No Transitional Justice without Attribution of Criminal Responsibility

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1. In the phase following the end of an unjust regime, the critical question almost always arises whether the protagonists of this regime, the government and the top members of the military and security service – or also those at the very bottom end of the chain of command, or who, as eagerly obedient volunteers, were more or less willing to carry out their orders and abused, raped, tortured or murdered their victims – ought to be held criminally responsible. In view of grave violations on the scale of a genocide or a crime against humanity, this question may not be, at least not *de lege ferenda*, as urgent today as it was after 1945. With international criminal law and the international criminal court, the punishment of such crimes has become legally applicable internationally. Yet the question remains critical in view of the numerous other crimes a regime commits towards its own population. The objection that such criminal procedures would violate the human right to protection from retroactive criminalization and punishment of a behavior that was permitted or required under the unjust regime, loses its persuasive power in view of the increasing trend towards international positivism of human rights and their universal global recognition – whether this objection ever had persuasive power when it comes to retroactive punishment of self-privileging, state-reinforcing criminality. More convincing is the objection of the threat to peace that this would pose: the punishment and criminal prosecution of those who belonged to the past unjust regime, who supported it or in some way profited from it, and who now fear not merely the loss of their privileges and advantages, but also, and even more so, all the disadvantages that accompany a public criminal procedure and the threat of punishment. One cannot dismiss out of hand the claim that, in the transition phase, amnesty and forgetting may be the appropriate means to avoid new social conflicts that risk destabilizing the newly erected liberal-constitutional order.

2. Meanwhile an insight has gained favor that the choice between punishment or amnesty is possibly amiss, or at least it obfuscates the view of other possible and less risky ways of coming to terms with past injustice. Fixating on the act of punishing, of consciously and intentionally inflicting an evil because of a wrong, as well the accompanying fixation on the purposes of the

punishment, fails to recognize that for most of those involved, the victims and their relatives more than anyone, it is frequently about something other than experiencing how their tormentors suffer the evil of a punishment. Even if the factual needs for compensation cannot be denied, this is not a legitimate aim of public punishment. And in view of the different subjective shape of these needs, they can hardly be objectified in the form of punishment that follows the principle of equality. It is possible that the need for compensation and the corresponding evil of punishment express – albeit in a distorted manner – what could be reached, perhaps much more efficiently, by means of a different path and in a different manner. In phases of collective transition much more than with individual everyday crimes in societies based on the rule of law, the need for a clarification of the facts, of the committed crimes, of the circumstances and of those involved, as well as the public determination of injustice and guilt that follows, is often greater than the need for their punishment. It is possible that thereby the recognition as victim of an unjust regime is already reached and that the punishment does not add anything more than a conventional symbolic reinforcement.

Furthermore, the prospect of being an accused in a criminal procedure prompts those affected, purely out of need for self-protection, either to flee or to resort to measures to suppress evidence and, when these do not help, to pursue strategies to neutralize the extent of injustice of the crimes or to deny one's own involvement or individual responsibility. Corresponding to this is the (human) right of the accused, as a subject of the procedure, to not have to contribute to his or her self-incrimination (*nemo tenetur se ipse accusare*). This is especially the case under constitutional procedural conditions, the observance of which is indispensable in the transition phase because of their exemplary effect on the legal consciousness of the population. In this case the accused cannot be denied the possibility of bringing to bear for him or herself all the rights of procedure that he or she is entitled to, right up to the limit of what is permissible. The aim of the constitutional criminal procedure to investigate into the truth of the accused deed must not triumph over the right to fair procedure. The individual motive to avert or minimize an imminent punishment has here in law its legitimate place in remaining silent. For this reason, in many transition states like South Africa or some countries in Latin America, alternative procedures have been developed and practiced, which pull the accused out from the conflict zone between clarifying the truth and avoiding an evil of the punishment. So-called truth commissions are, or at least purport to be, directed towards opening the way – for the victims and their relatives and the public together with the accused – to clarifying the historical events and of releasing the accused, who is at the same the main "witness," from the threat of punishment, or at least of lessening this threat that prevents him or her from cooperating.

3. These examples of alternative procedures are justified with the insight that clarifying the historical wrong for all those directly and indirectly involved and affected is more important than the punishment of the perpetrators. This includes, however, the public determination of the wrong, which relies on clarifying the events, as well as the justified attribution to the persons responsible, including a judgment on the nature and scope of the accountability. The reasons for this are principally normative in nature. They may be disclosed negatively from the probable

consequences that would arise from neglecting to establish the facts, the wrong and the ascription of responsibility. Three case configurations in particular can be observed where public clarification is neglected:

(a) A possible consequence for the victims and their relatives is the propensity, known from psychological trauma research, to attribute to oneself what one has suffered as the consequence of one's own wrongdoing, that is, to look for the guilt in oneself. Pain, suffering, or the loss of relatives appears then as one's own mistakes, as the consequence of one's own naivety, ignorance, stupidity, which one could have possibly avoided. Also fatal is the constant doubt whether it would not have indeed been better to have accepted the unjust regime, to have believed in its legitimacy, to have gone along with or even played a part in one's crimes in order to protect oneself and those closest. To the extent that during and after the transition phase no public collective narrative develops, which identifies the crimes of the regime for what they are, that is, as a wrong, the victims are left only with the possibility of processing what was suffered individually each in his or her own biography. The more serious the traumatization, however, the less successful this is. There is an accordingly high risk of the victims being left with feelings of guilt, self-doubt and loss of self-confidence, as well as mistrust towards others. In the public sphere, those affected are perceived for the most part as failures, notoriously as unsatisfied troublemakers that cannot, and do not want to, come to terms with their fate.

(b) Instead of recognizing the crimes publicly as a wrong that needs to be answered for, a collective narrative that interprets the crimes as misfortune or fate, against which ultimately no one could do anything, has been favored especially in the past. A common feature of such a narrative is the extensive neutralization of individual responsibility of the perpetrators. The authors of this narrative often fully concede that the crimes were wrong, but these crimes are presented at the same time as unfortunate and unavoidable measures against even greater dangers (the argumentation model of the "lesser evil"). Responsibility is shifted to hostile collectives (other nations and governments, ethnicities, minorities, ideologically blinded forces and powers etc.), forces presiding over humans, or to other perceived states of emergency and necessities that supposedly left the perpetrators with no other choice. Whoever interprets history as a playing field of a higher, divine providence, as a religious Last Judgment, as a fight of survival imposed by nature between nations, peoples, ethnicities or races, that is, as a necessary fight between progressive and regressive classes through a law-governed course of history, which necessitates on the other side unusual measures to combat the ideological enemy ("cold war") – to him or her the single crimes appear at most as unfortunate events. They are measures necessary in a state of emergency to avert dangers that cannot be averted by other means, or as (mostly preventive) actions of defense against, for their part, unlawful attacks from external and internal enemies. For the victims this means either one of two things: either they must, as with the first option, ask themselves whether they did not, in this struggle of fate and survival, behave badly or stand on the wrong side, or else they must interpret their own trauma as bad

luck and misfortune, which no one can do anything about, and the consequences of which they must overcome by themselves in their own life history. If politics is fate, then the victims are merely victims of fate and not the victims of politically (and legally) responsible persons. Also here the only escape remaining is to come to terms retrospectively with the fact that something happened to someone, and which simply happened in the past, and that is that. In the transition phase this can result in the widespread attitude of mistrust, resignation and helplessness in the face of political decision processes.

(c) Parallel to the first two consequences just mentioned are transition phases in which a failure to provide public clarification of a past wrong is often also characterized by claims of injustice and ascriptions of responsibility taking place, as it were, in the private sphere of those directly or indirectly affected. Failure to provide clarification cannot prevent the victim and his or her relatives, those systematically disadvantaged and discriminated against, from becoming active themselves in order to take the investigation of truth – which means then primarily "their" truth – into their own hands. The less these spontaneous and, as it were, wild ascriptions can face public critique and inter-subjective rational argumentation – either because the past is collectively hushed up or because public utterances about past crimes are not heard, contested in their truthfulness, or because they are systematically suppressed or rejected under threats – and the more often the authors are slandered, their credibility questioned and they themselves not recognized as serious participants in a public discourse about the past, the greater is the danger that the widespread ascriptions that developed hidden away assume irrational traits. Thus conspiracy theories develop: secret knowledge about hostile agents, minorities, elites, groups with secret identities and their own malicious political agenda, supposedly operating in a clandestine manner and which are not held responsible for the past crimes. Moreover, it is claimed of them that they are now and would continue into the future to follow undetected their evil intentions, so that one must remain watchful and mistrusting. If such conspiracy theories along with the "outstanding accounts" that often accompany them are handed down to the next generations, this can become a long-term source of new conflicts and sudden collective aggressions, especially if, in transition phases, economic and social problems among the population must be overcome. Collective narratives of this kind remain in the memory a long time. They shape mentalities and attitudes over decades or even centuries ("hereditary enmity"), and are invoked again and again when externalizing clarifications and scapegoats are sought for current social burdens. Then often only a minor provocation is sufficient to trigger wars, extreme acts of violence or pogroms.

4. By contrast, a public determination of the past wrong as well as the justified ascription of responsibility in formalized and fair procedures, works in at least three different directions: One, the victims and their relatives are not required to interpret the crimes suffered as their own mistakes, but rather as mistakes for which others are responsible. Correspondingly, the

perpetrators can no longer neutralize their crimes with the argument that the victims were themselves guilty. For society this means that it too is not collectively responsible for the crimes. Two, the victim must no longer quarrel with his or her fate, interpret and cope with his or her injuries as misfortune, bad luck or destiny, as an unavoidable catastrophe in uncontrollable upheavals of history. Rather, these injuries are recognized as a publicly determined injustice that someone is responsible for. Thus the perpetrators are deprived of the chance to neutralize their crimes by means of quasi reasons for justification and apology in the way described above in thesis 3b, and to seek instead public recognition from the citizens in society. Finally, with the public determination of injustice and guilt, it is made clear to victims and perpetrators, and normatively reinforced, that society does not share in these asserted justifications, that it recognizes as such the injustice manifest in the crimes, and does not tolerate but rather rejects it. Without this rejection, society would share in the (unjust) convictions that found expression in the past crimes, that is, society would accept them also for its own normative order instead of marking them as "shared wrongs" in solidarity with the victims. The claims to validity of the crimes for the norms of the unjust regime require public opposition – and this all the more so, and more thoroughly, with state-reinforced crime than with everyday offences. What is opposed is not merely the assertion of validity made implicitly by the perpetrators, but also the asserted legitimacy of their normative source. What is negated is not merely the norm that is in violation of human rights, but also the claim of legitimation of the authority to be able to impart legal validity to the norm, and that means to make the norm binding. The determination of the wrong must be complemented by the determination of guilt, because otherwise the neutralization that is widespread precisely in cases of government criminality of not having been able to act differently as a perpetrator and therefore of not having been able to do anything for his or her offense, must equally be rejected by society. Opposing this assertion that aims at an excuse or the elimination of guilt is necessary in order to make clear how much freedom was available to the individual and to what extent the wrong is the result of a lack of individual motivation to avoid it. Only in this way can it be guaranteed, moreover, that communicating the objection to the asserted validity of the norm that conflicts with human rights is also performatively directed specifically to the one responsible for this assertion of validity; that is, it is directed to the one who has committed him or herself publicly to the assertion in committing the crime. (And also only in this way is it possible to unsettle the rest of the population in its trust in the validity of norms conforming to human rights).

5. Especially the last-mentioned necessity is controversial – the necessity of establishing alongside the injustice also the guilt and responsibility of the persons involved – and it seems questionable in view of the close link between guilt and punishment. For the victims, due to their weakened or missing self-confidence as a result of the suffered crimes, it is necessary to be told that it is not they or nobody who is responsible for the suffered injustice, but rather identifiable persons, which includes a clarification of the degree and scope of the accountability. But the determination of guilt belongs to the public clarification of past crimes in transition

phases for another reason. This reason does not lie immediately at the center of criminal attribution and determination of guilt, but rather in the presuppositions of collective political autonomy, as it assumes shape in *democratic* constitutional states.

6. The three negative consequences described in thesis 3 of failing to provide a clarification have the following in common: They all presuppose a strong motive for the citizens to remain politically passive in the transition phase and, after the consolidation of the democratic constitutional state, to withdraw from the public sphere, to not participate in shaping the political opinion and will, to observe their basic and human rights only with reservation or exclusively with a view to personal economic interest. In more extreme cases this may even mean, beyond the usual and necessary degree of mistrust in democracies towards political institutions, associating with conspiracy theories and their political ideology, which often aims at the abolishment of the democratic constitutional state. If such attitudes are also widespread in modern democracies, which enjoy a long tradition of robust political autonomy and stable democratic institutions along with the respect for human rights, then there is, in contrast to transition states with a history of injustice, a striking difference. In the latter, political (self) marginalization wholeheartedly seizes the citizenship status – the holders of this status cannot form a self-conception, according to which they are conferred an ability and a power which makes them into the responsible authors of their own legal and constitutional order. Effectively deprived of power through mistrust, fear, traumatization and loss of self-confidence, they are not capable of fulfilling the citizenship status; they shy away from raising their voices in the process of shaping public opinion and the will. As traumatized victims of a political fate, of a mistake with catastrophic consequences arising from their own fault, being at the mercy of overly powerful elites who have appropriated the prerogative of interpretation of past crimes, they trust, during and after the transition phase, neither their voice nor the persuasive power of the reasons they have brought forward. It is pretty much irrelevant whether they are excluded from the democratic public sphere or whether they withdraw from it on their own accord – the factual exclusion is in both cases the same. If this supposition is accurate, that the failure to determine injustice and guilt in view of a collective past of injustice has such effects of civil deprivation of power, then no self-conception, which is the basis of the democratic public sphere and politically autonomous legislation, can develop.

7. Citizenship status in a democratic constitutional state designates an ability that belongs to the person as legal person. It expands his or her natural ability to act into a legal ability, inseparably tied to the person, to shape and change law. In this way Georg Jellinek had defined the subject-public law in contrast to subjective private law. Admittedly for Jellinek the ability was still dependent on a decree of the state, where its civil significance is given clearest expression – in

the *status activus* or civitas (*Zivität*) in exercising political rights. Erhard Denninger is to be credited with having expanded Jellinek's status theory with the *status constituens*, which makes the citizens as holders of political rights, especially of the right to freedom of expression, into agents of the state constitution, because it is their task and basic right to generate the state and its legal order in the first place and also to further develop it in an ongoing process in the dynamic interpretation of its constitution. Only then do they understand themselves in the sense of the idea of political autonomy not merely as addressees but also as authors of their laws, that is, as co-legislators.

8. Corresponding to the legal ability, as it is pronounced in the *status constituens*, is a historical political experience from which the consciousness of a factual political ability originates. This first breathes life into the legal ability by generating not merely the motives of its use, but also and especially the self-confidence that is acknowledged between subjects to not fail from the outset or to be rejected in the use of the legal ability. Without a consciousness of ability, the citizen cannot acquire the performative power that he or she requires in order to actually make use of his or her rights. In transition states, this is the not so seldom experience of a self-initiated and induced revolution, of a successful elimination of an authoritarian unjust regime. In the case of a peaceful revolution, this is the experience of the continuously growing political power, under the effect of which the power of the unjust regime, which is based on violence, disintegrates. This is not merely the experience of the individual political power to act, but also and especially the experience of the communicative power that arises from the cooperative action of individual agents, as Hannah Arendt described it in reference to the example of the American Revolution. It is this experience of communicative power, which consists in raising one's own voice in a public auditorium among equals, alongside the experience of power that results from the convincing capacity of one's own arguments in the face of equals. The successful critique and elimination of an authoritarian regime as well as the generation of a new democratic constitutional state, whose constitution and legal order is generated by the communicative cooperative action of equal persons, deciding to form an association of free and equal legal fellow citizens, makes available to the agents involved an individual consciousness as well as a commonly shared consciousness of their own capacity.

Christian Meier has employed "consciousness of ability"[1] (*Könnens-Bewusstsein*) as one of the key concepts for the understanding of that singular historical process, which led in ancient Athens to the emergence of a radical democracy. Without such a consciousness of ability, the legal ability, the *status constituens*, which is realized especially (but not exclusively) in the political rights of participation, would remain ineffectual.

[1] Christian Meier. *The Greek Discovery of Politics*. Translated by David McLintock. Cambridge, Massachusetts: Harvard University Press, 1990.

9. If the public determination both of injustice and guilt in view of the crimes committed to the victims of an unjust regime is denied to the victims, and if this induces the consequences described above of (self-) exclusion, then this experience does not allow a consciousness of ability to arise in the first place, or else it immediately destroys anew the consciousness that is germinating in the revolutionary phase of transition. The same citizenship status that remains – for the victims marginalized in this way – a pale garment that is much too big for them, which they cannot fill and which they carelessly discard as soon as a new ideology or conspiracy theory reveals to them the secret causes of their fate. In this respect, the public clarification of the collective past of injustice is a functional precondition for the citizens to form a collective political self-conception, who understand themselves at the same time as addressees and authors of their laws.

10. The relation between the *status constituens* and the consciousness of ability, which fills it out with the criminal reprocessing of collective injustice, extends beyond, however, the functionality substantiated in thesis 9. The consciousness of ability is not merely a necessary condition for the *status constituens*, procuring for the holders of the legal competence for political autonomous legislation also the factual capacity of filling it out. Rather, the legal competence for co-legislation includes beyond that, the *accountability* of the co-legislators for their action, which is constitutive and legislative for a legal community in general. Co-legislators are not merely capable of legislating constitutions and laws in the legal sense, but are also responsible for its execution. They are not merely the "we" that legislates for itself a constitution (and thereby constitutes itself as a composed "we"); rather, the constitution that is given from a "we" for this "we" is also "their" or, from the internal perspective of the one making the constitution, "our" constitution. This accountability accompanies conceptually the legal ability as the power to be able to posit, change and end legal relations. It is the flipside of the legal capacity to act: Legal ability and legal accountability condition and complement each other at the same time. To whomever posits, shapes and changes law are also attributed the consequences that this brings with it. Whoever wants to posit, shape and change law also wants to have the changes that are thus brought about attributed to him or her.

Now the accountability for the consequences of the use of the competence, which is inherent to the legal competence, is based analogously on a consciousness of ability like the legal competence itself. We not only give ourselves credit for the competence because we have access to the corresponding consciousness of ability, but we also make ourselves responsible for the consequences of the use of this competence, because we have a consciousness of ability. Without a factual ability, without the capacity for action and attribution, we would have neither competences nor accountabilities. The legal ability of the *status constituens*, the civic role of the co-legislator, thus necessarily includes a reciprocal understanding as persons who are capable of action and attribution, that is, who are responsible. Without this reciprocal understanding, the

right to co-legislation could not at all in fact be exercised. Now, in the procedures of a politically autonomous self-legislation, the co-legislators are empowered and responsible authors of their laws. But they legislate themselves their laws with a view to their future role as *norm addressees*. Since they are, with regard to their capacity for action and attribution, nonetheless in the role of the author the same person as they are in the role of the norm addressee, they must maintain their self-conception as responsibly acting persons in both roles. They thus legislate for themselves their laws with a view to their role as responsible addressees capable of action and attribution. Whoever is co-legislator has no alternative but to see him or herself in the role of the norm addressee as a responsible legal person. And it would be a contradiction, with the competence as co-legislator, to make use of and claim a capacity for action and attribution, which one would want to contest in the role of a norm addressee. The accountability of all co-legislators for their legislation is reflected, as it were, in the accountability of the norm addressee. The one cannot be had without the other. Only when this relation is made explicit can one see that the co-legislators themselves also define the nature and scope of their accountability. The demands they place upon themselves in the role of norm addressees in view of observing norms under certain internal and external circumstances, that is, their willingness and capacity to observe norms they expect of each other, cannot be given in advance, but rather must be determined autonomously. The concept of criminal guilt, along with its negative conditions for exonerating one from criminal responsibility, for pardoning, and for unreasonable expectations of behavior in accordance with the norm – along with the unavoidable lack of knowledge of injustice – articulates the self-conception of democratically autonomous citizens under given historical conditions.

11. If there is, alongside the functional also this internal relation between the self-conception of citizenship and general legal and specific criminal accountability for the observance of norms, then this sheds new light on the initial question concerning the function and meaning of the determination of injustice and guilt for *transitional justice*. Expressed in the extreme: Citizens of a democracy, which understand themselves as co-authors of their legal order, perceive also their own history and with this their own past of injustice from the perspective of the consciousness of ability: *seeing like a democracy*. An interpretation of history as fate, bad luck, providence, as a struggle of higher powers, as realization of the secret plan of a conspired elite, as unrelenting necessity or result of decisions with no alternative, contradicts diametrically this self-conception. Whoever makes history in exercising a legal capacity with a consciousness of ability – to him or her, history cannot appear as pure fate or as a passive work that is to be tolerated, of ruling powers that cannot be criticized and controlled.

12. Does it now follow from this, however, that the democratically autonomous view, which is already shaped by the consciousness of ability, of one's own history with its past of injustice, must necessarily lead to a situation in which only individualized agents can be found, acting individuals who are responsible for everything? Must it lead to a situation in which there are no longer any excuses on hand, and agents cannot bring to bear any exonerating circumstances against the reproach of guilt? Then the attempt put forth here would end in a paradox: If politically autonomous legislation and the legal capacity for action and attribution correspond with one another by means of the legal ability and the factual consciousness of ability, then this applies *precisely not* to such societies in the present and the past in which there was no democratic but rather an authoritarian legislation. Indeed, in authoritarian legislation the ability and the factual consciousness of ability lay with the single person of the dictator or the small leading elite, but not with the addressees of legislation, with the population. Here an ongoing exchange of roles between the author and the addressee of legislation was not possible. No one, then, could be made responsible for the committed crimes under such conditions, or else the democratic view of the past of injustice leads to a distorted and false picture of the legal and real possibilities of action in a dictatorship. And is it not indeed a hallmark of authoritarian regimes that they make their victims responsible for everything in order to thereby justify the crimes committed against them?

These objections would only apply, however, if the concept of a responsible legal person – the flipside of the competent legal person – which the citizens reciprocally ascribe to each other both in the role of co-authors of legislation and in the role of norm addressees, would include such an absolute accountability without excuses. But that is not the case. Between both extremes, of a person who is responsible for *everything* and a person who is responsible for *nothing* (and is thereby, in fact, no person at all), democratic constitutional states tread the path towards developing a complex web of criteria for excluding excuses and guilt. Each can convince him or herself, by the constant exchange of roles between the author and the addressee of the laws, that the capacity for action and attribution is dependent on conditions that take into consideration one's internal and external nature and also the social circumstances. Yet this experience – which itself constantly changes with the historical, social, economic and technological dynamics of change – has a completely different meaning for autonomous citizens as it does for rulers and subjects of a dictatorship. It results, namely, from a *freely practiced* consciousness of ability, which, in the trust of accommodating relations of success and of not being rejected, can also, from case to case, fail in these relations. They are experiences that result from the *activity* of the consciousness of ability on the inter-subjectively recognized basis of the legal ability. This kind of experience initiates learning processes of the possibilities and boundaries, margins and constraints, and oppositions and failures of the ability. Yet they lead neither to a consciousness of ability that absolutizes itself, nor to its fatalistic abandonment, but rather to its learning self-modification. With these experiences, the co-legislators legislate their own laws, and with these experiences they define, in a way that changes and learns, the nature and scope of the expected average willingness and capacity to observe norms – that is, they define the legal and responsible capacity of a legal person. In this way they put themselves in their role as norm addressees under the given conditions of internal and external nature, as well

as under the possibilities and boundaries of life and action given in each case. Only they can develop in general the high degree of sensitivity for exonerating circumstances required for a publicly justified determination of guilt – not in order to understand and forgive everything, but rather to preserve, affirm and reinforce the constitutive concept of a legal person who is capable at once of acting and taking responsibility. An absolute accountability for everything, and likewise a fatalistic resignation, would lead *ad absurdum*.

For this self-conception as legal and factually competent, and thus also as responsible legal persons, it is necessary that a democratically constituted process of reworking past collective crimes with the determination of injustice and guilt also clarifies the nature and scope of individual accountability – and in fact with a *heightened* sensitivity to the incriminating circumstances of a dictatorship under which the agents acted. This sensitivity towards the perpetrators can also reasonably be expected of the victims, precisely because the (re)production of their own capacity to act and the (re)acquisition of an authentic consciousness of ability comes down to not only being relieved from the imputation of their own accountability, in that they experience *that* someone else is responsible for it, but also in experiencing to *what degree* of accountability the perpetrators acted. Not only the perpetrators but also the victims learn that the determination of criminal guilt under conditions of political autonomy is not based on a concept of limitless, absolute accountability, that this is not the concept of a legal person to which responsibility is ascribed under incriminating as well as exonerating circumstances.

When the conjectures presented here are not false, then ultimately punishment in the sense of an intentionally inflicted evil is dispensable. It is sufficient that there be a public determination of a wrong that has been answered for – and this can, as Flavia Püschel has shown, be reached even with a declaratory action under civil law instead of with a criminal procedure.