Directions and Developments in Criminal Justice and Law

TRANSITIONAL JUSTICE AND THE CRIMINAL RESPONSIBILITY OF JUDGES

Edited by
Claudia Cárdenas, Jaime Couso,
Florian Jeßberger and Milan Kuhli

Transitional Justice and the Criminal Responsibility of Judges

This collective volume delves into the criminal responsibility of judges under authoritarian regimes, with case studies from Germany, Argentina, and Chile, examining their involvement in criminal human rights abuses and failures to protect victims from such crimes.

Through comparative analysis, this volume offers insights into the legal and doctrinal challenges of prosecuting judicial involvement in crimes such as murder ('judicial murder'), kidnapping, unlawful detention, and torture. Bridging a gap in transitional justice and international criminal law literature, it focuses on the rarely explored criminal responsibility of judges beyond judicial misconduct. In doing so, it provides readers with a deeper understanding of judicial roles in authoritarian regimes and the complex legal standards involved in prosecuting such cases. It also informs the ongoing discourse on judicial accountability and the potential legal implications for judges in contemporary contexts.

Transitional Justice and the Criminal Responsibility of Judges is ideal for students, scholars, and civil servants or practitioners working in the domestic or the international criminal justice system.

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The ways in which crime is constructed in society is of time-honored interest to criminologists across the globe. The ever-changing landscape of what is criminal and what is not affects scholars and policymakers in their approach to the body of law defining prohibited conduct, how that law evolves, and the modes by which it is administered. Rule of law cannot exist without a transparent legal system, strong enforcement structures, and an independent judiciary to protect against the arbitrary use of power. Critical consideration of the mechanisms through which societies attempt to make the rule of law a reality is essential to understanding and developing effectual criminal justice systems. The *Directions and Developments in Criminal Justice and Law* series offers the best research on criminal justice and law around the world, offering original insights on a broadly defined range of socio-legal topics in law, criminal procedure, courts, justice, legislation, and jurisprudence. With an eye toward using innovative and advanced methodologies, series monographs offer solid social science scholarship illuminating issues and trends in law, crime, and justice. Books in this series will appeal to criminologists, sociologists, and other social scientists, as well as policymakers, legal researchers, and practitioners.

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In Collaboration with Cath Collins

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2025
by Routledge
4 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge
605 Third Avenue, New York, NY 10158

Routledge is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library

ISBN: 9781032746043 (hbk)
ISBN: 9781032746081 (pbk)
ISBN: 9781003470069 (ebk)

DOI: 10.4324/9781003470069

Typeset in Times New Roman
by Newgen Publishing UK

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Preface

This volume addresses a largely neglected aspect of transitional justice: the criminal responsibility of judges for their activity under authoritarian or totalitarian rule, and their involvement in crimes under international law.

The issue, its political relevance, and the complex theoretical and doctrinal questions that it raises, led the editors to convene leading experts to make contributions to this collective volume, which deals with relevant cases and cross-cutting topics. The experts gathered for this purpose include scholars with a background in transitional justice and international and comparative criminal law. They represent different legal systems and traditions including those of Chile, Argentina, Brazil, Germany, the Netherlands, Italy, and the United States.

Early drafts of the chapters were presented at a conference in Santiago de Chile in June 2023. The conference was hosted by Universidad de Chile and Universidad Diego Portales, and was convened by the editors of this volume jointly with Professor Juan Pablo Mañalich.

The result of this enterprise is an unprecedented volume that offers a comparison of the different patterns of judicial involvement in the crimes of a dictatorship that are discernible in the cases under study. The book also sheds light on how different legal systems have dealt with the phenomenon, identifying commonalities and relevant differences and evaluating the conditions under which criminal liability of judges could be asserted.

We are indebted to Professor Cath Collins, who provided invaluable support by language editing the volume. Julius Bayón, Luca Hauffe Charlotte Kallien, Dr. Hannah Ofterdinger, Micael Soares-Kamprad, and Hannah Welling helped with the copyediting of the manuscript. We are also grateful to Universität Hamburg, Universidad de Chile, Universidad Diego Portales, and Humboldt-Universität zu Berlin for providing funding for both the originating conference and this volume. Morwenna Scott, Commissioning Editor at Routledge, did an excellent job throughout the production process.

Santiago, Berlin, and Hamburg
June 2024
Claudia Cárdenas, Jaime Couso,
Florian Jeßberger, and Milan Kuhli

Abbreviations

Abl./KR Dtl. – Amtsblatt des Kontrollrates in Deutschland/Official gazette of the Control Council in Germany
AC – Appeal Cases
ACHR – American Convention on Human Rights
ADPCP – Anuario de Derecho Penal y Ciencias Penales
Advoc Q – The Advocates' Quarterly
AIDP/IAPL – International Review of Penal Law
AJIL – American Journal of International Law
Ala – Alabama Reports
Alberta L Rev – Alberta Law Review
All ER – All England Law Reports
ALR – Administrative Law Review
ALR – American Law Reports
Alternative L J – Alternative Law Journal
ARSP – Archiv für Rechts- und Sozialphilosophie
Art. – Artikel/article
BeckRS – Beck-Rechtsprechung
BeZG – Bezirksgericht/District Court
BGBl. – Bundesgesetzblatt/Federal Law Gazette
BGH – Bundesgerichtshof/German Federal Court of Justice
BGH GS – Großer Senat des Bundesgerichtshof/Joint Senate of the German Federal Supreme Court of Justice
BGHSt – Entscheidungen des Bundesgerichtshofes in Strafsachen/Recent Case Law of the German Federal Court of Justice in Criminal Law
BJCLCJ – Bergen Journal of Criminal Law & Criminal Justice
BT – Besonderer Teil
BT-Drs. – Bundestagdrucksachen; Documents of the German Bundestag
BVerfG – Bundesverfassungsgericht; German Federal Constitutional Court
Case W Rsrv L Rev – Case Western Reserve Law Review
Case W. Res. J. Int'l L. – Case Western Reserve Journal of International Law
Cato J – Cato Journal
CCL – Control Council Law

Cf. – compare
Chs. – chapters
CLP – current legal problems
CNI – Central Nacional de Informaciones/National Information Centre
CNPPT – Comisión Nacional sobre Prisión Política y Tortura/National Commission on Political Imprisonment and Torture
CNVR – Comisión Nacional de Verdad y Reconciliación/Chilean National Commission on Truth and Reconciliation
Colum. L. Rev. – Columbia Law Review
Cons – consideration
CSCL – Corte Suprema de Justicia de Chile
DINA – Dirección de Inteligencia Nacional; National Intelligence Directorate
DJZ – Deutsche Juristen-Zeitung
DOAJ – Anuario de Derechos Humanos
DtZ – Deutsch-Deutsche Rechts-Zeitschrift
Duke L J – Duke Law Journal
ECCC – Extraordinary Chambers in the Courts of Cambodia
ECHR – European Convention on Human Rights
EGStGB – *Einführungsgesetz zum Strafgesetzbuch*/Introductory Act to the German Criminal Code
EJIL – European Journal of International Law
ELR – Erasmus Law Review
F2d – Federal Reporter, Second Series
FRJ – Fraudulent res judicata
GA – Goltdammer's Archiv für Strafrecht
GDR – German Democratic Republic
GLJ – German Law Journal
HHRJ – Harvard Human Rights Journal
Harv L Rev – Harvard Law Review
HCA – High Court of Australia
IACtHR – Inter-American Court of Human Rights
Ibid – ibidem
ICC – International Criminal Court
ICL – International Criminal Law
ICRC – International Committee of the Red Cross
ICTR – International Criminal Tribunal for Rwanda
ICTY – International Criminal Tribunal for the former Yugoslavia
IJTJ – The International Journal of Transitional Justice
ILC – International Law Commission
IMT – International Military Tribunal
IMTFE – International Military Tribunal for the Far East
InDret – Indret: Revista para el Análisis del Derecho
IP – Ius et Praxis
JA – Juristische Arbeitsblätter
JCLC – Journal of Criminal Law and Criminology

JICJ – Journal of International Criminal Justice
JIPIT – Journal of International Political Theory
JOB – Judicial Officers Bulletin
JuS – Juristische Schulung
JZ – JuristenZeitung
KJ – Kritische Justiz
KritV – Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft
L&S – Langage et Société
LALS – Latin American Legal Studies
LaP – Law and Philosophy
Law Soc Rev – Law and Society Review
LG – Landgericht/District Court
LJIL – Leiden Journal of International Law
LRTWC – Law Reports of Trials of War Criminals
LSI – Law & Social Inquiry
MLR – Missouri Law Review
Neb – Nebraska Reports
New Zealand L Rev – New Zealand Law Review
NJ – Neue Justiz
NJLP – Netherlands Journal of Legal Philosophy
NJW – Neue Juristische Wochenschrift
NMT – Nuremberg Military Tribunal
NStZ – Neue Zeitschrift für Strafrecht
NStZ-RR – Neue Zeitschrift für Strafrecht-Rechtsprechungs-Report
NSWLR – New South Wales Law Reports
NWU L Rev – Northwestern University Law Review
NYU L Rev – New York University Law Review
NZLR – New Zealand Law Reports
OGHSt – Amtliche Sammlung der Entscheidungen des Obersten Gerichtshofes für die Britische Zone/Official collection of the judgments and decisions of the Surpreme Court of the British zone
OTP – Office of the Prosecutor (at the International Criminal Court)
Oxf J Leg Stud – Oxford Journal of Legal Studies
Polít. crim. – Política Criminal
Punishm Soc – Punishment & Society
QB – Queens Bench
QBD – Queens Bench Division
RChD – Revista Chilena de Derecho
REJ – Revista de Estudios de la Justicia
Rev. derecho penal criminol. – Revista Derecho Penal y Criminología
Rev. derecho (Valdivia) – Revista de Derecho (Valdivia)
Rev. mex. cienc. polít. soc. – Revista mexicana de ciencias políticas y sociales
Revista JCS – Revista de Derecho y Jurisprudencia y Ciencias Sociales.
RGBl. – Reichsgesetzblatt/Imperial Law Gazette
RIDPP – Rivista Italiana di Diritto e Procedura Penale

RIS – Revista internacional de sociología
RStGB – Reichsstrafgesetzbuch/Criminal Code of the German Empire
RW – Rechtswissenschaft – Zeitschrift für rechtswissenschaftliche Forschung
S Carolina L Rev – South Carolina Law Review
San Diego L Rev – San Diego Law Review
SBZ – Sowjetische Besatzungszone/Soviet zone of occupation
SCOTUS – Supreme Court of the United States
SCSL – Special Court for Sierra Leone
SJZ – Süddeutsche Juristen-Zeitung
SMU L Rev – Southern Methodist University Law Review
StA – Staatsanwaltschaft/German public prosecution
State Ct J – State Court Journal
StGB – *Strafgesetzbuch*/German Criminal Code
Temp L Rev – Temple Law Review
Mod. L. Rev. – The Modern Law Review
Touro L Rev – Touro Law Review
U Balt L Rev – University of Baltimore Law Review
UK – United Kingdom
UNB L J – University of New Brunswick Law Journal
Univ. Chic. Law Rev. – University of Chicago Law Review
UNWCC – UN War Crime Commission
US – United States (of America)
Va L Rev – Virginia Law Review
Vanderbilt j. transnatl. Law – Vanderbilt Journal of Transnational Law
VIZ – Zeitschrift für Vermögens- und Immobilienrecht
ZaöRV – Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZAP-Ost – Zeitschrift für die Anwaltspraxis-Ost
ZIS – Zeitschrift für internationale Strafrechtsdogmatik
ZJS – Zeitschrift für das juristische Studium
ZStW – Zeitschrift für die gesamte Strafrechtswissenschaft

Introduction

Jaime Couso and Florian Jeßberger

This book deals with the criminal responsibility of judges for their activities under authoritarian or totalitarian rule. It does so in a historical and comparative perspective, taking as its starting point the precedents offered by German and South American dictatorships and highlighting the global significance of the topic for scholarship in transitional justice and international criminal law. Establishing criminal responsibility for murder, torture, and unlawful detention committed or assisted through exercise of a judicial role – or, indeed, through failure to exercise such a role – poses highly complex legal and political questions. These often surface in contexts where transitional or post-transitional criminal prosecutions are being pursued or considered, in post-authoritarian or post-conflict settings.

The prosecution of actors other than military and political leaders or personnel has been somewhat neglected, in scholarship as in practice, since the 'renaissance' of international criminal law and the emergence of transitional justice as a distinct line of scholarship in the 1990s. Only recently has the issue of responsibility of judicial actors been propelled into the forefront of transitional justice scholarship due to several court proceedings in Argentina,[1] and to some extent in Chile,[2] building on previous case law from the post-World War II period. This explains why these precise settings are among the case studies by way of which this volume provides further treatment of the topic.

By comprehensively analyzing these recent developments and the substantive and procedural law questions that underlie them, the present volume aims to make a contribution to scholarly discourse on this matter by providing the wherewithal for a historical and comparative foundation. That the present topic cannot be reduced to a matter of mere legal history, nor treated as of importance only to South America or to Germany, is amply demonstrated by contemporaneous efforts to hold accountable judges from Iran, Russia, Turkey, and elsewhere for involvement in what may amount to international crimes.

1 From Nuremberg to Mendoza

The most prominent precedent dealt with in this volume dates back to what is usually referred to as the 'Justice Case', heard before a US Military Tribunal in

Nuremberg after World War II. Famously, during that case, the expression 'judicial murder' was used by the prosecution as a rationale for charging some defendants. The term was applied to killings that resulted from death sentences those defendants had handed down in application of aberrant criminal provisions, or in the context of blatantly unfair trials. As the Tribunal famously explained, "The dagger of the assassin was concealed beneath the robe of the jurist".[3] Since the Justice Case there have been other instances of criminal prosecutions and convictions, whether for judicial murder or for what might, in the same vein, be referred to as 'judicial torture' and 'judicial unlawful detention', perpetrated in dictatorial contexts. A feature common to all of the extant examples is that the defendants were found guilty not – or not only – of 'judicial perversion of justice', but also of the criminal consequences resulting from it. That is, they were treated as though they themselves had perpetrated the ensuing killings, torture, and kidnappings; and indeed the guilty verdicts that were handed down asserted that they did.

Seventy years later, and thousands of miles away from Nuremberg, in 2017 four former Argentine judges and public prosecutors were sentenced to life imprisonment as one result of a large-scale criminal prosecution, known as the '*megacausa*', carried out in the Argentine city of Mendoza. The grounds for the convictions were that the four had deliberately failed to prosecute secret police agents who had arrested, tortured, and eventually murdered several political dissidents; despite having had a legal duty to do so, and to protect victims whose deaths – it was asserted – they could have prevented. The decision set a historical precedent for South American transitional justice, entailing some political – and arguably legal – consequences for other countries. These include Chile, whose Supreme Court had granted the 2013 extradition of one of the four defendants to Argentina after finding the charges outstanding against him in Mendoza to also be punishable as murder under Chilean criminal law.

Over the course of the seven decades that separated Nuremberg from Mendoza, Germany once again saw judges were convicted of judicial murder, both in socialist East Germany (the German Democratic Republic, GDR) and in the reunified Federal Republic after 1990. First, GDR courts convicted dozens of Nazi judges and prosecutors for wartime actions similar to those the 'Justice Case' had dealt with. Later (after 1990) a handful of GDR judges were in turn convicted over some of the custodial sentences and death sentences they had handed down against Nazi war criminals. This second tier of prosecutions took as its basis the unfairness of the prosecutions and trials to which the former Nazi collaborators had been subjected in the GDR.

2 Between Immunity and Responsibility

The theoretical and doctrinal foundations of the decisions discussed here, by which judges were convicted of murder, kidnapping, or torture, are by no means settled matters. 'Show trials' present a relatively straightforward example, but in several other instances too, there has been criminal prosecution and trial of prosecutors and judges who acted on the basis of unjust, but applicable, laws to deliver or

uphold unfair convictions with consequences including imprisonment or even death. Moreover, judicial or prosecutorial failure to prevent killings, tortures, and kidnappings committed by state agents during dictatorships are absolutely not simple cases of criminal liability of the respective prosecutors or judges as perpetrators or aiders and abetters of these crimes.

In fact, this is a matter about which legal traditions tend to diverge. The Anglo-American legal tradition seems to abide by the principle of judicial immunity, at least where there is an actual exercise of jurisdiction. Accordingly, judges face, at most, the risk of being held liable for judicial misconduct. By contrast, other traditions – German criminal law among them – find it less difficult to ascribe criminal liability for killings or unlawful detentions, so long as the judge's decision can also be considered to have constituted judicial 'perversion of justice' (*Rechtsbeugung* (Germ.); *prevaricación* (Sp.)). Under such circumstances a defendant will be convicted for judicial perversion of justice in addition to – not instead of – murder or unlawful detention. In 2017, the Argentine court that heard the Mendoza '*megacausa*' case rejected a defense argument based on the first of the traditions characterized above: the defense had alleged that when judges, by omission, fail to prevent a killing, they do not commit murder but, at most, the crime of judicial dereliction of duty (an omissive variant of judicial misconduct). In its ruling, the Court instead seems to have favored the German tradition, just as the Chilean Supreme Court had done in its extradition ruling.

Criminal liability of judges and prosecutors for murder, torture, and unlawful detention also raises complicated issues of causality, mens rea, and modes of liability, especially in cases of failure to prevent these crimes. Asserting such liability could pose questions related to the weak or absent causal link between the justice officer's conduct and the result of the crime, depending on prevailing patterns of judicial involvement in criminal repression in each historical case. Thus, for example, factors such as the degree of proximity between courts and agents ordering or directly perpetrating a dictatorial regime's crimes, and/or the level of legal formality of the proceedings, would have to be considered.

Criminal intent or – more broadly – mens rea requirements could moreover be difficult to prove if justice system officers were not certain what would happen to detainees; were unaware of their actual power to intervene, or were afraid of the consequences of such an intervention for their personal safety, to a degree that would affect their capacity to act willingly. Finally, if judicial immunity is rejected, a defense of mistake of law could be raised if the defendant is not to be blamed for having mistakenly assumed that they were bound by law to prosecute and convict.

3 Novelty of This Research in the Field

Relatively little scholarly work has been done on this issue.[4] While previous works do exist, their main contributions are in identifying patterns of judicial involvement with authoritarian repression, and reflecting on the limited, but in some contexts nonetheless real, margin of action that courts might enjoy if seeking to use their power to prevent human rights violations.

The present volume offers a fresh analysis of all major legal issues specifically related to criminal responsibility for judicial involvement in murder, unlawful detention, and torture. It is also innovative in comparing the already well-known examples of the Nuremberg 'Justice Case', East German prosecutions of former Nazis, and reunified German prosecutions of East German judges and prosecutors, with more recent cases not previously discussed in legal scholarly literature in English (namely, Argentina's 2017 *megacausa* ruling, and recent rulings in Chile invalidating verdicts of dictatorship-era courts-martial).

In so doing, as mentioned above, the volume fills a gap in transitional justice and international criminal law scholarship by comprehensively analyzing these developments, and the underlying substantive and procedural law issues, for the first time.

4 Structure of This Volume

The structure of the volume reflects the aims and ambitions set out above. Immediately following this introduction (written by two of the editors, Couso and Jeßberger), Part I of the book presents case studies carefully selected for relevance. These deal, in turn, with the Nazi period in Germany; the East German Socialist regime; the 1976–1983 Argentine military dictatorship; and the Pinochet dictatorship in Chile. The chapters that make up this part are by Jeßberger and Kuhli (the Nazi era's 'NS-*Justizunrecht*'), Cornelius ('Waldheim Trials'), Werle and Vormbaum (East Germany's 'SED'-dictatorship), Palermo (the Mendoza '*Megacausa*'), Couso (the Pinochet dictatorship), and Accatino (self-representations by Chilean judges). Together, they offer a legal-historical account of the main precedents that case studies offer. Beginning with the Nuremberg 'Justice Case', which ushered in the contemporary history of criminal prosecution of 'judicial murder', the part goes on to study the re-emergence of this same issue that was brought about by the post-1990 prosecution, in democratic Germany, of judges from the former GDR. Next, it traces the beginnings of the 'internationalization' of this new chapter of transitional justice. This is exemplified first through the '*megacausa*' prosecutions in Argentina, and then by recent events in Chile. These include the invalidation of the historical decisions of dictatorship-era courts martial and the convictions of some of their members, along with demonstrable change in the attitude of the Chilean Supreme Court regarding its own historical responsibility for atrocities. Notwithstanding fundamental differences between the various German and South American settings and periods discussed in this part, 'dictatorship' is used across Part I as an umbrella term to denote the authoritarian or totalitarian rule under which the grave human rights violations at issue here took place. Germany, Argentina, and Chile have after all each faced – albeit in distinct historical circumstances and to a differing degree – the challenges entailed by (efforts to) hold judges or members of military tribunals responsible for crimes committed through the exercise of jurisdiction, or indeed through a failure to duly exercise it. Any reader concerned with this topic cannot but wish to learn more about these particular case studies, as they are the first to emerge after the half-century of oblivion that followed the Nuremberg

'Justice Case'. It was, precisely, in the three countries that are our focus in Part I that criminal prosecution of judges experienced a renaissance, built moreover on a moral rationale and doctrinal foundations akin to those that had led, five decades earlier, to the conviction of Germany's Nazi jurists. The fact that each of the three contemporaneous case studies has been relatively well researched in its own right (providing a solid point of departure for our specific interests) further strengthens our analytical framework, as does the fact that we are dealing with three countries that have a shared understanding of the foundations of criminal liability.

In its subsequent parts and their component chapters, the volume groups together three sets of studies on crosscutting topics.

Part II embarks upon identification and analysis of some of the complex theoretical and legal-doctrinal issues raised by the prosecutions and trials studied in Part I. In particular, it deals with factors that could limit the possibility of a conviction: judicial immunity, *res judicata*, and the 'blocking effect' of convictions for malfeasance. This part contains chapters by Combs (on an Anglo-American approach to judicial immunity), Wilenmann (judicial immunity in South America), Abraham (invalidation of judicial decisions in cases of farcical prosecutions), Mañalich (fraudulent *res judicata* and impunity in Chile), and Cárdenas (invalidation, under international law, of judicial decisions based on 'show trials'). As this part shows, while judicial immunity tends to be a strong defense in the common law tradition, the 'blocking effect' is a German device that for decades prevented German courts from convicting judges. By contrast, in South America *res judicata* was not allowed to impede courts in countries including Chile invalidating courts martial decisions and convicting some of their members. This came about owing, in part, to an important ruling by the Inter-American Court of Human Rights (introducing the doctrine now commonly known as 'fraudulent' *res judicata*).

Part III, in turn, features chapters by Martins (a normative approach to mistake of law as a defense in cases of judicial abuse of office), Castillo (a comparative approach to mistake of law as a defense for judges of rogue regimes), Viganò (judicial murder, torture and unlawful detention under Italian law), and Rojas (on the relationship between judicial perversion of justice and judicial participation in crimes against humanity). It continues the analysis of issues raised by the case studies at the level of criminal law doctrine. These include, first, to what extent a judge's reliance on the validity of the law applicable at the time can be raised as a defense, where such law is contrary to basic standards of human rights and justice; and second, whether it is sound to impute the consequences of judicial misconduct – killings, tortures, kidnappings – to the justice officer responsible for that misconduct.

The analysis of the legal-doctrinal issues raised by the historical precedents studied in the volume concludes with Part IV, which contains chapters by Hernández (responsibility of judges for their failure to prevent atrocities under Chilean criminal law), van Sliedregt (modes of responsibility applicable to jurists or judges from the perspective of international criminal law), Londoño (judges' responsibility for participation in a criminal association from a comparative perspective), Lorca (judges as criminal associates under international law, with a focus

on the Chilean case), and Geneuss (participation of judges in a criminal or terrorist association under German law). Even if justice officers are to be held liable for the consequences of their misconduct, some important questions remain as to the mode of liability that best fits their participation. This part accordingly examines whether such officers can be considered principals or just accomplices in relation to ensuing murders, tortures, and unlawful detentions. It further considers whether active intervention – such as unjustly condemning a victim to death – should be required, or whether omissive behavior suffices (e.g. failure to repeal an unjust conviction or to prevent active perpetration of the crimes by a third party). Prosecution of judges as either members of a criminal association or external accomplices of it is explored as an alternative, arguably easier, charge.

The volume ends with a brief summary and conclusion written by two of its editors (Cárdenas and Kuhli).

We conclude this introduction with one final note regarding terminology, an issue which every comparative (legal) study must, to a greater or lesser extent, confront. Legal terms often defy simple translation, since they carry their own 'thick' meaning and are loaded with intent and inference beyond the superficially plain meaning of the words that make them up. It is of course the preserve of each and every author of the chapters that follow to explain the specific meaning(s) they attach to any particular term or concept within the context of the individual topic or chapter concerned. Nonetheless, we think it helpful to offer the reader some preliminary orientation here regarding a number of the key words and concepts that appear frequently in the rest of this volume. This is not intended in any way to detract from the self-evident fact – which many chapters explicitly address – that these same terms may have their own specific meaning(s) across different jurisdictions.

- ***Judicial murder*** – as used in this volume, the term does not refer to a particular offence or mode of liability, but, in a broad sense, to the death of a person, when that death was unlawfully ordered or determined by any person invested with, or claiming to have, judicial or prosecutorial jurisdiction. This unlawfulness may derive either from the absence of genuine exercise of judicial or prosecutorial jurisdiction, or from serious procedural or substantive defects in the criminal law.
- ***Show trials*** *and* ***farcical prosecution*** – as used in this volume, the terms 'show trial', 'sham trial', or 'farcical prosecution' are used to denote a fraudulent imitation of a real criminal prosecution or trial, used as a cover-up or pretext for the illegitimate imposition of a punishment that had been decided before the initiation of the prosecution or trial. It can lead to judicial murder, where the outcome is a sentence of capital punishment.
- ***Judicial perversion of justice*** (*Rechtsbeugung* (Germ.); *prevaricación judicial* (Sp.)) – in what follows, the term refers to a criminal offence consisting of willful bending of the law by a judge or prosecutor. The offence presupposes that there has been an actual exercise of judicial or prosecutorial jurisdiction, but with a flawed application of substantive or procedural law. In the context

of authoritarian rule, judicial perversion of justice in criminal matters can lead to the unjust imposition of a death sentence or prison sentence. In most legal systems, however, provided that the judge or prosecutor is genuinely exercising jurisdiction they will not, as a general rule, later face attempts to hold them responsible for (judicial) murder or unlawful detention. Instead, they may find themselves accused of the lesser crime of perversion of justice, judicial misconduct, or malfeasance in office. Exceptions to this general rule can however be found: some legal systems allow, and have seen, conviction of a judge or prosecutor for (judicial) murder, unlawful detention, or other regular crimes. This may be without requiring any special conditions beyond (indirect) intervention in the crimes through the exercise of jurisdiction – as in the case of the Argentine judges and prosecutors convicted in the so-called *megacausa* – or only if the (arguably stringent) requirements for judicial perversion of justice are simultaneously met (this latter is the case in Germany: see discussion of the 'blocking effect', *Sperrwirkung*).

- ***Judicial immunity*** – this volume deploys this term to refer to a legal safeguard that judges and prosecutors enjoy, which prevents them from facing criminal responsibility for judicial acts (i.e., for a genuine exercise of judicial or prosecutorial jurisdiction) even if the outcome turns out to be unlawful. This legal safeguard, which aims to protect judicial independence, takes different forms in different jurisdictions, and may have a broader or narrower reach in each. It may prevent a judge or prosecutor from facing any criminal charges at all (absolute immunity); or may allow (for example) a criminal charge for bending the law or malfeasance in office, while ruling out prosecution for the unlawful death or detention of the convicted person (relative immunity). It can be virtually invincible, as is the case in the United States, or it can be susceptible to challenge, as in Germany (where, following what is often termed the 'Radbruch formula', it may be set aside if the judge has purposely bent the law, and the conviction was based on an unbearably unjust application of the law).[5] Jurisdictions also exist where no such immunity is granted in any form, as in the case of many South American jurisdictions: here, however, there are usually special procedural safeguards in place which in some manner shield judges from politically instrumentalized prosecution.

Notes

1 See Argentina's Judges' Trial, by the Tribunal Oral en lo Criminal Federal No 1 de Mendoza; Judgment of 20 September 2017, Sentence Nº 1718 Autos Nr. 076-M 2689; cf. also Chapter 4.

2 See Chile's 'Fundo El Toro' case, by Instructing magistrate Judge Álvaro Mesa Latorre, Judgment of 26 September 2019, Rol No 10.819 and Judgment of 10 February 2021, Rol No 10.819; cf. also Chapter 5.

3 *United States v. Josef Altstötter et al* (1947).

4 Perhaps the most comprehensive work in the field, and still relatively recent, is Hans Petter Graver's legal-comparative volume *Judges Against Justice: On Judges When the*

Rule of Law Is Under Attack (Heidelberg: Springer, 2015). This text addresses many of the legal issues raised by judicial complicity with atrocities at an exploratory level, thereby contributing to setting an agenda for further research that could deepen analysis on specific questions. Earlier works focus on selected historical cases, such as David Dyzenhaus' *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing, 1998), or offer a comparative political science analysis of the role of courts in dictatorships, such as Tom Ginsburg and Tamir Moustafa's edited volume *Rule by Law. The Politics of Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2008). Additionally, some works not available in English offer a deeper insight into the relevant legal issues in specific historical cases, such as Juan Pablo Bohoslavsky's *¿Usted también, doctor?: Complicidad de jueces, fiscales y abogados durante la dictadura* (Buenos Aires: Siglo Veintiuno Editores, 2015) or Ingo Müller's *Furchtbare Juristen. Die unbewältigte Vergangenheit der deutschen Justiz* (Berlin: Verlag Klaus Bitterman, 2015).

5 Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht' (1946) 1 *SJZ* 105, 105 et seq.

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Part I

Case Studies

Germany, Argentina, and Chile