1

Introduction

Transitional Justice (TJ) measures are a driver of regime change and regime consolidation. They can consolidate both democratic and authoritarian regimes. TJ encompasses a number of different legal, political or historical instruments and mechanisms and thus measures that are used by various political and civil actors with different political wills and intentions. Trials, truth commissions, reparations, apologies, vetting procedures, compensations, security sector reforms or amnesties are just a few of these measures. Different political, economic and social civil actors use TJ measures as tools or means for their political or social interests, to strengthen, weaken, enhance or accelerate processes and paths of regime consolidation of both democracy or autocracy. In this book I will focus on regime consolidation and TJ measures that are linked to this long-term process. Furthermore, TJ measures such as commissions of inquiry, trials, lustrations and vetting procedures, or memorials, are instruments for dealing with an unjust past and building a civic and political culture that is the foundation of a consolidated regime. However, the main focus on their possible mutual impact or – as I will further explain – spiral effect, will be that these measures can consolidate not only democratic but also authoritarian and dictatorial regimes. In this book I will test these assumptions on the case studies of the Federal Republic of Germany (West Germany) from 1949 to 1989; the socialist German Democratic Republic (GDR, East Germany) 1949–1989; Spain from 1975 until present; and Turkey from around 1989 until present. I will also look at the multi-causal interlinkage of TJ measures and regime consolidation after the German reunification in 1990 and thus accession of the GDR to the Federal Republic of Germany. To better highlight the differences for the reader between the Federal Republic of Germany (West) and the GDR (East), I will use the short forms of West and East Germany and unified Germany throughout the entire book.

In any regime type, political and civil actors can use TJ measures in political processes to delegitimise the previous regime and at the same

time strengthen and legitimise a new political regime or system of whatever type.[1] TJ measures support political actors and help citizens to 'practise' fundamental components of the new – ideally democratic – regime, such as respect for those people who are different because of their gender, ethnicity, and religion or otherwise. If used in an inclusive way to address all relevant victims and victimisers of the past, the measures can contribute to a more pluralistic society, which can be the basis for a democratic regime. TJ measures also allow citizens to become familiar with the rule of law during trials and tribunals, which show that human rights-based constitutions and law is for everyone, not just for the winners. So long as these measures are employed equally *by* and *for* all civil and political actors, victims and victimisers alike, they can be helpful measures for building and strengthening democratic regimes because they leverage the respect of others and the principle of fairness.[2]

After the end of an authoritarian, a dictatorial and violent regime, the society enters a period of regime change through transition. This period lasts until a new political regime is established, usually after a new constitution and its subsequent legal reforms and institutions are in place. If the regime aims to be democratic, this period is also called democratisation. The period of regime change is over and transition has passed when the political regime starts to consolidate and enters the period of long-term transformation.

But whether the new-born political regime turns into an authoritarian or democratic regime type depends on various factors such as economic development, constitutional and institutional setup, political spectrum and parties, political culture and many more – among which TJ measures are only one factor of many. During the short period of regime change political and societal actors determine the future of the subsequent medium and long-term political consolidation of that regime. Generally speaking, regime change takes between one to five or ten years. During these short periods, also called transition, the pathways to authoritarianism or democracy are mostly determined, i.e. by the way the constitution or electoral system is set up. But it also depends on how various actors and parts of society delegitimise the previous regime (from which they aim to be different by all means) and how they aim to legitimise the new political

[1] R. Teitel, *Globalizing Transitional Justice* (Oxford: Oxford University Press, 2014), pp. 11–18.
[2] W. Merkel and H. Puhle, *Von der Diktatur zur Demokratie, Transformationen, Erfolgsbedingungen, Entwicklungspfade* (Wiesbaden/Opladen: Westdeutscher Verlag, 1999), p. 167.

regime. This is where in the first years of regime transition TJ measures are influential to set the pathways of consolidation. The subsequent longer period of regime consolidation can be either democratic or authoritarian consolidation.

Authoritarian regimes are those political systems in which pluralism and human rights are limited, ideological claims for nationalism or patriotism are high on the agenda and civil participation is either suppressed or radically restricted by a political elite.[3] Trust in political institutions is low and free civic engagement either top-down organised or non-existent. Juan Linz and Alfred Stepan, however, argue that an authoritarian regime in its latest stage might have a robust civil society, a legal culture supportive of constitutionalism and rule of law – albeit not entirely free, but present and active. Opposed to authoritarian regimes, necessary steps to turn regime change towards democratisation would be the creation of the autonomy, authority, power and legitimacy of democratic institutions firmly based on civic engagement and civil society.[4] In the case of the latter, TJ measures can pave the way when used by civil society actors, because democratic regimes are characterised by constitutionally installed and granted human rights and equity norms, a pluralistic society and institutions that enjoy a high level of trust and civil participation. The political elite does not control all aspects of society and instead reacts and responds to civic engagement and participation in decision-making processes in a timely and adequate manner.[5]

I define consolidation of a regime referring to the general definitions of Linz, Stepan, Wolfgang Merkel and Larry Diamond. Linz and Stepan define a regime as consolidated if five interconnected and mutually reinforcing conditions are met. First, there has to be a free and lively civil society; second, a relatively autonomous and valued political society; third, there must be a rule of law and thus, for example, a constitutional court or other supervising legislative and judicial bodies, to ensure legal guarantees for citizens and human rights; and fourth, a state bureaucracy that is usable and under the mandate of the new democratic government. Last but not least there must be an institutionalised economic society.[6]

[3] W. Merkel, *Systemtransformation* (Oplanden: Leske & Budrich UTB, 1999), p. 36.
[4] J.J. Linz and A. Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore, MD: Johns Hopkins University Press, 1996).
[5] W. Merkel, *Systemtransformation*, p. 143.
[6] Ibid., p. 7.

Nevertheless, the authors make clear that a robust civil society is among the most crucial elements among these reinforcing conditions. They also differentiate four different types of autocratic regimes of which an authoritarian regime next to a totalitarian, post-totalitarian or sultanistic one is the most likely one to transit successfully to a democracy because it has stronger roots of civil society than all the other autocratic regimes.[7] In addition to this, Diamond argues that consolidation is most usefully constructed as the process of achieving deep legitimation when all significant political actors on an elite and mass or civil society level agree that the democratic regime is the best one for the society. Legitimation of a democratic regime is thus complete, if the attitude, behaviour and habits of citizens go beyond the normative constitutional commitment to democracy and when all relevant actors regard democratic laws, procedures and institutions as 'the only game in town'.[8]

In response to their definitions, an authoritarian regime lacks strong civil society participation. It is thus an active and free citizen participation that makes most of the difference between modern authoritarian and democratic societies and which can with the help of TJ measures be strengthened. In authoritarian regimes we usually find a segregated society in which ethnic, ideological, religious and social conflicts prevail. These segregations can even be enhanced through selective and exclusive TJ measures such as biased memorials and compensation programmes or show trials. This is due to a political leadership that is incapable of reconciling different social groups in the first years after the regime change. Nevertheless, regime consolidation takes place in two dimensions – the normative and behavioural –for both authoritarian and democratic regimes. These dimensions take place on three levels of society. The highest one is the political elite, the top decision makers, organisational leaders, governments, opinion makers, or economy. The intermediate one is the level of parties, organisations or civil movements; and the third level is that of mass public, and whether or not they believe in the democratic regime or not. At least two-thirds of them should support it, but 66 per cent is a more compelling indicator to show whether a regime is truly consolidated.[9]

[7] Ibid., pp. 56ff.
[8] L.J. Diamond, *Developing Democracy: Toward Consolidation* (Baltimore, MD: Johns Hopkins University Press, 1999), p. 65.
[9] Ibid., p. 68.

Merkel elaborates the concept of democratic regime consolidation further and draws fine lines between the different stages of consolidation, to which in this book I will draw back during the case studies. He, for example, confirms that a regime is consolidated when all social groups can fully and freely participate, democratic institutions have been established, and these institutions respond adequately to citizens' claims and needs. The regime is legitimised if the overall majority of citizens believe that the regime's institutions and procedures are better than any alternative regime or political system. But in order to get there, society and institutions have to undergo several stages of constitutional, representative, behavioural and attitudinal and civic consolidation, which I will later explain in more detail.[10] Whatever its defects regime consolidation faces during its consolidation it is legitimised if the majority of people believe it to be.[11] Merkel borrows most of his criteria for system legitimacy from Hannah Arendt, Karl Loewenstein and Otto Brunner and classifies aspects of power and governance into legitimacy of power structures, access to it, the monopoly of power, the structure, the claims and the way this power is executed. These criteria serve as assessment tools to differentiate between fully fledged democracies when moving towards or from defective or deficit democracies or weak regimes as opposed to authoritarian regimes, in which any of the abovementioned logic of democracy is perverted, absent or reversed.[12] Totalitarian regimes, such as the communist ones until 1989, lack any pluralism. Power is in the hands of a political elite and the rule of law is absent, for example.[13] This is a regime type with a power structure that leaves little room for TJ measures claimed by victim groups of the previous regime. My case study on the former East Germany will highlight this relationship also in reference to TJ measures. In an ideal democracy, however, executive, legislative and judicial power needs to be in full but independent control, acting according to general constitutional agreements made during the regime change. In contrast, an authoritarian regime consolidation is based on coercion and lack of free citizen participation. It is possible that the majority of people support the

[10] W. Merkel, *Systemtransformation, Eine Einführung in die Theorie und Empirie der Transformationsforschung*, 2nd edition (Wiesbaden: VS Verlag, 2010), pp. 40–54.
[11] W. Merkel and H.-J. Puhle, *Von der Diktatur zur Demokratie, Transformationen, Erfolgsbedingungen, Entwicklungspfade* (Opladen: Westdeutscher Verlag, 1999), p. 176.
[12] Merkel, *Systemtransformation, Eine Einführung in die Theorie und Empirie der Transformationsforschung*, pp. 22–23.
[13] Ibid., p. 24.

leadership and thus the authoritarian regime, but this is due to coercion and lack of alternatives as the case study of Turkey will show.

Throughout this comparative study, I will explore how the stages and pathways of regime consolidation interact and are intertwined with TJ initiatives, and whether these interactions relate to the civic trust and civic engagement that is eventually key to consolidation as will be shown in the case studies of West Germany, Spain and reunified Germany.

Throughout this book, I view TJ measures as tools, means, instruments or as 'glue' that links different actors with political institutions in a mutually reinforcing and thus spiral way. They link in a spiral way legal and political instruments; politics and mechanisms such as trials, commissions of inquiries and memorials. These measures can be used or abused by actors and their institutions for political purposes or individual interests. They can channel people's voices and claims or they can deny and silence them. As such, the measures themselves have no direct or mono-causal effect on regime consolidation. They stand in a cumulative causal relationship to regimes, and their effects depend on how diverse actors use or abuse them in their power games during regime change and consolidation.

My main hypothesis is that the likelihood in which political and civil actors are using TJ measures in an inclusive manner positively correlates with the quality in which regime consolidation takes place. A more inclusive use of TJ measures, in turn, helps legitimise institution building and regime consolidation in a democratic way. An exclusive and selective (ab)use of these measures leads the regime towards autocracy. Thus, throughout this study, I hypothesise that there is a cumulative causality and spiral inter-linkage between, on the one hand, the institutions put in place during regime change and transition; and, on the other hand, the use of TJ measures by actors. Both affect the degree of legitimacy that political institutions enjoy.

I compare different regime types in three different countries. My sample comprises three countries with three different regime types that moved from autocratic regimes to democratic or semi-democratic or back to authoritarian or totalitarian regimes. Taking Linz's and Stepan's concepts of autocratic regimes into account, one could argue that West and East Germany moved from totalitarian and post-totalitarian regimes after 1945 to a democratic one in West Germany and back to a totalitarian one in the East. Spain moved from an authoritarian one to a democratic one. And Turkey moved first from a sultanistic autocracy to an authoritarian and later to a democratic regime with major democratic flaws or deficits, and due to the lack of free civil society in recent years, it moved

back to an authoritarian one.[14] Nevertheless, what they all had in common was the clear commitment to normative democratic reforms at some stage in their development and they all had forms of statehood and state institutions on which they could build on and through which they later introduced TJ measures, such as trials, commissions of inquiry, amnesties, vetting or reparation measures.

The first case study in this book looks at the countries of West and East Germany since 1949 and the unified Germany since 1990; the second case study looks at Spain since 1975; and the third one studies Turkey since 1989. Each case study chronicles the countries' development in the decades since their regime changes after war or dictatorship and their clear formal or *de jure* commitment to democracy, but not yet de facto. I provide evidence that the use of TJ measures as political tools affects both autocratic and democratic regime building as well as those regimes' pathways to consolidation. In these processes, the TJ measures used (for example, commissions of inquiry, memorials, lustration, amnesties or trials) and the existing basic state, non-state and inter-governmental institutions (constitution, courts, parliaments, civil society, memberships in international organisations, etc.) mutually reinforce each other in an upward or downward spiral way.

I use the term 'regime change' to denote the change of relations of power during the transition period, for example through altering norms of institutions. This period is usually completed when a new constitution and the subsequent institutions are in place and start working and first or second election terms have been held. In the early stage of regime change the promise for justice by way of trials, tribunals, reparations, compensations or vetting procedures can be an incentive to set up the necessary legal and political framework, for example providing for truth commissions to come into force in the near future, to allow for domestic or international trials of past perpetrators, etc. It does not mean that all TJ measures ought to be applied in the first two to three years of transition. Most countries opt also for amnesty laws during this period, for reasons of stability and tranquillity, as Spain did. As long as they are not blanket amnesties, but rather conditional, such laws can be changed later but during early transition they can have a positive effect on the later consolidation process. Early regime change is a series of negotiations and compromises between actors such as political parties, victim groups,

[14] See examples given by Linz and Stepan, pp. 56ff.

victimisers and international organisations, who often have very different interests and resources. A regime is no longer in 'change' but starts to consolidate when new political rules are in place and widely adhered to. But the term 'consolidation' does not in itself say anything about whether this adherence is achieved by means of terror, pressure or through consent and persuasion.[15]

TJ measures are thus in this study, the independent variables in the hands of actors and society; and regime consolidation is my dependent variable. I argue that the mutual reinforcement between institutions and TJ measures over a longer period of time can lead either to democracy or authoritarianism and even totalitarianism. There is no 'autopilot' determining that dealing with the unjust or atrocious regimes of the past through trials, truth commissions or reparations will automatically lead a regime into democracy. Therefore, there is no mono-causal path from TJ measures to either democracy or authoritarianism nor to any other specific regime type. The difference is grounded in *the way how* powers and institutions use TJ measures for their political goals. If the pathway to consolidation is determined by a rule of law abating manner, by means of pluralism based on the sovereignty of the citizens, the likeliness that the regime becomes democratic is higher than if the pathways are arbitrary, repressive and exclusive towards interest groups or former elites which characterise authoritarian and totalitarian regimes.[16]

In general, I speak of a *multi-causal cumulative process* of mutual reinforcement of institutions and actors based on their attitudes, trust, behaviours and policies that result in regime consolidation of various degrees and kinds. Overall I argue that the main role TJ measures can have in this multi-causal cumulative process is the ability to delegitimise the previous (unjust) regime and to legitimise the new regime, be it democratic or authoritarian as illustrated in Table 1.1.

The spiral relationship between TJ measures and institutions can go in various directions. For example, if a country decides to prosecute crimes committed by the previous regime, and the domestic judiciary proves itself independent and impartial in its judgment of those on trials, citizens will become more positive about the effect that TJ measures can have. In this way, when institutions are strong and a TJ measure such as open and

[15] J. Brückner, 'Transitionasansätze' in R. Kollmorgen, W. Merkel and H.-J. Wagner (eds.) *Handbuch Transformationsforschung* (Wiesbaden: Springer VS, 2014), pp. 90–91.
[16] W. Merkel, *Systemtransformation, Eine Einführung in die Theorie und Empirie der Transformationsforschung*, p. 23.

Table 1.1 *Multi-causal linkage between independent and dependent variable*

Independent variable	⇨	Dependent variable
Transitional justice measures –***Historical***, *apologetic justice and memorials* –***Criminal***, *punitive, retributive justice* – ***Political***, *restorative and cultural justice* –***Silence*** *and amnesty laws*	Multi- and cumulative causal pathways Spiral interlinkages and effect	– ***Regime change and consolidation*** *(constitutional, representative/institutional, behavioural/attitudinal and civic)* – ***Democratic or authoritarian*** *regime consolidation*

fair trials succeeds, TJ can trigger demands from local actors for more such measures. Thus, it will increase citizen participation for more claims for trials or other measures.

However, TJ measures can also fail. For example, if imposed on a country through winner's justice or by foreign powers, trials have the potential to intimidate domestic claims and thus hamper justice. Alternatively, and as has been the case in many post-conflict societies, countries often pass on perpetrators to international courts and tribunals without aiming to take domestic action. In these cases, when domestic institutions are weak or otherwise incapable of putting perpetrators to justice, international, hybrid or special courts can fill the 'justice gap' for a determined time or for a single case until domestic independent judiciary is in place – ideally. The fact that these determined courts, such as the International Criminal Tribunals for the former Yugoslavia (ICTY) or for Rwanda (ICTR) take decades to close their final cases, also indicate the weakness of domestic political institution building and lack of independence, but not necessarily the imperial character of such international tribunals or courts.

Gunnar Myrdal convincingly described the mutually reinforcing relationship between measures and institutions, as well as the spiral effect already in the 1950s.[17] He showed how external incentives, such as initiative by international organisations, politics and civil society could affect

[17] G. Myrdal, *Rich Lands and Poor: The Road to World Prosperity*, World Perspectives Edition (New York: Harper and Brothers, 1957), vol. XVI.

circular and cumulative causation in regime change and consolidation. These causations spiral either upward or downward, having either a positive or negative effect on the development of the regime. Upward would be in his terms towards a democratic regime and downward development would be towards an authoritarian regime. According to Myrdal's concept, TJ measures can thus be seen as external incentives and interference mechanisms, and their effects depend on how actors use or abuse them. TJ measures can either prompt democratic institution building and consolidation or they can impede democratic development and strengthen autocratic and dictatorial government.

With the examples of East, West and reunified Germany, Spain and Turkey, I illustrate how this spiral effect has also been working in the context of TJ and regime consolidation. As I will explain in more detail throughout this book, my approach compares the 'most different' case studies, choosing countries that are most different in their histories, contexts and outcomes and yet all have used or misused TJ measures during the period of regime change and consolidations. The reader will see that there is no mono-causal or automatic link between TJ measures and regime consolidation. At best, TJ is only one factor among many others that have a long-lasting effect on regime transformation.

As mentioned earlier, of relevance to this comparison are the studies by Linz and Stepan because of their profound investigations of regime change and consolidation. They focus on rule of law and civil society in transition countries and identify five main factors that matter for regime consolidation and have remained the same for over decades, namely: (1) the role played by civil society; (2) political society and elites; (3) the rule of law; (4) the state apparatus and institutions; as well as (5) the market economy. And, as indicated earlier, Merkel has specified these different levels and stages of regime consolidation by identifying four stages of consolidation after transition which in addition apply to these case studies: first, the normative-constitutional; second, the representative role of actors that use or abuse the norms set in the constitution; third, the behaviour and attitudinal shift in society when all political and civil actors, private companies as well as civil society organisations (CSOs) adhere to these constitutional norms and play a fair game; and fourth, when civil culture is established because civil society interacts with politics through active participation, which is usually the case one generation after regime change.[18] Throughout this study, I will repetitively come back

[18] W. Merkel, *Systemtransformation*, pp. 145–146.