torture. The TRC's Amnesty Committee had the power to grant amnesty to persons who applied and who qualified. The TRC was also tasked with the compilation of a list of victims for reparations purposes. Finally, the TRC was tasked with the writing of a narrative report on the nature and incidences of gross human rights violations in the period 1960 to 1994.

The various committees of the TRC heard testimony from more than 21,000 victims and other witnesses. The public hearings, chaired most of the time by Archbishop Desmond Tutu, received oral testimony from more than 2,000 individuals. The Amnesty Committee received 7,112 applications, of which 849 were successful.[51] A number of applications were later withdrawn. The systematic destruction of apartheid-era documentation and records posed a significant problem for the work of the TRC. In fact, even after the first democratic elections in 1994 and while the GNU was in place, records were still systematically destroyed by holdovers from the old order. Despite these challenges, the TRC was ultimately in a position to publish its report and recommendations. The Reparations Committee recommended a reparations programme that included financial, symbolic and community reparations. A list of perpetrators was published, with a recommendation for the prosecution of around 300 individuals.[52]

The TRC was the product of political compromise and moral imperative, as reflected in the postscript to the interim constitution. It was, however, not universally supported. A collective of political and victims' groups therefore challenged the constitutionality of the legal framework that set up the TRC. The challenge was heard by the Constitutional Court. The court rejected the application and confirmed the constitutionality of the TRC, but the court was also careful to recognise the inherent moral difficulty of the TRC model as a transitional mechanism. On the amnesty process, the Constitutional Court noted the following:

> "Every decent human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk the streets of this land with impunity, protected in their freedom by an amnesty immune from constitutional attack, but the circumstances in support of this course require carefully to be appreciated … Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling … That

[51] *Linda van de Vijver*, "The amnesty process", in: Wilmot James/Linda van de Viver (eds.), After the TRC – Reflections on truth and reconciliation in South Africa (2000), pp. 128–139.

[52] For the full TRC Report, see: Truth and Reconciliation Commission of South Africa Report, Vol. I to VII (1998). For an online version, see: http://www.justice.gov.za/trc/report/. For an overview, see: https://www.usip.org/publications/1995/12/truth-commission-south-africa.

> truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do."[53]

The Constitutional Court also put the work of the TRC, and the amnesty process in particular, in the broader context of the transition from apartheid and authoritarianism to democracy and the rule of law. The court stated as follows:

> "Although the mechanisms adopted to facilitate that process [of a transition to democracy] have differed from country to country and from time to time, the principle that amnesty should, in appropriate circumstances, be accorded to violators of human rights in order to facilitate the consolidation of new democracies was accepted in all these countries [Chile, Argentina, El Salvador] and truth commissions were also established in such countries."[54]

The Constitutional Court's articulation and contextualisation of the TRC's transitional justice rationale was valid at the time and is probably still true, today. Even more than twenty years after the TRC concluded its work, it is hard to disagree with the essential conclusion that the TRC played a crucial role in South Africa's transition from apartheid to democracy. It is also true, however, that the role of the TRC in the transition should not be overstated. Mahmood Mamdani argued that South Africa's transitional processes (notably CODESA and the MPNP) correctly viewed apartheid first and foremost as a collective political problem rather than individual transgressions. Of course, the logic of the TRC demanded that individual perpetrators had to apply for amnesty or risk being prosecuted. But this criminal justice dimension of the transitional process was not the main focus. For Mamdani, anti-impunity modalities (from Nuremberg on the one extreme to qualified modalities like the amnesty process in South Africa at the other end of spectrum), are inevitably backward looking, but the main focus in South Africa's transition was forward-looking: negotiations at CODESA and later the MPNP aimed at the constitutional framework for a new inclusive, just, and democratic society based on the rule of law and respect for human rights.[55]

From a rule of law and justice point of view, the amnesty compromise turned out to be tainted by what happened in the post-TRC failure of the National Prosecuting Authority (NPA) to follow through on the prosecution of those apartheid-era criminals identified by the TRC for possible prosecution. But this was not merely a case of inaction by the NPA. Disturbing allegations of political interference were later con-

[53] *Azanian People's Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*, 1996 (8) BCLR 1015 (CC), pp. 1027 – 1028.

[54] *AZAPO* case (supra), p. 1030.

[55] *Mahmood Mamdani*, Neither settler nor native – The making and unmaking of permanent minorities (2020), p. 180.

firmed in an application before the Supreme Court of Appeal.[56] It seemed that a political decision at the highest levels was made during the period 2003 to 2017. This decision boiled down to *de facto* impunity, because none of the apartheid-era gross human rights violations were to be pursued. This was obviously a direct violation of the amnesty compromise that was reached during the negotiations in the 1990s to create a TRC as part of South Africa's transition to democracy. Already in 2019, before the decision by the Supreme Court of Appeal, several former TRC commissioners wrote a letter[57] to President Ramaphosa. The letter called on the President to apologise on behalf of the State to the victims of gross human rights violations and their families who were denied justice. The former commissioners also requested the President to appoint a commission of inquiry into the alleged (and now confirmed) political interference which has stopped the investigation and prosecution of almost all the cases which were referred by the TRC to the NPA. The former commissioners wrote:

> "In our Final Report released on 21 March 2003 we stressed that the amnesty should not be seen as promoting impunity. We highlighted the imperative of 'a bold prosecution policy' in those cases not amnestied to avoid any suggestion of impunity or of South Africa contravening its obligations in terms of international law.
>
> Most victims accepted the necessary and harsh compromises that had to be made to cross the historic bridge from apartheid to democracy. They did so on the basis that there would be a genuine follow-up of those offenders who spurned the process and those refused amnesty. Sadly, this has not happened."

The letter further noted what was later confirmed by the Supreme Court of Appeal, namely that changes in prosecutorial policy during the Mbeki and Zuma administrations resulted in the politically motivated end to NPA efforts to follow up on the TRC's list of apartheid-era gross human rights violations which needed to be investigated and prosecuted.

The political and legal backlash against the NPA's post-TRC inaction prompted a new approach and in November 2021 a historically significant indictment was issued. This indictment against two former apartheid-era security police officers included, for the first time, a charge of the crime against humanity of apartheid.[58] This case has not yet commenced at the time of writing, but the historic significance of the inclusion of not only apartheid-era crimes like murder as a crime against humanity, but

[56] *Rodrigues v. The National Director of Public Prosecutions* [2021] ZASCA 87 (21 June 2021).

[57] For the text of the full letter, see https://www.scribd.com/document/399024578/TRC-Letter-to-the-President-5-02-2019, last visit 08.05.2022.

[58] In the High Court of South Africa, Gauteng Division, Johannesburg, indictment of TE Mfalapitsa and CS Rorich, November 2021, on charges of kidnapping, the crime against humanity of murder, and the crime against humanity of apartheid. Copy of indictment on file with author. For civil society reaction, see: https://www.ijr.org.za/2021/11/26/the-institute-for-justice-and-reconciliation-welcomes-the-decision-of-the-director-of-public-prosecutions-dpp-to-include-crimes-against-humanity-in-the-indictment-of-the-accused-in-the-cosas-4-trial/, last visit 08.08.2022.

indeed of the crime against humanity of apartheid itself, cannot be overstated. Time will tell how the criminal courts of South Africa will deal with indictments like these, but the NPA's change of heart regarding post-TRC prosecutions, is a significant and historical development in its own right.

VIII. Concluding Remarks

In the broader scheme of things, the relative success of South Africa's transition from the oppression and authoritarianism of apartheid to a democratic society built on the rule of law, should not only be viewed with reference to the work of the various transitional mechanisms discussed in this contribution. Taken as parts of a whole, all these mechanisms were part of a bridge which made the transition possible, but the real test is whether what came as a result of the transition, South Africa's *transformative* constitutional democracy, is able and willing to deliver a better life for the people.[59]

[59] For critical reflections, see: *Jean Meiring* (ed.), South Africa's constitution at twenty-one (2017).

Drei Jahre Antisemitismusbeauftragte der Generalstaatsanwaltschaft Berlin – ein Erfahrungsbericht[1]

Von *Claudia Vanoni*

Hier, wo wir heute sind, im Haus der Wannseekonferenz, trafen sich am 20. Januar 1942 hochrangige Vertreter der SS, der NSDAP und mehrerer Reichsministerien. Sie trafen sich, um ein Thema zu besprechen, nämlich die „Endlösung" der Judenfrage. Es ging darum, wie alle Jüdinnen und Juden in Europa in den Osten deportiert werden können, um sie dort zu ermorden. Das war vor 80 Jahren.

Heute – also 80 Jahre später – stellen Sie sich bitte vor, Sie sind in Berlin unterwegs, im Prenzlauer Berg. Es ist ein netter Kiez am Helmholtzplatz. Es gibt dort Cafés, Restaurants, Spielplätze, und Sie sind unterwegs zu Freunden. Sie sind guter Dinge, und auf einmal werden Sie von der gegenüberliegenden Straßenseite angeschrien, beschimpft. Es ist ein junger Mann, der auf Sie einschreit; er wechselt die Straßenseite, kommt auf Sie zu, schimpft weiter auf Sie ein, zieht seinen Gürtel und schlägt mit der Gürtelschnalle auf Sie ein, auf Ihren Oberkörper, auf Ihr Gesicht. Warum tut er das? Weil Sie eine Kippa tragen und weil die Kippa für ihn das Symbol für das verhasste Israel und das verhasste Judentum ist. Genau das ist im April 2018 passiert, in Berlin im Prenzlauer Berg.

Dieser Fall zeigt, wie viele andere Fälle leider auch, dass es auch heute noch, 80 Jahre später, Menschen gibt, die Hass gegen Juden hegen, die der Ansicht sind, dass Jüdinnen und Juden keine gleichwertigen Menschen seien, dass sie für alles Schlechte auf dieser Welt verantwortlich seien und dass sie am besten weder hier noch anderswo leben sollten.

Es wird viel im Internet gegen Juden gehetzt, sie werden beleidigt, bedroht, der Holocaust wird geleugnet. All das findet aber auch auf offener Straße, vor unseren Augen statt. Hauswände werden mit judenfeindlichen Parolen beschmiert, jüdische Friedhöfe werden geschändet, Jüdinnen und Juden werden auf offener Straße angefeindet, beschimpft, bespuckt, beleidigt und auch körperlich angegriffen.

Wenige Monate nach dieser „Gürtelschlägerattacke": Ich bin in meinem Büro, es klingelt das Telefon. Die Generalstaatsanwältin, Frau Koppers, ruft mich an und bittet mich zu einem Gespräch. Frau Koppers möchte die Antisemitismusbekämpfung

[1] Vortrag gehalten am 14. 9. 2021 im Rahmen des Symposions „From Dictatorship to Democracy" im Haus der Wannseekonferenz. Die Vortragsform wurde beibehalten.

durch effektive Strafverfolgung noch stärker in den Fokus nehmen. Sie möchte Haltung beziehen und ein Zeichen im Kampf gegen Antisemitismus setzen. Deshalb möchte sie die Stelle einer oder eines Antisemitismusbeauftragten bei ihrer Behörde einrichten. Als sie mich fragte, ob ich mir vorstellen könne, diese Aufgabe zu übernehmen, war mir sofort klar, dass ich das unbedingt machen möchte. Für mich als Staatsanwältin, und auch für mich persönlich, ist die Verfolgung von antisemitischen Straftaten wichtig, sie ist ein wesentlicher Bestandteil unseres Rechtsstaats – und für mich, wie gesagt, auch ein persönliches Anliegen.

Zum damaligen Zeitpunkt, im Sommer 2018, gab es noch keine vergleichbare Stelle einer oder eines Antisemitismusbeauftragten bei den Strafverfolgungsbehörden. Deshalb galt es für mich zunächst, die Stelle neu zu konzipieren. Bei meiner Konzeptionierung hatte ich ein für mich damals ganz klares Ziel vor Augen: Ich möchte das Vertrauen der jüdischen Gemeinschaft in die Arbeit der Strafverfolgungsbehörden bei der Verfolgung von antisemitischen Straftaten stärken!

Damit Sie eine Vorstellung davon bekommen, von welchem Umfang antisemitischer Straftaten wir in Berlin sprechen, würde ich gerne zunächst einen Blick auf die Fallzahlen werfen: Die Polizei Berlin hat im Jahr 2020 359 antisemitische Straftaten erfasst. Im Durchschnitt ist das eine antisemitische Tat pro Tag. In der Tendenz nehmen die Straftaten zu, und der deutliche Anstieg im letzten Jahr ist meines Erachtens auch auf die Corona-Pandemie zurückzuführen. Die Corona-Pandemie führte zu einer Konjunktur antisemitischer Verschwörungstheorien. Jüdinnen und Juden wurden für die weltweite Krise verantwortlich gemacht, und für mich wirkt die Corona-Pandemie wie ein Brennglas, das deutlich aufzeigt, wie tief verwurzelt Antisemitismus immer noch in unserer Gesellschaft ist, immer noch nach 80 Jahren. Es zeigt, wie antisemitische Vorurteile gerade in Krisensituationen aufleben, welche gefährlichen Entwicklungen sich daran anschließen können und wie dadurch Jüdinnen und Juden noch mehr als sonst in das Visier von antisemitischen Straftätern geraten. 359 Taten, die den Behörden bekannt sind, weil sie der Polizei oder einer anderen Behörde gemeldet wurden. Zugleich wissen wir aus Studien, dass 80 Prozent der Betroffenen selbst schwerwiegende Vorfälle gar nicht erst bei der Polizei oder einer Behörde melden. 80 Prozent – das ist ein wirklich großer Anteil, und das heißt zugleich, dass die 359 Taten, die der Polizei und den Behörden letztes Jahr gemeldet wurden, wirklich nur die Spitze vom Eisberg sind.

Warum zeigen Betroffene so viele Vorfälle nicht an? Dafür gibt es verschiedene Gründe. Wie Umfragen belegen, haben Jüdinnen und Juden oft den Eindruck, dass Anzeigen gar nichts bewirken würden, dass die Verfahren sowieso eingestellt würden. Sie haben Angst davor, was auf sie zukommt, wenn sie eine Strafanzeige erstatten, Angst davor, mit den Tätern konfrontiert zu werden, zum Beispiel in einer Hauptverhandlung vor Gericht. Und Betroffene fühlen sich häufig nicht ernst genommen.

Der Eindruck, dass die Verfahren sowieso eingestellt würden, kann daher rühren, dass tatsächlich etwa 40 % der Verfahren mit antisemitischem Hintergrund eingestellt werden müssen. Das ist ein großer Anteil, was jedoch unter anderem daran

liegt, dass viele Taten im Internet stattfinden und die Täterinnen und Täter die Anonymität des Internets nutzen. Die Strafverfolgungsbehörden können in diesem Fällen die wirkliche Identität der Täter häufig nicht ermitteln. In manchen Fällen müssen Verfahren eingestellt werden, weil eine Äußerung zwar ganz klar antisemitisch, aber dennoch nicht strafbar ist. Antisemitismus für sich genommen ist kein Straftatbestand. Im Bereich von Äußerungsdelikten gibt es Straftatbestände wie die Beleidigung, die Bedrohung oder die Volksverhetzung. Diese Straftatbestände schränken letztlich die Meinungsfreiheit ein und haben deshalb enge Voraussetzungen. So kann es sein, dass eine Äußerung ganz eindeutig antisemitisch und trotzdem nicht strafbar ist, weil die engen Voraussetzungen dieser Straftatbestände nicht erfüllt sind.

Die Angst vor der Konfrontation mit dem Täter – das, glaube ich, können wir alle nachvollziehen. Wenn ich mir vorstelle, persönlich angegriffen zu werden, dann ist es für mich natürlich beängstigend, womöglich in einer Hauptverhandlung noch einmal auf den Täter oder die Täterin treffen zu müssen. Für diese Fälle gibt es Schutz- und Unterstützungsmöglichkeiten. Aber nicht allen Betroffenen sind diese Möglichkeiten und ihre Rechte wirklich bekannt. Außerdem fühlen sich Betroffene leider häufig nicht ernst genommen. Das heißt, wenn sie zum Beispiel eine Anzeige bei der Polizei oder der Staatsanwaltschaft erstatten und sagen, die Tat sei antisemitisch motiviert, ist es schon vorgekommen, dass dieses Motiv gar nicht aufgenommen oder aufgrund eines zu kurz greifenden Verständnisses von Antisemitismus nicht als antisemitisch eingestuft wurde. Es kann auch sein, dass zum Beispiel bei einer Verurteilung der Fokus auf der Körperverletzung liegt und sich das Gericht zu dem Motiv gar nicht ausdrücklich verhält. Dies kann bei den Betroffenen durchaus den Eindruck erwecken, das Tatgeschehen sei gar nicht so richtig erfasst und sie selbst seien in ihren Wahrnehmungen nicht ernst genommen worden.

All diese negativen Erfahrungen wirken, das muss man sich auch immer wieder bewusst machen, gerade vor dem Hintergrund der Geschichte von Polizei und Justiz im Nationalsozialismus, natürlich viel nachhaltiger bei Jüdinnen und Juden als positive Erfahrungen. Ich selbst bin wenige Monate nach Beginn meiner Tätigkeit von einer Jüdin angesprochen worden. Es war anlässlich eines Treffens mit Expertinnen und Experten aus der Zivilgesellschaft. Sie sagte zu mir:

> „Frau Vanoni, Sie sprechen immer von Vertrauen stärken. Das setzt jedoch voraus, dass Vertrauen überhaupt besteht. Ich möchte ganz offen zu Ihnen sein. Viele Jüdinnen und Juden haben überhaupt kein Vertrauen in die Justiz und in die Polizei. Sie haben ihre Eltern oder Großeltern im Holocaust durch das Handeln des Staates verloren. Und wenn Jüdinnen und Juden heute groß werden, bekommen sie immer wieder zu hören: Sei wachsam, sei achtsam, sei vorsichtig!“

Das hat mich nachdenklich gestimmt, und ich muss sagen, dass ich bei meiner Konzeptionierung, bei der ich das klare Ziel vor Augen hatte, das Vertrauen zu stärken, letzten Endes einem Irrtum unterlag. Es geht nicht um Vertrauensstärkung bzw. nicht nur. Es geht um Vertrauensaufbau. Wenn wir also antisemitische Straftaten so gut wie möglich verfolgen wollen und d. h. auch so viele wie möglich, dann brauchen

wir das Vertrauen der jüdischen Community in unsere Arbeit. Das bedeutet: Ziel muss es sein, dieses Vertrauen aufzubauen, zu erhalten und zu stärken, um Straftaten effektiv verfolgen zu können. Wir müssen die Betroffenen von antisemitischen Taten ermutigen, Strafanzeigen zu erstatten. Dafür braucht es einen sensiblen Umgang mit ihnen, also eine Sensibilisierung auf Seiten der Mitarbeitenden der Staatsanwaltschaft und auch der Polizei bei der Bearbeitung von antisemitischen Taten – eine Sensibilisierung für das Thema Antisemitismus, seine unterschiedlichen Erscheinungsformen, wie er Jüdinnen und Juden im Alltag begegnet und was er mit ihnen macht. Dabei ist es wichtig, dass die Betroffenenperspektive ernst genommen wird, dass wir zuhören und auch die Ängste und Sorgen der Betroffenen aufgreifen, zum Beispiel die Angst davor, in einer Hauptverhandlung auf den Täter zu treffen oder bei einer Zeugenvernehmung die eigene Anschrift angeben zu müssen. Dieser Ängste und Sorgen müssen wir uns bewusst sein und die Betroffenen dabei unterstützen, dass sie den bestmöglichen Schutz bekommen.

Neben der Sensibilisierung müssen wir mehr Transparenz schaffen. Wir müssen unser Handeln verständlich machen, das heißt, unsere Entscheidungen müssen nachvollziehbar sein. Wenn wir zum Beispiel Verfahren einstellen, weil Täter nicht ermittelt werden können oder die angezeigte Tat nicht strafbar ist, ist es wichtig, dass wir unsere Entscheidungen verständlich und auch empathisch kommunizieren. Wir Juristen sprechen gerne im Juristendeutsch, wir drücken uns häufig sehr korrekt und formal aus, was aber nicht heißt, dass das gerade für Nichtjuristen klar und gut begreiflich ist.

Betroffene haben darüber hinaus auch ein besonderes Informationsbedürfnis. Wenn eine Anzeige erstattet wird, dann will die anzeigende Person wissen, was aus ihrer Anzeige geworden ist. Wie ich bereits ausgeführt habe, haben viele Betroffene den Eindruck, dass eine Anzeige nichts bewirken würde. So kann es sein, dass nach einer Anzeigeerstattung ein Täter oder eine Täterin in einem schriftlichen Verfahren verurteilt wird, ohne dass es zu einer Hauptverhandlung kommt und die anzeigende Person davon überhaupt etwas erfährt. Es überrascht nicht, dass diese den Eindruck gewinnt, dass auf ihre Anzeige hin nichts passiert sei, obwohl genau das Gegenteil der Fall ist. Deswegen ist es wichtig, mehr Transparenz zu schaffen und dem Informationsbedürfnis der Betroffenen gerecht zu werden.

Um all diese Ziele zu erreichen, haben wir in den letzten drei Jahren bereits einige Maßnahmen ergriffen und Optimierungen vorgenommen. Ein erster wichtiger Punkt, der sich bereits bei meiner Konzeptionierung aufzeigte, war die Frage nach einer Definition. Was ist Antisemitismus? Wir Juristen lieben Definitionen, an denen wir uns orientieren können. Es gibt keine Legaldefinition zu Antisemitismus, zugleich ist es wichtig, dass sowohl die Polizei als auch die Staatsanwaltschaft und die Gerichte bei der Bearbeitung von antisemitisch motivierten Fällen ein einheitliches Verständnis von Antisemitismus zugrunde legen. Mit der Einführung der Stelle der Antisemitismusbeauftragten haben wir daher zeitgleich als Arbeits- und Orientierungshilfe die

Arbeitsdefinition der „International Holocaust Remembrance Alliance“ eingeführt, die auch Grundlage meiner Konzeptionierung war.

Nach dieser Definition ist Antisemitismus

> „eine bestimmte Wahrnehmung von Juden, die sich als Hass gegenüber Juden ausdrücken kann. Der Antisemitismus richtet sich in Wort oder Tat gegen jüdische oder nichtjüdische Einzelpersonen und oder deren Eigentum sowie gegen jüdische Gemeindeinstitutionen oder religiöse Einrichtungen. Darüber hinaus kann auch der Staat Israel, der dabei als jüdisches Kollektiv verstanden wird, Ziel solcher Angriffe sein.“[2]

Was nehmen wir aus dieser Definition mit? Antisemitismus ist eine Wahrnehmung, es ist eine Haltung, die sich in Wort oder Tat äußern kann, und sie kann sich gegen jüdische, aber auch gegen nichtjüdische Einzelpersonen richten. Das heißt also, eine antisemitische Beschimpfung, die gegenüber einer Person geäußert wurde, die tatsächlich nicht jüdisch ist, ist trotzdem eine antisemitische Handlung. Eine antisemitische Tat kann sich auch gegen das Eigentum richten, zum Beispiel eine Sachbeschädigung. Aber auch ein Diebstahl kann antisemitisch motiviert sein. Und: Auch der Staat Israel, wenn er als jüdisches Kollektiv verstanden wird, kann Ziel solcher Angriffe sein. Das ist ein ganz wichtiger Punkt bei dieser Definition, weil wir häufig Äußerungen haben, die sich vordergründig gegen Israel oder die Politik des Staates Israel richten, aber letzten Endes geht es um Angriffe gegen das Judentum, gegen Jüdinnen und Juden. Nicht nur die Berliner Strafverfolgungsbehörden verwenden diese Definition als Arbeitsgrundlage, sie wurde auch bei der Berliner Polizei sowie der gesamten Berliner Verwaltung eingeführt.

Und weil dieses einheitliche Verständnis von Antisemitismus so wichtig ist, haben wir ebenfalls zeitgleich mit der Einrichtung der Stelle der Antisemitismusbeauftragten bei der Staatsanwaltschaft in der Fachabteilung für Hasskriminalität, in der auch alle Verfahren mit antisemitischem Hintergrund bearbeitet werden, Staatsanwältinnen und Staatsanwälte bestimmt, die sich speziell mit den Verfahren mit antisemitischem Hintergrund befassen und die deshalb auch besonders geschult werden. Durch diese Spezialisierung, die für sich genommen schon zu einer Sensibilisierung und einer erhöhten Aufmerksamkeit für dieses Thema führt, wollen wir vor allem einen einheitlichen Bearbeitungsstandard, einen effizienten Wissens- und Informationsaustausch – insbesondere in der Zusammenarbeit mit mir – und bestmöglich auch eine personelle Kontinuität gewährleisten.

Neben der Spezialisierung ist auch das Thema Fortbildung ein ganz wichtiger Punkt, zum einen die Fortbildung der Kolleginnen und Kollegen der Fachabteilung der Staatsanwaltschaft, die Verfahren mit antisemitischem Hintergrund bearbeiten, aber auch generell von allen Mitarbeitenden der Berliner Strafverfolgungsbehörden, der gesamten Justiz und der Polizei. Inhaltlich geht es dabei um die unterschiedlichen Erscheinungsformen von Antisemitismus, wie er sich heute zeigt, und auch, wie man

[2] https://www.holocaustremembrance.com/de/resources/working-definitions-charters/arbeitsdefinition-von-antisemitismus [zuletzt abgerufen am 23. 10. 2023].

ihn erkennen kann – zum Beispiel wenn Codierungen, d. h. Begriffe oder Formulierungen, verwendet werden, die sich dem äußeren Anschein nicht ausdrücklich auf Juden beziehen, aber letzten Endes auf Hetze gegen Juden abzielen.

Anfang September 2021 fand die erste Fachtagung Antisemitismus für die Berliner und die Brandenburger Justiz statt, die sich ausschließlich dem Thema Antisemitismus widmete, gerade auch in seinen aktuellen Erscheinungsformen. Die Fachtagung stieß auf großes Interesse, worüber ich mich sehr gefreut habe, und es nahmen nicht nur Staatsanwältinnen und Staatsanwälte teil, sondern auch viele Richterinnen und Richter sowie Kolleginnen und Kollegen von der Polizei.

Die Berliner Polizei und Staatsanwaltschaft haben in den letzten Jahren ihre Arbeitsweisen bei der Verfolgung von antisemitischen Straftaten weiterentwickelt, um besser auf die Bedürfnisse und die Belange der Betroffenen einzugehen. Zum Beispiel: Wenn heute eine betroffene Person zum Landeskriminalamt zur Zeugenvernehmung kommt und sie ist Opfer einer antisemitischen Straftat geworden, dann erhält sie von der Polizei proaktiv Hinweise auf Melde- und Beratungsstellen, wo sie Hilfe suchen und Unterstützung erfahren kann. Sie kann selbstverständlich eine Vertrauensperson zur Vernehmung mitnehmen, und man ermöglicht ihr auch, soweit die gesetzlichen Voraussetzungen gegeben sind, dass sie bei ihrer Zeugenvernehmung nicht ihre persönliche Anschrift angeben muss, sondern eine ladungsfähige Anschrift einer Organisation oder ihres Arbeitgebers, damit sie nicht besorgen muss, der Täter könnte womöglich über die Einsichtnahme in die Akten vom Wohnort der betroffenen Person erfahren. Die Staatsanwaltschaft hat es sich zur Aufgabe gemacht, verständlich und empathisch zu kommunizieren. Muss ein Verfahren, das eine antisemitische Straftat zum Gegenstand hat, eingestellt werden, weil der Täter nicht ermittelt werden kann, greifen wir das antisemitische Motiv dennoch im Einstellungsbescheid auf, um zu verdeutlichen, dass es erfasst und der oder die Betroffene ernst genommen wurde. Auch legen wir dar, welche Maßnahmen unternommen wurden, um den Täter zu ermitteln und warum diese Maßnahmen leider nicht zur Identifizierung des Täters geführt haben.

Um dem Informationsbedürfnis der Betroffenen nachzukommen, benachrichtigen wir diese über die einzelnen Verfahrensschritte. D. h. die Betroffenen erhalten, sowohl wenn Anklage erhoben wird von der Staatsanwaltschaft eine Mitteilung, als auch wenn eine Verurteilung erfolgt, ohne dass sie dies explizit anfordern müssten.

All diese Bearbeitungsstandards, die wir in den letzten Jahren entwickelt haben, haben der Antisemitismusbeauftragte der Berliner Polizei und ich in einem gemeinsamen „Leitfaden zur Verfolgung antisemitischer Straftaten in Berlin“ festgehalten, den wir im Frühsommer 2021 veröffentlicht haben. Dieser Leitfaden dient im Sinne einer praxisnahe Handlungsempfehlung als Arbeitsmittel für – gerade auch neu hinzukommende – Kolleginnen und Kollegen in den zuständigen Fachbereichen der Polizei und Staatsanwaltschaft. Wir wollen mit dem Leitfaden aber auch unsere Bearbeitungsstandards festlegen, an denen wir uns messen lassen und auf deren Grundlage wird weitere Optimierungsmöglichkeiten entwickeln wollen.

Neben all diesen Maßnahmen ist mir noch ein anderer Punkt ganz wichtig, der zentral für meine Arbeit, aber auch für die Arbeit der Staatsanwaltschaft ist: Das ist die Kooperation und der fachliche Austausch mit jüdischen Organisationen und Organisationen der Antisemitismusbekämpfung, ohne die wir wahrscheinlich noch nicht da wären, wo wir jetzt sind. Wir erfahren durch diesen Dialog, wie unsere Arbeit wirkt, und können so unsere Arbeitsweisen verbessern und anpassen. Die Expertinnen und Experten aus der Zivilgesellschaft sind für uns als Strafverfolgungsbehörden letztlich auch die Verbindung in die jüdische Community, die wir so besser erreichen können. Ich erhielt zum Beispiel vor wenigen Monaten einen Anruf vom Antisemitismusbeauftragten der jüdischen Gemeinde. In den Medien war ein etwas irritierender Artikel zu einem Verfahren mit antisemitischem Hintergrund erschienen, das die Staatsanwaltschaft eingestellt hatte. Ich konnte ihm erklären, warum das Verfahren eingestellt werden musste und dadurch die Irritationen beseitigen.

Aufgrund der Wichtigkeit des Dialogs mit der Zivilgesellschaft habe ich einen regelmäßigen Wissens- und Erfahrungsaustausch zwischen den Staatsanwältinnen und Staatsanwälten, die die Verfahren mit antisemitischem Hintergrund bearbeiten, und Expertinnen und Experten aus der jüdischen Community, der Opferberatung und der Antisemitismusbekämpfung eingeführt. Durch diesen Austausch, der im Rahmen von regelmäßigen persönlichen Treffen stattfindet, erhalten wir Feedback zur Arbeit der Strafverfolgungsbehörden, erfahren, wie bestimmte Entscheidungen in der jüdischen Community aufgefasst werden, können allgemein sowie in Einzelfällen unser Handeln besser erläutern und auch Verbesserungsmöglichkeiten identifizieren. Darüber hinaus bietet dieser persönliche Kontakt mit den Expertinnen und Experten aus der Zivilgesellschaft natürlich auch eine wertvolle Grundlage für Vertrauen.

Wie ich bereits ausgeführt habe, wären wir ohne die Kooperation mit der Zivilgesellschaft noch nicht so weit und hätten mit Sicherheit auch noch nicht all diese Maßnahmen ergriffen. Wenn ich auf die letzten drei Jahre zurückblicke, dann sind wir meines Erachtens mit diesen Maßnahmen auf einem guten Weg. Vertrauensaufbau ist jedoch ein Prozess, der nicht von heute auf morgen gelingen kann, sondern länger andauert. An diesem Prozess werden die Berliner Strafverfolgungsbehörden weiterarbeiten, um antisemitische Straftaten bestmöglich und wirksam verfolgen zu können. Denn zu einer umfassenden Strategie gegen Antisemitismus gehört neben Präventions- und Interventionsarbeit unbedingt auch eine konsequente Verfolgung antisemitischer Straftaten.

Kontinuität, Tradierung und Transformation des Antisemitismus

Von *Samuel Salzborn*

Hitler habe den Menschen einen neuen kategorischen Imperativ aufgezwungen, schrieb Theodor W. Adorno[1] in der *Negativen Dialektik*, den Imperativ, „ihr Denken und Handeln so einzurichten, daß Auschwitz nicht sich wiederhole, nichts Ähnliches geschehe". Dieser Imperativ hat bis heute nichts von seiner zwingenden Notwendigkeit verloren.

Denn heute, da Antisemitismus nicht einfach eine abstrakte Bedrohung, sondern wieder blutige Realität ist, stellt sich die Frage nach der Erinnerung erneut. Gerade die antisemitische Gegenwart erzwingt die Notwendigkeit der Erinnerung, erzwingt es zu ertragen, dass der aktuelle Antisemitismus auf der Tradierung einer Erinnerungsverweigerung fußt, bei der bis heute im nationalen und vor allem familiären Gedächtnis die Weigerung in die Einsicht dominiert, dass – je nach Alter – der eigene Vater oder die eigene Mutter, der eigene Opa oder die eigene Oma, der eigene Uropa oder die eigene Uroma schuldig waren. Schuldig meint dabei Schuld in einem vielfältigen Sinn: die Schuld, weggesehen zu haben; die Schuld, die offensichtlichen Lügen der Nazis geglaubt zu haben; die Schuld, die Straßenseite gewechselt zu haben, wenn einem ein Jude oder eine Jüdin entgegenkam; die Schuld, Freundschaften beendet zu haben; die Schuld, EhepartnerInnen verlassen zu haben; die Schuld, denunziert zu haben; die Schuld, nicht in jüdischen Geschäften gekauft zu haben; die Schuld, Jüdinnen und Juden nichts verkauft zu haben; die Schuld, Angestellte entlassen zu haben; die Schuld, Raubgut und enteignete Waren gekauft zu haben; die Schuld, von Raub und Plünderung der deutschen Soldaten profitiert zu haben; die Schuld, den sogenannten Feindsender nicht gehört zu haben; die Schuld, von Hitler fasziniert gewesen zu sein; die Schuld, geglaubt zu haben, die Juden seien der Ursprung der eigenen Unzulänglichkeiten; die Schuld, die Nazis gewählt zu haben; die Schuld, in einer der unzähligen Situationen des Alltags geschwiegen zu haben: „Zwar wussten die wenigsten alles, aber die meisten doch genug, um aus den verfügbaren Einzelinformationen auf ein Gesamtbild schließen zu können."[2]

[1] *Adorno*, Theodor W., Negative Dialektik, in: ders., Gesammelte Schriften Band 6, Frankfurt 1997, S. 358.

[2] *Bajohr*, Frank/*Löw*, Andrea, Tendenzen und Probleme der neueren Holocaust-Forschung: Eine Einführung, in: dies. (Hrsg.), Der Holocaust. Ergebnisse und neue Fragen der Forschung, Frankfurt 2015, S. 13.

Es ist eine Schuld, die weit früher beginnt als beim handgreiflichen Mord, eine Schuld, von der so gut wie keine deutsche Familie frei ist – die aber nach wie vor von der Mehrheit der Kinder und Enkel in ihrer eigenen Familiengeschichte nicht aufgearbeitet wurde bzw. aktiv verharmlost und geleugnet wird.

Antisemitismus ist der schmerzhafteste Ausdruck der Unwilligkeit und der Unfähigkeit, die eigene Vergangenheit als eine Vergangenheit der unerträglichen Verstörung aufzuarbeiten.[3] Deshalb tut man den Opfern auch ein weiteres Mal Gewalt an: eine Gewalt der Erinnerungsverweigerung, eine Gewalt des Vergessens. Die neuen AntisemitInnen ertragen die Verstörung nicht, sie ertragen nicht, dass sich für sie nichts Positives, nichts Konstruktives aus Auschwitz ergibt, sondern dass sie das Erbe der Barbarei nur verarbeiten könnten, wenn sie zunächst einmal bereit wären, es zu ertragen. Wie Adorno in *Schuld und Abwehr* sagt:

> „Man darf vielleicht sagen, daß eigentlich nur der vom neurotischen Schuldgefühl frei ist und fähig, den ganzen Komplex zu überwinden, der sich selbst als schuldig erfährt, auch an dem, woran er im handgreiflichen Sinne nicht schuldig ist."[4]

Die Täterschaft der eigenen Eltern oder Großeltern verschwindet eben dadurch nicht, dass sie verleugnet oder unbearbeitet verdrängt wird. Sie bleibt bei den Kindern und Enkeln, mit Thanos Lipowatz gesprochen,[5] „anderswo" im Unbewussten und kann von dort wieder, an anderer Stelle, ins Bewusstsein zurückkehren. Die infantile Lüge, die schon Alexander und Margarete Mitscherlich[6] als psychischen Abwehrmechanismus beschrieben haben, nach der man im Nationalsozialismus „nur" dem Führer gefolgt und von diesem verraten worden, also eigentlich selbst Opfer gewesen sei, wird von der Kinder- und Enkelgeneration tradiert: als doppelte Lüge über die eigenen Eltern und Großeltern, deren Täterschaft emotional und symbolisch stets präsent geblieben ist. Dauerpräsent im Alltag, etwa in Familienfotoalben mit Wehrmachts- und SS-Uniformen, auf Postkartensammlungen „von der Front", durch weiterhin in Wohnungen befindliche (nun anders genutzte) Waffenschränke, durch lokale Aufmarsch- und Initiationsorte (die beispielsweise von Schützen- und Heimatvereinen weiter genutzt wurden), durch Vertriebenentreffen mit geschichts- und gebietsrevisionistischer Rhetorik und völkischer Brauchtumspflege, durch NS-Bauwerke (deren Architektur auch nach Entfernung der Hakenkreuze nazistisch geblieben ist), durch das Nachwirken von bis heute öffentlich erhaltener NS-Kunst (von Leni Riefenstahl bis Arno Breker), durch rechtsextreme Parteien wie die Sozialistische Reichspartei oder den (zeitweilig sogar an der Regierungskoalition beteiligten)

[3] Vgl. *Salzborn*, Samuel, Kollektive Unschuld. Die Abwehr der Shoah im deutschen Erinnern, 2020.

[4] *Adorno*, Theodor W., Schuld und Abwehr. Eine qualitative Analyse zum Gruppenexperiment, in: ders., Gesammelte Schriften Band 9.2, 1997, S. 320.

[5] *Lipowatz*, Thanos, Politik der Psyche. Eine Einführung in die Psychopathologie des Politischen, 1998, S. 49.

[6] *Mitscherlich*, Alexander/*Mitscherlich*, Margarete, Die Unfähigkeit zu trauern. Grundlagen kollektiven Verhaltens, 1980, S. 53 f.

Block der Heimatvertriebenen und Entrechteten, durch zahlreiche Altnazis in Ministerämtern und vieles mehr.

Jede/r wusste, dass es unzählige TäterInnen gab, aber niemand wagte zu erkennen, dass diese TäterInnen Abend für Abend mit am eigenen Esstisch saßen, als „vom Krieg" die Rede war, von dem man dann in der Schule erfuhr, dass es ein *deutscher Vernichtungskrieg* war, lernte, dass die Nazis Millionen von Menschen ermordet hatten in diesem und während dieses Krieges – ahnend, dass es einen Zusammenhang geben *muss* zwischen allgemeinem Geschichtslernen und eigener Familiengeschichte, aber sich dieses niemals eingestehend und deshalb die familiäre Täterschaft verdrängend in das Unbewusste, aus dem es dann – als Schuldabwehr, als Israelhass – wieder hervorbricht.

Die Unerträglichkeit der barbarischen Gewalt, die in Person von Vater oder Mutter, Oma oder Opa täglich mit am Tisch saß, das Wissen, dass diese Menschen, die man über alles geliebt hat, genau die antisemitischen MörderInnen gewesen sein *mussten*, von denen man in der Schule hörte, war so unerträglich, dass es verdrängt wurde. Und so wurden die TäterInnen im Familiengedächtnis sogar zu Opfern umgelogen, wenn Kinder und Enkel der Nazi-TäterInnen ihre Eltern bzw. Großeltern in der Erinnerung zu Opfern stilisieren, da sie einerseits eben kein präzises Wissen über die NS-Vergangenheit und die Shoah hatten (oder haben wollten) und zugleich die Eltern bzw. Großeltern als Opfer von Bespitzelung, Terror, Krieg, Bomben und Gefangenschaft wahrgenommen wurden, wie die familienbiografische Studie *Opa war kein Nazi*[7] gezeigt hat. Da die Kinder- und Enkelgeneration der NS-TäterInnen Letzteres aber moralisch verurteilte und für „schlecht" und „böse" hielt, wurden die eigenen Eltern und Großeltern zu WiderstandskämpferInnen und Opfern des Nationalsozialismus umgelogen. Historische Schätzungen zeigen hingegen aber, dass der Anteil derer, die potenziellen Opfern des Nationalsozialismus tatsächlich geholfen haben, bei ungefähr 0,3 Prozent liegt, was etwa 200.000 Menschen bei einer Bevölkerung von rund 70 Millionen entspricht.[8] Insofern ist es völlig ausgeschlossen, dass auch nur ein Bruchteil derer, die sich selbst in Oppositions- oder Widerstandsgeschichten ihrer Familien ergehen, damit auch eine Realität beschreiben.

Das Phantasma eines kollektiven Opferstatus und einer erfundenen Widerstandsbiografie ist hingegen bis in die Gegenwart weit verbreitet: Die MEMO-Studie 2019 des Instituts für interdisziplinäre Konflikt- und Gewaltforschung der Universität Bielefeld und der Stiftung Erinnerung, Verantwortung, Zukunft hat gezeigt, dass 69,8 Prozent der Deutschen der Auffassung sind, dass ihre Vorfahren nicht „unter den Tätern während der Zeit des Nationalsozialismus" waren; zugleich phantasieren sich 35,9 Prozent der Deutschen die Lüge herbei, dass ihre Vorfahren „unter den Op-

[7] *Welzer*, Harald/*Moller*, Sabine/*Tschuggnall*, Karoline, „Opa war kein Nazi". Nationalsozialismus und Holocaust im Familiengedächtnis, 2002.

[8] *Hensel*, Jana, Opa war kein Held, in: Zeit Online v. 3. März. 2018. https://www.zeit.de/gesellschaft/zeitgeschehen/2018-03/holocaust-gedenken-nationalsozialismus-erinnerungskultur-essay-jana-hensel/komplettansicht [zuletzt abgerufen am 20. 09. 2022].

fern während der Zeit des Nationalsozialismus" gewesen seien. Und 28,7 Prozent behaupten, dass ihre Vorfahren „während der Zeit des Nationalsozialismus potentiellen Opfern geholfen" hätten.

Verachtung, Zorn und Wut waren durchaus vorhanden, sie wurden aber nicht gegen die gerichtet, die sie verdient hatten: gegen die eigenen Eltern und Großeltern, sondern abermals projiziert: gegen die Überlebenden und ihre Nachkommen – die man verantwortlich machte für die Erinnerung, dafür, dass man irgendwo tief in seinem Unbewussten eingeschrieben hatte und das ahnende Wissen niemals würde loswerden können, dass die eigenen Eltern oder Großeltern Teil der antisemitischen Vernichtungspraxis waren, dass *sie* konkret die TäterInnen waren, von denen man im Geschichtsunterricht abstrakt gehört hatte. Dieses unbewusste Wissen ist das psychische Erbe des Antisemitismus, das wie ein Alb auf den Kindern und Enkeln (und bald auch Urenkeln) der TäterInnen lastet, denn, wie Alexandra Senfft gesagt hat: „Kein Geschichtsbuch, kein Film, keine Veranstaltung und keine Ausstellung werden zur Aufklärung führen, wenn wir nicht den persönlichen Bezug erkennen."[9] Die heutige Elterngeneration hat die Auseinandersetzung mit ihren Eltern, also den TäterInnen des Nationalsozialismus – von wenigen Ausnahmen abgesehen – entweder in Gänze unterlassen oder hinter kryptischen Formeln der Kritik am Nationalsozialismus als „Faschismus" und Überwachungsstaat versteckt und damit den antisemitischen Kern der NS-Politik geleugnet.

Die sowohl aus der verschweigenden wie der rationalisierenden Form der Erinnerungsverweigerung an die konkreten TäterInnen während des Nationalsozialismus resultierende emotionale Erbschaft der Nicht-Aufarbeitung wird an die Enkelgeneration weitergegeben, die nun wiederum noch deutlichere Formen der Erinnerungs- und Schuldabwehr an den Tag legt, weil sich die Nicht-Reflexion verdoppelt: denn mit der Hinterfragung der eigenen Eltern wäre notwendig eine doppelte Kritik verbunden – die unmittelbare an ihnen als Eltern (die jeden individuellen Emanzipationsprozess begleiten muss, soll er gelingen), wie auch die an ihrer unkritischen Form der Entsorgung der eigenen (individuellen wie kollektiven) Vergangenheit im (Nicht-)Dialog mit der Großeltern-Generation.

All die verdrängte Wut und der verschobene Hass auf die unbewussten Familienerbschaften und die Nicht-Aufarbeitung der eigenen Familiengeschichten richtet sich nun wieder bei der Generation der Nachgeborenen gegen die Juden und gegen Israel als jüdischem Schutzraum, den Staat, der nun militärisch dazu in der Lage ist, sich gegen die AntisemitInnen zu wehren – und der verdrängte Hass tritt auf diesem Umweg wieder ans Licht, einem Umweg, der es ersparte, sich seine Wut und seinen Zorn gegenüber seinen Eltern und Großeltern eingestehen zu müssen, da man nun nicht mehr sie hassen musste, sondern mit ihnen gemeinsam hassen

[9] *Senfft*, Alexandra, Schweigen tut weh. Eine deutsche Familiengeschichte, 2008, S. 343.

kann. So hat, wie Lipowatz sagt, eben „das Unbewußte, das nicht abgeschafft werden kann", immer „das letzte Wort".[10]

Antisemitismus war und ist in der bundesdeutschen Geschichte offiziell diskreditiert, trotzdem sowohl in der Nachkriegszeit wie in der Gegenwart weit verbreitet. Quantitative Studien belegen kontinuierlich und bis in die Gegenwart mindestens 15 bis 20 Prozent Antisemitinnen und Antisemiten in der deutschen Gesellschaft. Diese finden sich in allen politischen Spektren, artikulieren sich aber unterschiedlich – wobei nicht übersehen werden darf, dass alle Varianten des Nachkriegsantisemitismus eine Folge und Reaktion auf den NS-Antisemitismus sind, also nicht ohne die Massenvernichtung der europäischen Jüdinnen und Juden gedacht werden können. Und das heißt, dass jede antisemitische Äußerung in Deutschland dieses Erbe der Schuldverantwortung objektiv einschließt, auch wenn es subjektiv nicht intendiert sein muss.

Die von AntisemitInnen aller politischen Spektren geteilte Schuldabwehr steht dabei in direktem psychischen Zusammenhang zu dem gegen Israel gerichteten Antisemitismus. Denn die antiisraelischen Solidarisierungen mit den PalästinenserInnen sind in ihrer Projektionsorientierung gerade deshalb so wirkmächtig, weil sie zweierlei psychische Funktionen erfüllen und insofern eine konformistische Rebellion *par excellence* sind: Auf der einen Seite stellen sie einen vordergründigen Bruch mit der NS-Ideologie dar, auf der anderen Seite handelt es sich aber um keinen Bruch, sondern nur um ein psychisch wirksames Rebellionssurrogat, in dem das völkische und antisemitische Weltbild des Nationalsozialismus übernommen wird, verbunden mit einer moralischen Scheinabgrenzung. So wird rebelliert, ohne sich (selbstkritisch) infrage stellen zu müssen.

Insofern tradiert sich Antisemitismus – und er transformiert sich zugleich fortlaufend: alle Formen von Antisemitismus sind heute weiterhin präsent, sie werden anlassbezogen formuliert, nutzen jeden Vorwand, mal chiffriert, mal ganz offen und direkt. Ganz gleich, welchen Weg oder Umweg sie nehmen, ganz gleich, wer sie formuliert und pseudolegitimiert, bleiben ihr Kern aber unverändert: Antisemitismus.[11]

[10] *Lipowatz*, Thanos, Politik der Psyche. Eine Einführung in die Psychopathologie des Politischen, 1998, S. 47.

[11] *Salzborn*, Samuel, Globaler Antisemitismus. Eine Spurensuche in den Abgründen der Moderne. Mit einem Vorwort von Josef Schuster, 2022.

The Treatment of the Nazi Past in Contemporary German Legal Education

By *Jan Thiessen*

I. Legal Studies and Legal Thinking

As a law professor, I am bound to believe that lawyers put into practice what they have learned in law school. Of course, when law students leave university and move into legal practice, they learn a lot of new things above and beyond the curricula of our law schools. Nevertheless, what students learn at law school is what I call the way of legal thinking. I am convinced that this way of legal thinking will stick with our former law students during their whole professional lives. Thus, if one wants to change the way of legal thinking of future generations of lawyers, one has to change legal education. This is at least true in theory. In real life, it must be noted that generations of German lawyers, scholars and politicians have discussed various amendments to legal education for at least the last two centuries.[1] The main result of those debates is that legal education is nearly the same as it was two centuries ago.

However, there has been a recent change in German legal education.[2] In June 2021, the German Parliament passed an act to amend the German Judges' Code (Deutsches Richtergesetz). The new parts of section 5a of the German Judges' Code read as follows:

> "the mandatory subjects [of legal studies, J. T.] have to be taught so as to reflect upon the National Socialist injustice and the injustice done by the East German dictatorship." Further, "The studies have to consider the ethical foundations of law and promote the ability to critically reflect on the law".[3]

[1] *Gerhard Dilcher*, Die preußischen Juristen und die Staatsprüfung. Zur Entwicklung der juristischen Professionalisierung im 18. Jahrhundert, in: Festschrift für Hans Thieme, 1986, pp. 295–305; *Hans Hattenhauer*, Juristenausbildung. Geschichte und Problem, in: JuS, 1989, pp. 513–520; *Thomas Rüfner*, Historischer Überblick: Studium, Prüfungen, Berufszugang der Juristen in der geschichtlichen Entwicklung, in: Christian Baldus/Thomas Finkenauer/Thomas Rüfner (eds.), Bologna und das Rechtsstudium. Fortschritte und Rückschritte der europäischen Juristenausbildung, 2011, pp. 3–31.

[2] Gesetz zur Modernisierung des notariellen Berufsrechts und zur Änderung weiterer Vorschriften vom 25. Juni 2021, BGBl. I pp. 2154 et seq.

[3] § 5a Abs. 2 S. 2 DRiG: "Die Vermittlung der Pflichtfächer [des rechtswissenschaftlichen Studiums, J. T.] erfolgt auch in Auseinandersetzung mit dem nationalsozialistischen Unrecht und dem Unrecht der SED-Diktatur."; § 5a Abs. 3 S. 1 DRiG: "Die Inhalte des Studiums

In order to evaluate the potential impact of this amendment, we have to take into account the status quo ante. It is not surprising that legal education is designed to teach the skills that lawyers need. With respect to German legal education in particular, it is designed to teach the skills that judges need. German law students pursue qualification as a judge (Befähigung zum Richteramt),[4] notwithstanding the fact that many students will never become judges but will work in various other legal professions or even professions without any relation to their legal studies. In any case, the skills that law students must acquire do not concentrate on legal history from the outset. Legal education is predominantly dedicated to private law, criminal law, constitutional law, administrative law and so on. Nevertheless, some of the statutory requirements for legal education include legal history to a certain degree.

As is well-known, in German legal education there is a crucial distinction between the first and the second examinations.[5] To begin with the second examination, it focuses on legal practice in the judiciary, advocacy, and public administration. At least in Berlin, there is no specific regulation concerning legal history as a subject of the second examination. However, the Nazi past is much more a subject of the apprenticeship prior to the second examination (Referendariat) than it is within the mandatory classes at law schools. When the new apprentices (Referendare) are sworn-in here in Berlin, the ceremony takes place at the Kammergericht, the Higher Court of Berlin. It is held in the hall where the notorious Volksgerichtshof and its President Roland Freisler administered injustice against the conspirators of the 20th of July 1944. Prior to the swearing-in, the respective president of the Kammergericht talks about this history. During the Referendariat's classes, the apprentices have to pass mandatory lessons on the Nazi past. Some of these lessons take place at historical sites in Berlin.

At the law schools the situation is reversed. Aside from the recent amendment, legal studies have to include the "historical, philosophical and social foundations"[6] of law. Therefore all German law schools offer lectures on these foundations. However, at most law schools it is up to the student to choose from several lectures. Even if students are required to pass an examination in legal history within the first semesters, this may mean that they deal with late-antiquity Roman Law – and not necessarily with the Nazi past. This is also true for advanced studies in specialized pro-

berücksichtigen die ethischen Grundlagen des Rechts und fördern die Fähigkeit zur kritischen Reflexion des Rechts.", BGBl. I p. 2172.

[4] § 5 Abs. 1 DRiG.

[5] The classic two-stage educational structure was only briefly called into question in the context of reform discussions of the 1970s, see Gesetz zur Änderung des DRiG vom 10.09.1971, BGBl. I p. 1557; for a critical reflection, see *Nicolas Lührig*, Die Diskussion über die Reform der Juristenausbildung von 1945 bis 1995, 1997, pp. 143–180.

[6] § 5a Abs. 2 DRiG: "Pflichtfächer sind die Kernbereiche des Bürgerlichen Rechts, des Strafrechts, des Öffentlichen Rechts und des Verfahrensrechts einschließlich […] der philosophischen, geschichtlichen und gesellschaftlichen Grundlagen".

grams (Schwerpunktstudium). Whether lectures on the Nazi past are available depends on the respective law school's staff.

Now, however, the new section 5a of the German Judges' Code requires both professors and students to reflect on the injustice brought by the Nazi Law. The amendment that was passed in June 2021 has been discussed for at least four years. In 2017, the former German Minister of Justice Heiko Maas presented the findings of the historical commission to investigate the influence of Nazi law and Nazi lawyers on the law in general, and the staff of the West German Ministry of Justice in particular post-1945.[7] Minister Maas postulated that law students should learn more about this part of the history of their subject and profession. This proposal caused considerable debate and controversy.[8] The questions raised were quite simple. Why should this part of legal education be limited to the Nazi past? What about injustice done by jurists in general? What about East Germany, Stalinism, and colonialism? Other questions were even more basic: How to teach these reflections on the Nazi past, and examine students on this material?

II. Why to Focus on the Nazi Past

As we have seen at the beginning of this text, the East German dictatorship is now a mandatory subject of legal education alongside the Nazi past. This is a last-minute amendment of a last-minute amendment. At the beginning of 2021, the federal government intended to propose new requirements regarding the injustice of the Nazi era as a subject of legal studies. Nevertheless, the relevant draft from the Ministry of Justice had not been published. It was left to the State of North-Rhine-Westphalia to initiate the amendment via the second chamber (Bundesrat) of the German Parliament in February.[9] In June, the committee of the first chamber (Bundestag) responsible for legal issues proposed to insert the East German dictatorship as an additional subject

[7] *Manfred Görtemaker/Christoph Safferling* (eds.), Die Rosenburg. Das Bundesministerium der Justiz und die NS-Vergangenheit – eine Bestandsaufnahme, 2013; *Manfred Görtemaker/Christoph Safferling*, Die Akte Rosenburg. Das Bundesministerium der Justiz und die NS-Zeit, 2016; see also https://www.bmj.de/SharedDocs/Publikationen/DE/Rosenburg_Broschuere_englisch.pdf?__blob=publicationFile&v=5, last visit 02. 11. 2022.

[8] *Lena Foljanty*, Historische Reflexion als Ausgangspunkt für die heutige Berufspraxis: Das Justizunrecht des 20. Jahrhunderts als Gegenstand der juristischen Ausbildung, in: AnwBl 2017, pp. 1158 – 1164; Contributions of *Christoph Gusy*, *Hannes Ludyga*, *Joachim Rückert*, *Chrisoph Safferling* and *Frank Bleckmann* in the special issue "Juristenausbildung und NS-Unrecht", ZDRW 2019, pp. 1 – 84; *Christine Lamprecht*, Neu über Recht und Unrecht nachdenken, in: FAZ, 28. 1. 2021, https://www.faz.net/aktuell/politik/inland/gastbeitrag-zur-juristenausbildung-neu-ueber-un-recht-nachdenken-17168083.html, last visit 02. 11. 2022; *Gerhard Werle/Moritz Vormbaum*, Nationalsozialistisches Unrecht, SED-Unrecht und juristische Ausbildung – Zur Reform von § 5a DRiG, JZ 2021, pp. 1163 – 1167.

[9] BR-Drs. 20/21, p. 15: "Im gesamten Studium ist gerade vor dem Hintergrund des nationalsozialistischen Unrechts die Fähigkeit zur kritischen Reflexion des Rechts einschließlich seines Missbrauchspotentials zu fördern."

of historical reflection.[10] Thus, one of the main criticisms of Minister Maas' original proposal has been solved by legislation.

Still, the question remains as to why this part of legal education is limited to German history. In my opinion, this limitation can be justified by the tradition of German legal education that spans medieval Bologna to the Berlin Republic. From the rediscovery of the Digests in Northern Italy up to the law schools of our time, legal education has consisted of discussing cases and forming a system out of those cases. Of course, law students all over the world discuss cases. But in the tradition of German legal education, forming a system out of those cases means more than to sort precedents and distinguish them. Forming a system in this sense means that scholars and students try to elaborate legal principles based on an abstraction from the plentitude of peculiarities offered by the abundance of single cases. When new cases were to be solved, both scholars and students tried to match the principles that were derived from old cases. I suppose, and I fear, that this approach to legal education continued throughout the Nazi years up until the present time.

Although there were ideologically-based amendments of legal education in 1934 – 1935[11], and although these amendments have been undone post-1945, these changes in legal education have not significantly affected legal technique. What does this mean? Obviously, the content of legal education in the Nazi era had changed.[12] There were new lectures and new textbooks, new legislation, and new commentaries on it. In particular, there were a lot of anti-Semitic and racist laws. The Nazi law integrated the so-called people's community ("Volksgemeinschaft"), but excluded all individuals considered to be so-called people's enemies ("Volksfeinde"). Both the single cases and the legal principles had changed. The single cases dealt with conflicts such as when a landlord tried to evict a Jewish tenant. Legal principles were corrupted by the orders of the "Führer" made to advance the program of the Nazi party. Once the traditional principles like equal freedom in private law[13] or nulla poena sine lege in criminal law[14] had been altered, the legal technique went on working as usual.

[10] BT-Drs. 19/30503 pp. 21 – 22.

[11] Justizausbildungsordnung vom 22. Juli 1934, RGBl. I, p. 727; *Karl August Eckhardt*, Das Studium der Rechtswissenschaft, 1935; for a critical assessment see *Martin Würfel*, Das Reichsjusitzprüfungsamt. 2019, pp. 34 – 63.

[12] *Ralf Frassek*, Steter Tropfen höhlt den Stein – Juristenausbildung im Nationalsozialismus und danach, in: ZRG (GA) 117, 2000, pp. 294 – 361 (300 et seq.), continued in: KJ 2004, pp. 85 – 96; *Louis Pahlow*, "Ich verüble dem Verfasser weniger einzelne juristische Fehler als das Versagen des Rechtsgefühls". Juristische Staatsprüfungen im Dritten Reich (1934 – 1945), in: Festschrift für Hermann Nehlsen, 2008, pp. 399 – 420 (405 et seq.).

[13] Reichsbürgergesetz vom 15. September 1935, RGBl. I, p. 1146; Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre vom 15. September 1935, RGBl. I, p. 1146 – 1147.

[14] Gesetz über Verhängung und Vollzug der Todesstrafe vom 29. März 1933, RGBl. I, p. 151; Gesetz zur Änderung des Strafgesetzbuches vom 28. Juni 1935, RGBl. I, pp. 839 – 843.

To make it clear: This is not an old or a new version of the legend that German lawyers helplessly followed positive law, regardless of its origin.[15] The lawyers applied the new Nazi law but also interpreted the old law in the light of Nazi ideology. There were many professors, judges, and lawyers who taught Nazi ideology simply because they were fanatical Nazis. Students and apprentices had to learn this ideology, and many of them were fanatical Nazis too. The traditional legal method did not force professors, students, judges and lawyers to integrate Nazi ideology into the legal system. Nevertheless, the traditional legal method allowed the integration of Nazi ideology into the legal system.[16] Jurists of all occupations continued discussing cases and principles, writing and reading textbooks, journals and commentaries. But they discussed cases and principles under the primacy of ideology. It can be assumed, however, that old professors stuck to their old lectures. During the war, at least only a few students and apprentices were left. They began their professional careers once the Nazi period had ended. Therefore, those lawyers who had been educated during the Nazi period started to work under the conditions of democracy and the rule of law in the Western occupation zones and the Federal Republic of Germany. And even though the older professors, judges and lawyers had been members of the Nazi party or other Nazi organizations and were entangled in a system of injustice, their educational background originated from periods under the rule of law or even democracy. In West Germany, those jurists were paid for working within the rule of law and democracy, and the rule of law and democracy paid for them. At least, this is my explanation of how it was possible for formerly Nazi lawyers to establish the rule of law and democracy.

III. Why East Germany Is Different

With respect to legal education, we can see one important difference between the Nazi period and East Germany. In the four decades of the East German dictatorship, Marxist philosophy was an essential part of the legal studies curriculum,[17] whereas

[15] *Gustav Radbruch*, Gesetzliches Unrecht und übergesetzliches Recht, SJZ 1946, pp. 105 et seq.; for critical reflections see *Horst Dreier*, Die Radbruchsche Formel – Erkenntnis oder Bekenntnis?, in: Festschrift für Robert Walter, 1991, pp. 117–135 (120 et seq.); *Fabian Wittreck*, Radbruchs Auseinandersetzung mit dem Nationalsozialismus, in: Walter Pauly (ed.), Rechts- und Staatsphilosophie des Relativismus. Pluralismus, Demokratie und Rechtsgeltung bei Gustav Radbruch, 2011, pp. 207–222 (211 et seq.).

[16] In summary *Hans-Peter Haferkamp*, Wege zur Rechtsgeschichte: Das BGB, 2022, pp. 230–248.

[17] *Ulrike Lehmann/Karl-Heinz Lehmann*, DDR-Juristenausbildung im Wandel, in: DA, 1990, pp. 747–750; *Malgorzata Liwinska*, Die juristische Ausbildung in der DDR – im Spannungsfeld von Parteilichkeit und Fachlichkeit, 1997, pp. 61 et seq.; *Steffen Schröder*, Die Juristenausbildung in der DDR, in: Gerd Bender/Ulrich Falk (eds.), Recht im Sozialismus Bd. 2: Justizpolitik, 1999, pp. 441–486; *Hans-Peter Haferkamp*, Richterausbildung in der DDR, in: Adrian Schmidt-Recla/Achim Seifert (eds.), Das Recht der DDR als Gegenstand der Rechtsgeschichte, 2022, pp. 35–88 (52 et seq.).

during the Nazi period only a few lectures explicitly addressed Nazi ideology. In East Germany, legal technique declined in favour of a Marxist interpretation of law.[18] Consequently, there were only a few law journals, textbooks and commentaries. To put it plainly: The East German students had to learn law almost without books. That is why in East Germany the traditional legal method lost more of its importance than it did during the Nazi period. In this text, I cannot comment on the question of how useful it is to compare the Nazi period with the East German dictatorship. As far as legal education is concerned, the East German model is far removed from both the Nazi period and today's legal education. Thus it would not have been necessary to include the East German dictatorship in legal education as a mandatory topic, although East German legal history is well worth teaching and studying. In any case, I must now return to the subject of the Nazi past.

IV. Lessons from Post-Colonial Studies

During the last years a very controversial debate has broken out on the question of whether concentrating on the Nazi past neglects the importance of crimes related to colonialism.[19] With regard to legal education, it is obvious that post-colonial studies should be integrated into classes on public international law, international criminal law, constitutional law and of course legal history. First steps towards post-colonial legal studies in Germany have been gone.[20] There is no need to neglect the impacts of either the Nazi past or colonialism. It is necessary to investigate how German colonialism prepared Germans, and German jurists in particular, to deny the equal dignity of all human beings, to commit genocides, to elaborate schemes for conquering other countries. It is necessary to investigate the question about fundamental differences between colonialism and the Shoah. And it is necessary to reject any attempt to derive anti-Semitic arguments from post-colonial studies.

[18] *Jan Schröder*, Recht als Wissenschaft Bd. 2: Geschichte der juristischen Methodenlehre in der Neuzeit (1933 – 1990), 2021, pp. 77 et seq.; *Michael Ploenus*, Gelenkte Erkenntnis. Über die gesellschaftswissenschaftliche Schulung an den Universitäten der DDR, in: Adrian Schmidt-Recla/Achim Seifert (eds.), Das Recht der DDR als Gegenstand der Rechtsgeschichte, 2022, pp. 13 – 34 (14).

[19] *Saul Friedländer/Norbert Frei/Sybille Steinbacher/Dan Diner/Jürgen Habermas*, Ein Verbrechen ohne Namen. Anmerkungen zum neuen Streit über den Holocaust, 2022; *Susan Neiman/Michael Wildt* (eds.), Historiker streiten. Gewalt und Holocaust – die Debatte, 2022; *Jürgen Zimmerer* (ed.), Erinnerungskämpfe. Neues deutsches Geschichtsbewusstsein, 2023.

[20] *Jochen von Bernstorff/Philipp Dann/Isabel Feichtner* (eds.), (Post)Koloniale Rechtswissenschaft, 2022.

V. Nazi Past as a Subject of Legal Education

Let me return to the question of how to teach and examine reflections on the Nazi past as a subject of legal education. It may be surprising that a legal historian says: This is not a question of teaching and examining legal history. It is a question of teaching and examining the current law. Legal historians do know a great deal about the Nazi past. Legal historians touch on the topic more or less inevitably within their lectures on legal history. In contrast, many of the professors who teach current law will never discuss the Nazi past during their lessons. It is my ceterum censeo that nearly all parts of the current law originate from tradition older than the Nazi period, but underwent a process of change during the Nazi period, the impacts of which are still present. In order to teach and to examine substantial knowledge about this tradition and these changes, it is necessary to identify instructive examples from topics that are mandatory subjects of classes on current law.

Of course, the recent amendment to the German Judges' Code has not yet been executed to a significant degree within legal studies. During the last semesters, I offered a new lecture within my specialised program on contemporary legal history in order to write a new textbook on Nazi injustice as a subject of legal education. At first glance, this seems to be a contradiction to what I said a few minutes ago: that Nazi injustice should be reflected upon in classes on current law and not necessarily in classes on legal history. Unfortunately, I cannot teach all subjects of current law and I cannot teach them all at the same time. Thus, I started to discuss with my students what they know about the Nazi past, both from school and from their legal studies. Their answers were extremely heterogenous. They depended on where the students had gone to school and their teachers, both at school and in our law faculty. Some of our students had received several lessons on the Nazi past in school. They read books or visited memorial sites. But some of our students learned nearly nothing at school about the Nazi past. At our law school, some of the professors mentioned the historical roots of certain provisions of current law, and some did not. Among the participants of my lecture, there was no common ground of knowledge about the Nazi past, although there was a consensus that it is necessary to learn more about it.

My scheme for this lecture is focused on three aspects. First of all, it has to be emphasised that legal education on these topics matters. Not only the tradition of the law but also the tradition of legal education are older than the Nazi period, but both the law and legal education were adapted to Nazi ideology. Consequently, legal education could be re-directed to teach fundamental principles of the rule of law and of democracy post-1945.[21] Reflecting on the Nazi past should be an integral part of legal education for the simple reason that Nazi ideology was able to corrupt fundamental principles of both law and legal education.

[21] *Nicolas Lührig*, Die Diskussion über die Reform der Juristenausbildung von 1945 bis 1995, 1997, pp. 46 et seq.

The second part of my lecture is the most comprehensive one. It deals with what I have called above ‚instructive examples' taken from mandatory subjects of current law. The third and final part is the argument that students should learn more about the ambiguity of legal methods than they usually learn within regular lectures on legal methodology.

VI. Some Examples

Let me tell you more about some examples from mandatory subjects of current law. These examples are taken from the three core fields of legal studies: public law, criminal law, and private law.[22]

1. Constitutional Law

As is well known, the German constitution, the basic law (Grundgesetz), was enacted as the very antithesis of Nazi injustice.[23] Human dignity is not only the head of the fundamental rights section but the head of the whole constitution. The provisions on the protection of human dignity and fundamental principles like democracy, the rule of law, or federalism cannot be amended by the houses of parliament. The federal chancellor cannot be dismissed without electing a new chancellor. The parliament cannot be dissolved by the federal president unless the election of a new chancellor has failed or unless the federal chancellor cannot rely on a parliamentary majority. In contrast, the president of the Weimar Republic could dissolve the parliament by his discretion, and the president could allow the chancellor to govern without the endorsement of the majority of the parliament. Both effects, the political instability caused by frequent re-election of the parliament on the one hand and presidential dictatorship without the consent of parliament on the other, were to be avoided by the new constitution of 1949. The lesson of the Weimar Republic was the essential message to be expressed by enacting the basic law.[24] It would appear to be impossible to teach the political structure of the Federal Republic of Germany without discussing these lessons from the past. Still, when I asked my students what they had learned about the basic law in contrast to the Weimar constitution, some of them said that they had learned the pure text of the constitution without any reference to the past, believe it or not.

In discussions of twentieth-century German legal history, it is a common narrative that, aside from obvious anti-Semitic or racist laws, the Nazi regime finished many

[22] § 5a Abs. 2 S. 2 DRiG.

[23] BVerfGE 124, 300–347 (328 et seq.).

[24] *Christian Waldhoff*, Folgen – Lehren – Rezeptionen: Zum Nachleben des Verfassungswerks von Weimar, in: Horst Dreier/Christian Waldhoff (eds.), Das Wagnis der Demokratie. Eine Anatomie der Weimarer Reichsverfassung, 2018, pp. 289–316.

legislative projects that had already been drafted during the Weimar Republic or even the Wilhelminian Empire. With regard to the fields of law in question, it seems legitimate that the respective laws have been unaltered post-1945. This narrative is relevant for public law, criminal law, and private law.

2. Administrative Law

To begin once again with public law, a very substantial part of modern administrative measures is dedicated to ensuring the citizen's economic subsistence. The German term for these provisions, Daseinsvorsorge, became popular during the Nazi period. The most influential contemporary author on this topic, Ernst Forsthoff, stated that due to industrializiation and urbanization, smaller social entities like families or farms could no longer guarantee the welfare of their respective communities.[25] In the expanding cities, provision for economic subsistence could no longer be limited to the poor. The provision of clean water, waste removal and public transport has long been recognised as a duty owed by the state to all citizens.

All of this seems to be self-evident, without any clear connection to the Nazi period. Nevertheless, there was a particular reason to deal with this topic during the Nazi period. Provision for economic subsistence was limited to the members of the people's community, the Volksgemeinschaft. Persons who were excluded from the people's community were step by step excluded from any public service. Here we can see what the historian Götz Aly called an "accommodating dictatorship" or dictatorship of favours (Gefälligkeitsdikatur).[26] For example, persons who had lost their home to bombardments during the war could sue the Nazi state for compensation. Aside from a monetary compensation to be paid back once the war was won, the compensation could consist of a new apartment, new furniture, new clothes and so on. Often, these apartments, furniture or clothes were robbed from Jews who had been murdered in concentration camps.[27] We can see that providing for economic subsistence was not only a phenomenon of industrialization or urbanization. It was also related to industrialized mass murder and to the expulsion of Jews, not only from urban societies.

[25] *Ernst Forsthoff*, Die Verwaltung als Leistungsträger, 1938; see *Florian Meinel*, Der Jurist in der industriellen Gesellschaft: Ernst Forsthoff und seine Zeit, 2011, pp. 154 et seq.

[26] *Götz Aly*, Hitlers Volksstaat. Raub, Rassenkrieg und nationaler Sozialismus, 2005, p. 49 and passim; english translation: *Götz Aly*, Hitler's Beneficiaries. Plunder, Racial War, and the Nazi Welfare State, 2008, p. 36 and passim. Aly's concept has been questioned by *Marc Buggeln*, Was Nazi Germany an "Accommodating Dictatorship"? A Comparative Perspective on Taxation of the Rich in World War II, in: Central European History 2023, 1 – 21.

[27] *Dominik A. Thompson*, Krieg ohne Schaden. Vertragsstreitigkeiten und Haftpflichtprozesse im Kontext von Kriegswirtschaft und Amtshaftungskonjunktur ausgehend von der Rechtsprechung des Landgerichts Bonn während des Zweiten Weltkrieges (1939 – 1945), Tübingen 2015, p. 98 et seq.

3. Criminal Law

a) Benefits by Deception and Embezzlement

In criminal law, new offences were introduced during the Nazi period which are still on the books today. One example is to obtain benefits by deception (Erschleichen von Leistungen). According to this provision, the offender "obtains the output of a machine or the services of a telecommunications network which serves public purposes or uses a means of transportation or obtains entrance to an event or facility by deception with the intention of not paying the fee."[28] This new offence had been drafted many years prior to 1935, when it was finally enacted.[29] Despite the ominous term "Erschleichen", it is not a Nazi law in itself, although the subsequent question as to whether or not a contractual agreement arises from simply using, for instance, a means of transportation was discussed during the Nazi period under the rubric of the "needs of the people's community." Another example is the offence of embezzlement (Untreue) which was also discussed for decades prior to the Nazi period. In this case, however, the Nazi legislation formulated an offence with a definition so vague that it is practically a non-definition. The offender is "whoever breaches their duty to safeguard the pecuniary interests of another which are incumbent upon them by reason of law, by commission of an authority, legal transaction or fiduciary relationship."[30] What is a fiduciary relationship (Treueverhältnis)? It could be anything. Not so many years ago, however, the Federal Constitutional Court held this provision to be constitutional, even though so much uncertainty is associated with the offence.[31] The Federal Constitutional Court argued that the criminal courts had drawn sufficiently precise contours for the offence to indicate to potential offenders, and other courts, what is allowed and what is forbidden.[32]

b) Murder and Manslaughter

A quite notorious example is related to murder and manslaughter. In contrast to other criminal offences, not the offence but the offender is here defined. A manslayer is a person who kills another person without being a murderer. Then who is a murder-

[28] § 265a a.F. StGB: "Wer die Leistung eines Automaten, die Beförderung durch ein Verkehrsmittel oder den Zutritt zu einer Veranstaltung oder einer Einrichtung in der Absicht erschleicht, das Entgelt nicht zu entrichten".

[29] Gesetz zur Änderung des Strafgesetzbuches vom 28. Juni 1935, RGBl. I, pp. 839–843 (842).

[30] Gesetzes zur Abänderung strafrechtlicher Vorschriften vom 26.5.1933, RGBl. I, p. 295: "Wer vorsätzlich die ihm durch Gesetz, behördlichen Auftrag oder Rechtsgeschäft eingeräumte Befugnis, über fremdes Vermögen zu verfügen oder einen anderen zu verpflichten, mißbraucht oder die ihm kraft Gesetzes, behördlichen Auftrags, Rechtsgeschäfts oder eines Treueverhältnisses obliegende Pflicht, fremde Vermögensinteressen wahrzunehmen, verletzt und dadurch dem, dessen Vermögensinteressen er zu betreuen hat, Nachteil zufügt".

[31] BVerfGE 126, 170–233 (200 et seq.).

[32] BVerfGE 126, 170–233 (208–209).

er? According to the German Penal Code in the version of 1941, a murderer is someone who kills another person out of a lust to kill, to obtain sexual gratification, out of greed or otherwise inferior motives, insidiously or cruelly, or by means constituting a public danger, or to facilitate or cover up another offence.[33] The difference between murder and manslaughter is not the offender's degree of premeditation. The difference between murder and manslaughter is based on motives or means, instead of plain intention. At first glance, there seems to be no specific relationship to the Nazi period except the fact that these definitions were introduced in 1941. Nevertheless, this date of coming into effect is not a mere coincidence. When the Nazis came to power, they commissioned a group of experts from courts, law schools, and the Ministry of Justice to draft amendments to the penal code. One of their tasks was to review the offences of murder and manslaughter. The main criterion for re-defining these offences was what kind of person the people's community would consider to be a murderer or a manslayer. It seems to be only a slight difference whether these offences are defined based on the offender or on their deeds. However, the reform of 1941 was based on a theory of a typology of offenders (Tätertypenlehre).[34] In other words: The offender as a person is a murderer or a manslayer. This was a significant contrast to the leading theory of the late nineteenth century that offenders have to be seen within their contexts as social beings. According to this theory, the social community does not define what sort of person is an offender—rather the offender grows up as part of the social community. The Nazi legislation reversed this theory. Offenders had to be punished for their intrinsic nature as offenders as it apperars in the offence, not for the offence itself as a complex part of social reality.[35] Admittedly, this theoretical question was not the crucial issue preoccupying the legislature and judiciary post-1945. During the Nazi period, the death penalty was used excessively. In reaction to this, the basic law of 1949 abolished the death penalty altogether.[36] Furthermore, it was argued that life imprisonment was a violation of human dignity, or at least unreasonable in cases where the choice of an insidious method was not based on inferior motives, such as the case in which a mistreated wife poisons her tyrannical husband, or kills him in his sleep. The Federal Constitutional Court held that murderers who had been sentenced to life imprisonment had to be released on probation after a certain time, for it is intrinsic to human dignity to have a prospect of regaining freedom.[37] The Federal Supreme Court also restricted the wide definition of insidiousness.[38]

[33] Gesetz zur Änderung des Reichsstrafgesetzbuches vom 4. September 1941, RGBl. I, p. 549–550 (549).

[34] *Georg Dahm*, Todesstrafe und Tätertyp nach der Strafgesetznovelle vom 4. September 1941, in: DR 1942, pp. 401–406; for a critical reflection, see *Gerhard Werle*, Justiz-Strafrecht und politische Verbrechensbekämpfung im Dritten Reich, 1989, pp. 708–715.

[35] *Gerhard Werle*, Justiz-Strafrecht und politische Verbrechensbekämpfung im Dritten Reich, 1989, pp. 705 et seq.; *Kai Ambos*, National Socialist Criminal Law. Continuity and Radicalization, 2019, pp. 138 et seq.

[36] Art. 102 GG.

[37] BVerfGE 45, 187–271 (227 et seq,).

4. Private Law

a) General Clauses

In classes on current private law, there are also several opportunities to deal with the Nazi past. Perhaps the most important issue is the interpretation of so-called general clauses (Generalklausen) like "good faith," "good morals" or "important reason".[39] According to Nazi ideology, it was a violation of good morals to charge significant interest for a loan, even in times when credit markets were in trouble, such as during the banking crisis of 1931. To "redeem Germans from living in the slavery of loan interest" was one of the Nazi party's anti-Semitic slogans. According to Nazi ideology, it was considered unbearable for so-called Aryan landlords, shareholders or employers to adhere to contractual agreements that had been made prior to 1933. The anti-Semitic "race doctrine" constituted an "important reason" for expelling Jewish tenants from their apartments, Jewish shareholders from their corporations, Jewish employees from their work. The expelled tenants, shareholders and employees were forced to accept their expulsion in order to comply with "good faith" in the Nazi sense of the expression. It is completely unknown to many contemporary German jurists that adjudicating on loan interest[40] or the expulsion of shareholders for an "important reason"[41] still draws on judicial decisions of the Nazi period. Of course, immorally high interest rates are possible, there could be important reasons to expel shareholders, and so on. Still, it has to be emphasized that the codifications of the Wilhelminian Empire were characterized by the principle that contractual obligations must be honoured regardless of whether or not a party to the contract regrets concluding it. The political, economic, and social crises between 1914 and 1933 shook the principle of contractual compliance. When the Nazis decided to blame the Jews for all the world's evil, Jewish parties were to be deprived of their contractual rights.

In other fields of private law, there are more provisions that can be discussed in law classes as survivals of the Nazi past. In the volume at hand, Benjamin Lahusen provides us with much detail about current developments in the restitution of Nazi-confiscated property. Up until now, such questions have not been raised frequently in lectures on private law. In principle, restitution claims under the German Civil Code could be suitable instruments for resolving conflicts between the heirs of per-

[38] BVerfGE 45, 187 – 271 (262 et seq.).

[39] For an historical overview, see *Bernd Rüthers*, Die unbegrenzte Auslegung. Zum Wandel der Privatrechtsordnung im Nationalsozialismus, 9th ed., 2022.

[40] *Jan Thiessen*, Gute Sitten und "gesundes Volksempfinden". Vor-, Miss- und Nachklänge in und um RGZ 150, 1, in: Arndt Kiehnle/Bernd Mertens/Gottfried Schiemann (eds.), Festschrift für Jan Schröder, 2013, pp. 187 – 219.

[41] *Jan Thiessen*, Der Ausschluss aus der GmbH als "praktische Durchführung einer verbrecherischen Irrlehre" – eine Rechtsfortbildungsgeschichte, forthcoming.

sons dispossessed by the Nazis and today's possessors of the confiscated property.[42] In practice, the restitution claims may fail due to acquisition in good faith, acquisition in prescription, or expired limitation periods.[43] Nevertheless, it is useful to talk about the effects of such modes of acquisition and limitations in classes, and alternative ways to settle those conflicts.

b) Family Law

My last example deals with discrimination and diversity. In family law, there has been a provision allowing so-called 'matrimony for all' since 2017.[44] Homosexual partners can now get married, just like heterosexual partners. When this amendment to family law was discussed in the Houses of Parliament, only one representative reminded the Bundestag's plenary assembly that homosexuals had been criminalized by the Nazis.[45] It has been shown by the "Rosenburg" research project that high-level postwar officials of the Federal Ministry of Justice argued against decriminalization of homosexuality based on the same terminology that was used by Nazi officials.[46] The "nation's body" had to be protected against any "weakening" by the alleged immorality of homosexuals. Thus, while discussing matrimony for all in class, law professors should remind students that human dignity and equality were threatened by Nazi ideology with respect even to individuals' most intimate sphere.

VII. Legal Methodology

So much for the topic of possible changes to legal education. I would like to conclude with some remarks on legal methodology. As we have seen, one of the new aims of legal education is "to consider the ethical foundations of law and to promote the

[42] *Sophie Schönberger*, Was soll zurück? Die Restitution von Kulturgütern im Zeitalter der Nostalgie, 2021, pp. 40 et seq.

[43] *Sophie Schönberger*, Was soll zurück? Die Restitution von Kulturgütern im Zeitalter der Nostalgie, 2021, p. 53; *Benjamin Lahusen*, Von *hard law* zu *soft law* und wieder zurück? Die Rückerstattung nationalsozialistischer Raubkunst, in: myops 46, 2022, pp. 4–21 (8); *Thomas Finkenauer/Jan Thiessen*, Zur rechtlichen Beurteilung von Kulturgutentziehungen in SBZ und DDR, 2023, p. 88–90.

[44] Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts vom 20. Juli 2017, BGBl. I, p. 2787–2788.

[45] *Mechthild Heil* (CDU/CSU): "Die Verfolgung homosexueller Menschen hat in Deutschland über viele Jahre großes Unrecht und Leid verursacht – in der Weimarer Republik, in der Zeit des Nationalsozialismus, aber auch in der neu gegründeten Bundesrepublik und in der Deutschen Demokratischen Republik."; BT-Plenarprotokoll 18/244, p. 25223 (D).

[46] *Manfred Görtemaker/Christoph Safferling*, Die Akte Rosenburg. Das Bundesministerium der Justiz und die NS-Zeit, 2016, pp. 306 et seq.

ability to critically reflect on the law."[47] Needless to say, critical reflections on the law are always welcome to a law professor. Does the law achieve its purpose? What is just, what is unjust? Is there any certainty about the outcome of a lawsuit in advance? What is equal, what is unequal? Does the law only protect the interests of the rich? Justice, equality, and certainty can be described as ethical foundations of the law. But these principles are so fundamental that it does not seem to be necessary to emphasize them by amending the provisions on legal education. Obviously, "ethical foundations" are meant to be more than this.

When reading the legislative reasons for the amendment,[48] however, it is hard to discover which ethical foundations are meant. Ethical foundations of law shall be "accentuated" as a "part of the philosophical foundations of law".[49] Students and apprentices "are expected to learn to recognize and to deal autonomously with the legal and ethical conflicts that are potentially related to various legal professions." They have to achieve the "capacity to methodically reflect on ethical dilemmas at the intersections of law and ethics."[50] Neither the dilemmas nor the intersections are specified in any way. On the one hand, every legal provision will be based on certain ethical reasons. On the other hand, law and ethics are not the same. Once a legal provision has been enacted within a democratic procedure according to the constitution, it is not up to a judge or a civil servant, for example, to question the legal concept behind the law. It would be against the rule of law if judges or civil servants could replace a legal provision with their own ethical convictions. Apparently, the mentioned dilemmas between law and ethics are imagined to emerge if a legal provision has been enacted in a formally correct procedure, whereas the content of the provision is illegitimate according to material constitutional standards. In such a case, a judge can request a preliminary decision from a constitutional court. A civil servant, however, has to apply the positive law. The person affected by this decision can take legal action at the administrative or constitutional courts. Under the rule of law, the courts will decide according to the constitution. To teach constitutional values in legal education, however, depends on the constitution. If the constitution itself violates principles like human dignity or equality, legal education alone cannot provide an effective remedy. But jurists who have learned more about how democracy and the

[47] § 5a Abs. 3 S. 1 DRiG: "Die Inhalte des Studiums berücksichtigen die ethischen Grundlagen des Rechts und fördern die Fähigkeit zur kritischen Reflexion des Rechts".

[48] BT-Drs. 19/26828 p. 254; BT-Drs. 19/30503 p. 21.

[49] BT-Drs. 19/26828 p. 254: "Durch die Ergänzung des Prüfungszwecks um die 'ethischen Grundlagen' des Rechts soll die aktive Befassung angehender Juristinnen und Juristen auch mit den ethischen Grundlagen des Rechts als Teil seiner philosophischen Grundlagen stärker akzentuiert werden."

[50] BT-Drs. 19/30503 p. 21: "Studierende und Rechtsreferendarinnen und Rechtsreferendare sollen erlernen, die rechtlichen und ethischen Konflikte, die mit den verschiedenen juristischen Tätigkeiten verbunden sein können, zu erkennen und selbstständig damit umzugehen. Ihnen soll ein methodisches Reflexionspotenzial zur Behandlung ethischer Dilemmata an den Schnittstellen von Recht und Ethik vermittelt werden."

rule of law have been threatened in German history may defend these constitutional values when necessary.

Let me finish by emphasising that students and apprentices certainly do need specific knowledge about the roots of the current law. It can be taught and it can be examined. Perhaps it is even possible to draw lessons from the past.

Learning from History?

Current Developments in the Restitution of Nazi-Confiscated Property

By *Benjamin Lahusen*

The idea that one can learn from history has a long tradition and has materialized in various different shapes. In its most direct form, it says: History holds a pool of experiences from which guidance for action in the present can be gleaned. In the best case, history immunizes against committing a historical mistake again; in a less optimistic version, history at least allows to take precautions to ensure that certain events cannot happen again. For German history, the keyword "Weimar" receives much attention in this respect. I must confess that l am very skeptical when it comes to drawing certain "lessons" from Weimar, but that is not my topic now.

Not I would like to talk about a much less immediate form of learning from history, namely the German tradition of *Wiedergutmachung* – a typical German noun that is only inadequately translated as "reparation" or "retribution" –, and now *Wiedergutmachung* particularly with regard to cultural assets that were lost under the rule of National Socialism.

It is generally agreed that National Socialism was, among many other things, the greatest robbery in history. Between 1933 and 1945, hundreds of thousands of cultural assets, real estates and companies were sold, confiscated, expropriated, stolen under Nazi pressure in Germany and far beyond. An important goal of the Allies was the reversal of this looting, especially the notorious "Aryanisations". In 1947, Law No. 59 of the US military government was enacted, which pursued the goal of restituting "identifiable assets" to persons persecuted under National Socialism. By shifting the burden of proof and excluding acquisition in good faith, the law went a long way towards accommodating the victims of the Nazi regime. A very short summary: The loss of property of a racially or politically persecuted person was considered to be due to persecution – that is the presumption of confiscation – and was subject to restitution unless the later owner could prove the opposite, i. e. in particular was able to show that an appropriate purchase price had been paid and the persecuted person had the free right of disposal of that purchase price. In principle, the aim of the law was in rem restitution, so the return of the objects themselves, not compensation payments.

For the most part, real estate and companies were not difficult to "identify" because there are corresponding public registers. The fate of looted art collections, however, could often only be clarified after decades; much remains in the dark to

this very day. This was one of the reasons why some topics were once again put on the international agenda in the 1990s, when the political, but also the archival conditions for dealing with the past had fundamentally changed after the fall of the Iron Curtain. The London Conference of 1997, which sought an international settlement of the so-called Nazi gold, should be mentioned here, but then above all the Washington Conference of 1998, whose official title was "Washington Conference on Holocaust-Era Assets".

The term "assets" clearly goes beyond "cultural goods or cultural property". In fact, cultural property, which today is mainly associated with the Washington Conference, was, at the time, not the most important issue. For the German side in particular, the focus was elsewhere. It was the claims against German insurance companies that the German government was most concerned about, up to calls for boycotts against German companies that were threatening in the US at the time. "Cultural property", on the other hand, did not trouble Germany, on the contrary. In this respect, there was the general conviction that everything that could possibly be done had already been done, that claims against German institutions, were only possible to a very small extent – the German government was aware of a total of 21 claims – while, on the other hand, Germany itself could finally claim a huge number of cultural assets that Allied soldiers had looted in Germany after the Second World War. The German government thus believed that from reopening Holocaust era claims German itself would primarily benefit.

The German delegation thus returned from Washington with quite some satisfaction. The report about the Conference states that France, the Netherlands, and Switzerland had had a rough time, where the German policy of *Wiedergutmachung* had received only positive comments. Greece had complained about the 1944 forced bond, but no other country had responded to these accusations, and neither to the Eastern European mourning about forced laborers. Finally, the German delegation claimed to have succeeded in setting their own accent to the final declaration. Purportedly following the German proposition, the declaration says: "The Conference recognizes that among participatory nations there are differing legal systems and that countries act within the context of their own laws." That was some wort of national reserve, which the Germans had defended to protect good faith acquisitions under the German Civil Code.

From the distance of more than 20 years, it is difficult to say how many misjudgments the German government succumbed to back then. The official 21 cases have since been joined by thousands more. Germany has indeed recovered some cultural assets, but the problem of art looted *in* Germany (*Beutekunst*) has lagged far behind the number of art works looted *by* Germany (*Raubkunst*). The real boomerang, however, was the nation-state reservation that the German delegation was so proud of. In 1998, the German legal system already had a tradition of more than fifty years of restitution of identifiable assets and it was precisely this tradition that was now being resorted to again, albeit in a most distant manner. In order to examine

which object had a provenance that mandates its restitution old Military Government Law No. 59 of 1947 were reused, but not in the form of a law, or a decree, but as non-binding "guidelines", i. e. deliberately beyond the law.

This had several reasons for this. First was the recognition that legal recourse for Holocaust Era Assets was excluded anyway. According to German Civil law, all claims had to fail at the latest because of the statute of limitations. Furthermore, it was German federalism that stood in the way of a too far-reaching binding force, because the German states did not want to give up their cultural sovereignty on such a sensitive issue. And finally, one had, supposedly, learned from history: the reparation procedures of the 1950s and 1960s (*Wiedergutmachungsverfahren*) were generally regarded as unpleasantly bureaucratic and formalistic. Jewish claimants who between 1933 and 1945 had been forced to give German authorities intimate insights into their assets before their deportation or to finance the Reich Flight Tax or other special levies were forced in the post-war period, again by German authorities, to again submit detailed documents in order to obtain reparations. At the end of the century, after the Washington Conference, this mistake was to be avoided and for this reason, too, a deliberately unbureaucratic, unformalistic, non-legal procedure was chosen, which in the end was to lead to what the Washington Conference confidently called "just and fair solutions".

This historical lesson soon turned out to be a fatal misconception. The treatment of looted art quickly developed into a field with its very own rules. The historical questions dealt with by provenance researchers are extremely complex and require detailed skills in art history, economic history, and social history. In addition, there are difficult questions of legal history, such as the extent to which it can be relevant today whether a Jewish claimant included a work of art in his restitution claim in the 1960s. If there was no claim, can this be regarded as an incidental renunciation? Are we repeating the formalism of the past if we see it that way, or are we merely giving *Rechtsfriede* (legal peace) the recognition it deserves?

On the whole, therefore, we are dealing with a field in which a concentrated amount of expertise sits on both sides, law firms, historical institutes, legal departments, and which is subject to considerable moral pressure. But although we find a structure which is not the least of legal nature, the subject still eludes legal categories to this day; to a certain extent, it is law that refuses to be law, a law in moral disguise. It would be interesting to take a closer look at this observation. What would Max Weber say to all this? And can a modern constitutional state, following the rule of law, actually commit itself to a certain action while rejecting law as a form of action?

I will come back to that. Before that, the title obliges me to talk about "current developments" in the restitution practice. This is an assignment that puts me in a certain embarrassment. It is not easy to make general statements in this area because there is no general overview of restitutions of cultural property in Germany. Culture is a state matter, so the German states can develop their own standards and act autonomously according to them. There is no central register from which all restitutions of

the last 20 years, or at least the majority of them, could be taken. Data protection concerns are often raised, less often it is admitted that it is also a matter of not creating precedents.

At least it can generally be said that the issue is being taken seriously. While the first positions for provenance researchers at public institutions, which were created around the year 2000, were usually limited to two years, they are now permanent positions. No public institution can afford to do without provenance research anymore.

However, public provenance research is still very much dependent on individual cases. The pragmatic orientation of the subject and the frequent link to current restitution demands have given provenance research the character of a museum fire brigade: There's a fire somewhere, and the provenance researchers are called to put it out. The beginning and end point of their research is the disputed work. There is no institution that could make a system out of the uncountable individual cases, or that could at least set precedents.

I take this as an opportunity to say a few words about the Advisory Commission, for which I served as secretary. The Commission was set up in 2003 as a result of the Washington Conference as an alternative dispute resolution mechanism mentioned there. Unfortunately, the fear or bindingness was also present here. To this day, the Commission can only take action if both sides agree to it – the state can thus unilaterally withdraw from a dispute resolution mechanism that it itself has set up –, the Commission can only make non-binding recommendations, and finally, the Commission is obliged to assess only individual cases, which, as was expressly desired, should have no precedent for other individual cases.

This brought together all the misconceptions that had already inspired Germany during the Washington Conference: we would only have to deal with a few cases at most, the cultural sovereignty of the *Länder* should not be touched, and any hint of normativity should be banned. For a jurist, this is a strange construction: a court of justice that should not be a court of justice; individual cases that should have no connection to each other; precedents that are denied their precedent character. It fits in with all this that until a few years ago the Commission justified its recommendations with one or two sentences, i. e. it cultivated more or less the practice that was last known in Germany from the Imperial Chamber Court, which disappeared in 1806.

Finally, one current development emerges from these observations. The Commission has been criticized ever since it existed. This is unavoidable in an adversarial process in which much is at stake. Initially, the criticism tended to come mainly from the side of the claimants, who accused the Commission of being non-transparent, inefficient and lacking empathy; for about three years now, the opposite accusation has been that the Commission is too friendly towards restitution and has abandoned the Washington Principles to the detriment of the museums. One of the last decisions concerned a sale in New York in 1940, which the Commission regarded as a forced sale, as the Jewish owner had been imprisoned in a concentration camp and completely dispossessed. Just before the sale, he noted he was only selling

to finance his escape. This did not sit well with many museums and Feuilleton writers.

Whether these perceptions of the Commission's work are right or wrong is not my point. It is more interesting to see that the same premise is implicit in all criticism, namely that the Commission is indeed a court of justice for restitution issues. Historically it has never been such a court, nor is it supposed to be to this day. But public perception and public expectation are different. The project of drafting an area of law that should not be allowed to emerge into law under any circumstances does not seem to have worked out. The public, claimants, cultural institutions, expect that there is an institution that offers orientation, that structures expectations and generates commitment, and they criticize the institution by which these hopes are not fulfilled, no matter what the official mandate to this institution may be. Law, in other words, is supposed to be law.

This brings me to the conclusion: German restitution practice has actually learned from history. In a certain way, it can even be described as applied legal history. It takes sources from all epochs of the post-war period in order to gain a normative substrate which can be used to evaluate events and processes from the time of National Socialism. The historical lessons of the 1990s, namely that it was an excess of law that made *Wiedergutmachung* an unpleasant experience for those affected and that one therefore should resort to an excess of morality, have not proven to be sustainable. More morality at the institutional level does not necessarily lead to somehow more moral outcomes. And that is the lesson I would draw from today's perspective: The separation of law and morality seems to make good sense.

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