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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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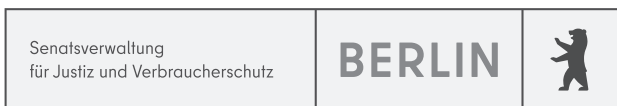
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Preface

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 Birkenenthal, 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

<i>Ignacio Czeguhn and Jan Thiessen</i> Dictatorship, Democracy, and Transitional Justice in Global Legal History – an Introduction	9
<i>Ignacio Czeguhn</i> The Berlin Administration of Justice after 1945 – Factual and Personnel Conti- nuities with the Nazi Justice System. Presentation of the Project and State of Research	15
<i>Vittoria Calabrò</i> Continuità e discontinuità nel passaggio dalla dittatura alla democrazia: la vicenda del giurista Gaspare Ambrosini	25
<i>Bronisław Sitek and Albert Pielak</i> From Sovietization to Democratization of Justice in Poland (1944–1997)	41
<i>Miho Mitsunari</i> Wartime Sexual Violence and War Responsibility: The “Comfort Women Issue” in Japan	69
<i>José Antonio Pérez Juan</i> The Amnesty Measures of the Spanish Transition	91
<i>Antonio Sánchez Aranda</i> Franco’s Regime. From Totalitarianism to Authoritarianism in its Repressive Model (April 1936–November 1975)	105
<i>Ramón M. Orza Linares</i> La transición a la democracia en los países de América Central	125
<i>Gerhard Kemp</i> From Apartheid to Democracy in South Africa	153
<i>Claudia Vanoni</i> Drei Jahre Antisemitismusbeauftragte der Generalstaatsanwaltschaft Berlin – ein Erfahrungsbericht	177
<i>Samuel Salzborn</i> Kontinuität, Tradierung und Transformation des Antisemitismus	185
<i>Jan Thiessen</i> The Treatment of the Nazi Past in Contemporary German Legal Education . . .	191
<i>Benjamin Lahusen</i> Learning from History? Current Developments in the Restitution of Nazi-Confiscated Property	207
List of Authors	213

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.