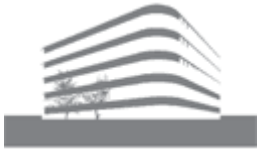

Authoritarian Repression, Judicial System and Transitional Justice: The Spanish Case in Comparative Perspective

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Abstract

Why have some democracies made considerable progress in prosecuting human rights violations committed by preceding dictatorships, while others still have amnesty laws that prevent –or at least hinder– the judicial review of such abuses? This article will compare the Spanish case with those of Chile and Argentina. The establishment of democracy following a right-wing dictatorship responsible for the systematic violation of human rights forced all three countries to consider how best to confront this violent past. We aim to demonstrate a causal relationship between the type of repressive practices used by dictatorships, the extent of the judicial system's involvement in this repression and subsequent transitional justice policies.

INTRODUCTION*

Researchers have claimed that different types of dictatorship produce different democratization processes[1], analyzed the transitional justice policies adopted by different countries[2], and studied the functioning of the judicial system under authoritarian regimes[3], but there have been no attempts to establish a causal relationship between the type of repressive practices used by dictatorships (clandestine *versus* official), the extent of the judicial system's involvement (direct *versus* indirect), and subsequent transitional justice policies (trials *versus* amnesties).

Precisely because of the systematic violation of human rights under right-wing dictatorships in Spain, Chile and Argentina, all three countries were forced to deal with this violent past in their respective democratization processes. Rather than compare these cases on equal terms, this article will focus on what has occurred in Spain (this case having received the least attention among researchers) while making specific comparisons with events in Chile and Argentina.

These three countries have adopted a wide variety of transitional justice measures: Argentina has held the most trials against perpetrators of human rights violations and was the first to repeal its amnesty law, which had guaranteed their impunity since 1983. In Spain there has been no judicial process and no review of the tens of thousands of political trials held during the civil war and the Franco regime, the 1977 amnesty law remains in force, and there is no political debate about whether it should be repealed. In Chile, strong initial resistance eventually gave way to several trials, and although the 1978 amnesty law is still in force, certain social and political actors have called for its repeal.

THEORETICAL DISCUSSION

To date, the most commonly cited reasons for the existence of judicial processes against the perpetrators of authoritarian repression and the State's determination to shed light on past events and compensate victims have been the preferences and strategic calculations of political elites, the correlation of forces between outgoing and incoming rulers, the rulers' capacity to provide goods and services, the dictatorship's residual legitimacy, the pressure exerted by human rights organizations, and the presence of a traumatic memory caused by previous political violence[4]. While acknowledging

* I thank Juan José del Águila, Cath Collins, Jorge Correa, Pablo Gil, Mónica Lanero and Manuel Ortiz for providing me valuable information for this article.

[1] Barbara Geddes, "What do we Know About Democratization After Twenty Years?", *Annual Review of Political Science*, 2 (1999), pp.115-44.

[2] Paloma Aguilar, *Políticas de la memoria y memorias de la política* (Madrid: Alianza, 2008a); Alexandra Barahona de Brito, *Human Rights and Democratization in Latin America* (Oxford: Oxford University Press, 1997); Monika Nalepa, "Captured Commitments: An Analytic Narrative of Transitions with Transitional Justice", *World Politics*, 62, 2, (2010), pp.341-80; Tricia Olsen, Leigh Payne, and Andrew Reiter, "The Justice Balance: When Transitional Justice Improves Human Rights and Democracy", *Human Rights Quarterly*, 32, 4 (2010), pp.980-1007.

[3] Tom Ginsburg and Tamir Moustafa, *Rule by Law. The Politics of Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2008); Lisa Hilbink, *Judges Beyond Politics in Democracy and Dictatorship* (Cambridge: Cambridge University Press, 2007); Anthony Pereira, *Political (In)Justice. Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina* (Pittsburgh: University of Pittsburgh Press, 2005).

[4] Aguilar, 2008a; Alexandra Barahona de Brito, "Truth, Justice, Memory, and Democratization in the Southern Cone", in Alexandra Barahona de Brito, Paloma Aguilar and Carmen González, eds., *The Politics of Memory. Transitional Justice in Democratizing Societies* (Oxford: Oxford University Press, 2001); Jon Elster, ed., *Retribution and Reparation in the Transition to Democracy* (Cambridge: Cambridge University Press, 2006); Brian Grodsky, "Weighing the Costs of Accountability: The Role of Institutional Incentives in Pursuing Transitional Justice", *Journal of Human Rights*, 7, 4 (2008), pp.353-375; Samuel P. Huntington, *The Third Wave. Democratization in the Late Twentieth Century* (London: University of Oklahoma Press, 1991); Guillermo O'Donnell, Philippe Schmitter and Laurence Whitehead, eds.,

the importance of all these factors, we aim to show that insufficient attention has been given to two fundamental –and intimately related– explanatory variables: a) the predominant type of repression: clandestine or official; and b) the degree of the judicial system's involvement –particularly ordinary justice– in political repression during the dictatorship: direct or indirect.

Our dependent variable does not cover every possible measure encompassed within "transitional justice" policies, but instead focuses on the existence or non-existence of trials against the main perpetrators of human rights violations, the applicability or non-applicability of amnesty laws that prevent –or at least hinder– such trials following regime democratization, and the creation of truth commissions that publicly expose the workings of the repressive machine under the dictatorship.

The Argentine and Chilean cases fall far more neatly into the "military dictatorship" category than the Spanish case. Even though Franco was a professional soldier and, especially in his early governments, military officers occupied important posts and enjoyed certain privileges, Francoism cannot be considered a military regime. In fact, it was not just the military or the special police forces –as in other two cases– who were responsible for political repression; the entire judicial system played a key role, not only as a silent accomplice to human rights violations, but also as a fundamental cog in the repressive machine, especially through its active and direct participation in courts-martial and the special jurisdictions created for repressive purposes.

We seek to confirm two main hypotheses. The first concerns the degree of clandestinity of the repression, which obviously is directly related to the judicial system's involvement in the latter: in those countries where victims are the result of a system of illegal repression devised by the political-military establishment (as in Argentina), judges are more likely to have had a lesser degree of involvement than where legal repression has prevailed (as in Spain). All three cases feature, albeit in differing proportions, coexistence of both legal and illegal repressive practices, but whereas in Argentina no death sentences for political reasons were enforced as a result of a court judgment, tens of thousands were enforced in Spain.

It should also be borne in mind that the more clandestine the repression (as in Argentina), the more social pressure there will be to publicly expose the workings of the repressive machine and to do everything possible to ascertain the victims' whereabouts. Furthermore, the more time that passes since the worst rights violations (as in the Spanish case), the easier it will be for the former rulers to turn over a new leaf and avoid confronting the past[5].

According to the second hypothesis, the greater and more direct the involvement of ordinary justice in the dictatorial repression –as was particularly the case in Spain and, to a lesser extent, in Chile–, the more resistance there will be to prosecuting those responsible for human rights violations once democracy is established. In other words, when liability not only falls on the military leadership and certain police forces, but also implicates the entire judicial system, judges and prosecutors will tend to be warier of any public review of the past and even more reluctant to approve punitive measures against the repressors. In fact, judicial processes started taking place far later in Chile than in Argentina, whereas in Spain they simply have not taken place. There will also be, logically, greater reluctance to repeal amnesty laws that prevent or hinder trials: whereas in Chile and Spain these laws remain in force, the first stage of the Argentine transition saw the repeal of the "self-amnesty" law passed by the military junta shortly before its demise, and years later the same fate would befall the "due obedience" and "full stop" laws passed under the Menem's presidency to curtail the ongoing trials.

In short, the more official and "legal" the repression of the opposition has been, the greater the judiciary's involvement will have been. And the greater the extent of the

Transitions from Authoritarian Rule (Baltimore: The Johns Hopkins University Press, 1986).

[5] Jon Elster, *Closing the books. Transitional Justice in Historical Perspective* (NY: Cambridge University Press, 2004), p.75.

judicial system's collaboration with the dictatorship, the more reluctant it will be to subject the past to judicial review, or to officially clarify the facts through truth commissions, as the professional reputation and standing of the entire judicial network might be seriously damaged. Subjecting the past to public scrutiny could also mean reviewing cases conducted inappropriately or without minimum judicial safeguards – even allowing for the extremely repressive legislation in force at the time–, all of which could raise doubts about the rigor and independence of the judicial bodies for many years to come.

THE PREDOMINANT TYPE OF REPRESSION: OFFICIAL OR CLANDESTINE

Many of the courts-martial and executions recorded in Chile and Spain after the respective military coups were of questionable legality and coexisted with clearly illegal killings backed or permitted by the military authorities (and, in the case of Spain, also be the civil authorities). The peculiarity of the Spanish case is that the failure of the 18 July 1936 coup d'état in approximately half the country triggered a long and bitter civil war in which both sides committed numerous extrajudicial executions. Several months would have to pass before the political repressions began to be "judicialized"[6].

Spain's prison population at the end of the war was 270,000; between 1936 and 1942, nearly 500,000 political prisoners passed through the more than 100 newly-created concentration camps, and several tens of thousands of Spaniards were court-martialed[7]. As for fatalities, the latest rough estimates (figures for some provinces have yet to be calculated) of deaths caused by Francoist and Republican repression stand at 130,000 (including some 50,000 after the civil war[8]) and 50,000, respectively. Despite there being no official figures for the subsequent period and no consensus among researchers, some sources indicate that the military jurisdiction enforced 13 court-martial death sentences between 1958 and 1975 (4 by garrotte and 9 by firing squad)[9].

In Chile, the notorious "caravan of death (…) deliberately violated the regime's own legality"[10]. In the immediate months after the coup, "the number of people summarily executed by the army or police (carabineros) seems to have far outweighed those treated in some sort of judicial manner. Those that were prosecuted were tried in military courts composed only of military officers who acted as if the country were at war"[11]. During the first three years, "An estimated six thousand Chileans were tried by these bodies (…). Approximately two hundred were sentenced to death and executed"[12]. Both Spain and Chile witnessed a shift towards the –always imperfect– "judicialization" of repression, but whereas the Spanish courts-martial continued to pass death sentences, albeit at an increasingly lower rate, their Chilean equivalents, despite continuing to operate, ceased to apply capital punishment. As time passed, Chilean extrajudicial repression – conducted mainly by the political police and the DINA intelligence agency– would become solely responsible for the deaths that continued to occur[13]. Repression did begin to wane after the DINA was replaced by the CNI in 1977, but not without the occasional resurgence, as in the early 1980s[14]. In the end, between 3,000 and 5,000 people disappeared or were murdered (between 23.07 and 34.62 per 100,000 inhabitants), some 60,000 were imprisoned for political reasons (461.54 per 100,000

[6] Pablo Gil, "Derecho y ficción: la represión judicial militar", in Francisco Espinosa (ed.), *Violencia roja y azul. España, 1936-1950* (Barcelona: Crítica, 2010), p.273.
[7] Javier Rodrigo, *Los campos de concentración franquistas* (Madrid: Siete Mares, 2003) and Gil, 2010.
[8] Espinosa, pp.76-77.
[9] *Comentario Sociológico,* 12-13, October 1975-March 1976, p.1014.
[10] Pereira, p.101.
[11] Pereira, p.25.
[12] Pamela Constable and Arturo Valenzuela, *A Nation of Enemies. Chile Under Pinochet* (NY: W.W. Norton & Company, 1991), p.118.
[13] In fact, after this first stage, only four death sentences resulting from a court judgment were enforced, none of them politically-motivated.
[14] Informe CONADEP, *Nunca Más* (Buenos Aries: Eudeba, [1984] 1997), p. 978.

inhabitants)[15], and several tens of thousands were tortured.

Argentina is a different case: although the death penalty was reintroduced during the dictatorship, neither the courts-martial nor the ordinary courts enforced a single death sentence. All the deaths and disappearances in this country were caused by the extrajudicial and clandestine machine of repression implemented by the military juntas, ultimately constituting one of the purest cases of "State terrorism". Victims were kidnapped by the security forces, taken to one of more than 300 clandestine detention centers spread throughout the country, brutally tortured and, in many cases, murdered, their corpses subsequently being hidden. The estimated number of people murdered and "disappeared" ranges between 20,000 and 30,000 (between 62.5 and 93.75 per 100,000 inhabitants), some 30.000 were imprisoned for political reasons (93.75 per 100,000 inhabitants)[16], and several tens of thousands were tortured.

Finally, whereas in Chile some 6,000 people were tried by court-martial for political offences, the equivalent figure in Argentina was only 350 (46.1 per 100,000 people in Chile as opposed to just 1.09 in Argentina. Political justice in Spain was very violent; "on a per capita basis", far more so than in Chile[17]. As for those tried by court-martial in comparison with victims of extrajudicial executions, the ratio is 1.5:1 in Chile and 1:71 in Argentina.

THE JUDICIAL SYSTEM'S INVOLVEMENT IN REPRESSION

The intense political repression carried out by both sides during the Spanish Civil War and by the Franco regime during the post-war period would not have been possible without the active participation of the judiciary. Although most of the political repression, especially during the war and the early years of Francoism, occurred in the field of military justice, it is essential to consider the direct involvement of ordinary justice in the implacable repressive machine that operated throughout the dictatorship, as will now be demonstrated by empirical evidence and comparisons with what happened in Chile and Argentina[18].

a) Francoist military justice, chiefly – though not solely– responsible for wartime and post-war repression, had to take on ordinary justice personnel due to the huge number of judicial proceedings it had to cope with, mainly between 1936 and 1944. According to one leading expert, "numerous judges and prosecutors actively participated in military jurisdiction as court-martial examining magistrates, prosecutors or rapporteurs"[19]. These legal professionals accepted temporary militarization[20], often voluntarily[21], which meant they formed part of the military courts that, up until the mid-1940s, enforced an estimated 50,000 death sentences, although many more were issued and subsequently pardoned. In 1941, owing to the reduced number of trials, the militarized judicial personnel began to be demobilized and sent back to the ordinary courts. However, the ordinary justice "military-legal" personnel continued to participate in courts-martial until the end of the dictatorship (and possibly even afterwards, given that the 1945 Code of

[15] Pereira, p.21.
[16] Pereira, p.21.
[17] Pereira, pp. 21;180.

[18] See also Hilbink, 2007, and Robert Barros, "Courts Out of Context: Authoritarian Sources of Judicial Failure in Chile (1973-1990) and Argentina (1976-1983)", in Ginsburg and Moustafa, pp.156-179.

[19] Mónica Lanero, *Una milicia de la justicia. La política judicial del franquismo* (1936-1945) (Madrid: Centro de Estudios Constitucionales, 1996), p. 335-6.

[20] From late 1936 on, "the Honorary Military Legal Corps received a huge influx of not only judicial personnel, but also drafted civil lawyers and law graduates". Subsequently, it "began to admit not only judges and prosecutors, but (…) all legal professionals and law graduates". Lanero, p.362. This extraordinary involvement of all types of legal professionals constitutes irrefutable evidence of their direct participation in Francoist political repression.

[21] Not only a matter of "compulsory enlistment" for "judges, prosecutors and candidates to both professions", but also of "allowing the voluntary militarization of judges, senior judges and prosecutors who abandon ordinary court service to perform military-legal duties in courts-martial and legal advice departments of military ministries and audit offices". Lanero, p.363.

Military Justice remained in force until 1980) through the figure of the 'rapporteur', whose presence was compulsory[22].

The majority of court-martial sentences were the result of summary procedures[23], which considerably reduced the defense opportunities of the accused. More often than not, the court reached its verdict before the trial was held; in many cases, not even the essential minimum formalities were observed, and failure to comply with the already repressive prevailing legislation was commonplace. In the case of summary procedures, it was obligatory for the defense lawyer to be not only a military officer[24], but also the lowest-ranked member of the court-martial. Due to the requirements of the summary procedure, the lawyer was barely given time to prepare his defense and, given his subordinate position in the military structure, had little scope to defend the accused.

Courts-martial were also held during peacetime in Chile and Argentina, whose respective regimes declared a state of war or state of emergency to increase their repressive capacity and restrict citizens' rights[25]. Chilean civil judges only participated exceptionally in courts-martial and prosecutors were always military officers[26], and in sharp contrast with the Spanish case, civil lawyers were allowed to defend the accused.

Most of the Chilean judicial system clearly aided and abetted the dictatorship's repressive policy. However, it did not participate in the vast majority of the courts-martial that issued and enforced the aforementioned death sentences, and there is evidence that some judges tried to remain neutral –which nearly always cost them dearly- and that some lawyers did their utmost to defend their clients before the courts-martial[27].

In Argentina, despite the complicity of a large part of the judicial system, the repressive strategy was basically extrajudicial[28]; this is also the case in which we find "the least amount of civil-military cooperation and integration in the judicial realm". On the other hand, there was "more opposition in the judiciary to military notions of national security in Argentina than in (…) Chile". Court-martials were hardly used to prosecute political dissidents, and unlike in the other two cases, "judges and lawyers were also targeted by the regime –over one hundred lawyers for political prisoners disappeared between 1976 and 1983"[29].

b) Spanish ordinary justice also participated in a number of special jurisdictions created to repress political dissidence. It is worth highlighting its

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[22] In fact, the rapporteur was the only court-martial member who had to be a Law graduate, besides being responsible for preparing the draft judgment, hence his key role in the dictatorial repression (I thank Juan José del Águila for this information). Following the major demobilization of the mid-1940s, jurists from the university sphere participated in courts-martial, as they were able to combine their teaching duties with Legal Corps work (I thank Pablo Gil for this information).

[23] As might be expected of a state of war that existed in Spain until 1948, although laws allowing military jurisdiction to use summary proceedings for certain offences continued to be passed thereafter.

[24] According to Juan José del Águila, civil lawyers were usually excluded from courts-martial, even if they were not summary, at least until 1963. Civil lawyers were only capable of defending political prisoners once the ordinary justice recovered its jurisdiction over political crimes, mainly through the creation of the Court of Public Order (Tribunal de Orden Público –TOP–), that is, from 1963 on.

[25] In Chile, "[t]he right to habeas corpus was revoked during states of siege". Constable and Valenzuela, p.137. Courts-martial continued to operate during the first five years following the military coup, while those held between 1978 and 1989 were of an ordinary nature. Pereira, pp.4; 25. In Argentina, the state of siege lasted until October 1983 and summary and secret courts-martial were held, in which civil defense lawyers were not allowed to participate, but these courts were far less active than in the other two countries analyzed. Pereira, p.133.

[26] Pereira, p.24.

[27] Constable and Valenzuela, p.115-139.

[28] "[T]he Argentine regime stands out for its almost complete disregard for legal conventions. It convicted some 350 people in military courts, but its main response to its political opponents was a fierce 'war' (…) conducted largely without judicial constraints". Pereira, p.26.

[29] Pereira, pp.13; 119; 26.

involvement in the Political Accountability jurisdiction[30], but it also collaborated in others: the Special Court for the repression of Freemasonry and Communism, the Vagrancy jurisdiction, the Provincial Tax Collection Agencies (*Fiscalías de Tasas*) and the Labour Jurisdiction[31]. In several of these cases, as in the courts-martial, "mixed courts" were set up, consisting of military officers (who normally comprised the majority and occupied only the most important posts), ordinary jurisdiction officials and members of the single party (FET-JONS)[32]. The extraordinary expansion of military jurisdiction – encroaching on numerous powers previously reserved for ordinary jurisdiction and being clearly pre-eminent over the latter in the event of conflicts of competence- and, above all, the proliferation of special jurisdictions geared towards political repression, have no equal in the Chilean and Argentine cases.

c) The "Causa General", ordered by a Decree issued on 26 April 1940, was conducted by the Spanish Attorney General's Office, subordinate to the Ministry of Justice. This mega-trial formed the basis of the brutal repression of the early post-war years. The information relating to alleged offences committed by the sympathizers of the winning side was compiled by ordinary justice prosecutors up until the 1960s and led to the opening of tens of thousands of judicial proceedings. Again, there is no equivalent in Chile or Argentina.

d) So far we have focused our attention on the first, and most blatantly repressive, stage of the Spanish dictatorship. Nevertheless, Francoism unceasingly persecuted dissidents until the end. As time went by, ordinary justice played an increasingly active role in this task; it is worth highlighting its exclusive participation in the special jurisdiction of the Court of Public Order (*Tribunal de Orden Público*, TOP), in which judges and senior judges, from 1963 to the end of 1976, voluntarily took the lead in carrying out ideological and political repression, except in the case of terrorist offences, which continued to fall under the remit of military jurisdiction[33].

In Argentina and Chile, apart from courts-martial, no courts were specifically created for political repression purposes. It is astonishing that the TOP, in the final years of Francoism, was capable of issuing so many severe prison sentences for actions which, in most cases, involved the exercise of the most basic democratic political rights.

e) Spanish ordinary justice, even when it acted outside the sphere of the special jurisdictions, collaborated with the dictatorship by exerting social control over the population and applying Francoist ideology in its sentences[34]. Its close collaboration with the regime's political police force –the Political-Social Brigade- and its constant refusal to hear reported cases of torture have also been abundantly documented[35].

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[30] 20% of senior judges and 3% of judges "were engaged in demanding political accountability" and belonging to these bodies was voluntary. Lanero, p.373.

[31] Lanero, pp.343; 374.

[32] Manuel Álvaro Dueñas, "Los militares en la represión política de la posguerra: la jurisdicción especial de responsabilidades políticas hasta la reforma de 1942", *Revista de Estudios Políticos*, 69 (1990), pp.141-162.

[33] The main source for the study of the TOP is Juan José del Águila, *El TOP. La represión de la libertad* (Barcelona: Planeta, 2001). To avoid the delays caused by the backlog of cases in this special court, besides the number of senior judge posts being increased in late 1971 and a second court being created, "examining magistrates and prosecutors throughout Spain were forced to conduct preliminary inquiries, making them officers of the Court of Public Order". Justicia Democrática, *Los jueces contra la dictadura (justicia y política en el franquismo)* (Madrid: Túcar Ediciones, 1978), p. 46. Thus, the involvement of ordinary justice in the dictatorship's repressive machine increased even more.

[34] Manuel Ortiz, *Violencia política en la II República y en el primer franquismo* (Madrid: Siglo XXI, 1996); Conxita Mir, *Vivir es sobrevivir* (Lleida: Milenio: 2000).

[35] This Brigade stemmed from a law passed on 8 March 1941, which remained in force until it was repealed on 9 December 1978 (three years after Franco's death). The judges and prosecutors guaranteed its impunity, as "it was customary for the Court of Public Order 'to impede direct questions' about police brutality".

The most reliable figures for death sentences enforced by ordinary justice, for non-political offences, correspond to the period 1947-1975 and amount to 41. For the period 1936-1946 there are no official figures for the number of execution verdicts delivered by the ordinary courts, but there is no doubt that the prevailing legislation allowed them to pass death sentences in various cases, including, for several years, those of a political nature.

Not a single death sentence was enforced by ordinary justice in Chile or in Argentina, notwithstanding evidence of its inhibition in several cases in which the defense lawyers requested an appeal for protection for their clients[36]. According to other authors, "judges repeatedly rejected petitions to protect prisoners who were likely to face torture". Also, they "were especially reluctant to challenge the DINA and other secret police agencies, which virtually always denied any detentions and refused to provide further information on national-security grounds"[37]. Nonetheless, despite the Rettig Report's criticisms of the functioning of the judicial system under the Chilean dictatorship, the report also acknowledges that "the first exhaustive investigations took place in the late 1970s" and that "despite difficulties concerning police assistance, Examining Magistrates and first-instance judges managed to prove the existence of crimes and the possible involvement of police officers"; precisely because of that, however, they had to declare themselves incompetent and, once in the hands of military justice, the prosecutions were unsuccessful[38].

Argentina's CONADEP Report is equally critical of the judges' inhibition and complicit silence, but it also says there were those "who, amid the tremendous pressures generated by the prevailing situation, performed their duties with the dignity and decency expected of them", and that "legal aid" was seriously undermined by the "banishment or death of defense lawyers"[39]. In general, the "courts were largely uninvolved in the repressive system, except to deny writs of habeas corpus and serve as a cover for state terror"[40].

All the above demonstrates the existence of a more combative attitude towards the dictatorship, at least in certain sectors of the legal profession, than that found in Spain, except in the case of Democratic Justice (*Justicia Democrática*)[41].

f) The Spanish Supreme Court stuck rigidly to Francoist doctrine in its interpretation of the law and upheld the regime's ideology in its sentences until the end of the dictatorship[42]. Moreover, the highest judicial organ contributed "to the subordination of ordinary justice by basing its decisions regarding the competence of ordinary and military courts on criteria that were unfailingly favourable to the latter"[43].

In Chile, the members of the Supreme Court sympathized with Pinochet's coup d'état from the outset, refusing to control the Executive's actions and to investigate human right violations. In fact, between 1973 and 1983, this court "rejected all but 10 of 5,400 habeas corpus petitions filed by the Vicaría"[44]. It is true that "A few high court justices risked occasional mild,

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Likewise, "formal complaints against the Social Brigade were ignored, without the accused commissioners and inspectors being held to account in any way whatsoever". Carlos Jiménez Villarejo, "Una aproximación a la 'policía política' del franquismo: la Sexta Brigada de Barcelona", in Ana Domínguez, ed., *Enrique Ruano. Memoria viva de la impunidad del franquismo* (Madrid: UCM, 2011), pp. 213-215. See also Justicia Democrática, pp.23; 65; 244-5.

[36] Pereira, pp.23; 54.

[37] Constable and Valenzuela, pp.116; 123.

[38] Rettig Report: Chapter IV, section A: "General attitude of the Judiciary to human rights violations".

[39] CONADEP Report, p.392.

[40] Pereira, p.4.

[41] Only this organization, created in 1971, spoke out against the judicial system's submission to the dictatorship, and it received very little backing. In fact, "the vast majority of judges and prosecutors remained loyal to dictatorial legal standards and not a single senior dictatorship official joined or even sympathized with Justicia Democrática". Nicolás Sartorius and Alberto Sabio, *El final de la dictadura* (Madrid: Temas de Hoy, 2007), p.517.

[42] Francisco Bastida, *Jueces y franquismo. El pensamiento político del Tribunal Supremo en la Dictadura* (Barcelona: Ariel, 1986).

[43] Lanero, p.325-6.

[44] Constable and Valenzuela, p.122.

dissenting opinions against repression and manipulation of the law, but most simply deferred to the wishes of the regime"[45]. Lastly, "The Chilean Supreme Court refused to review any military court verdicts"[46].

In Argentina, the military establishment's mistrust towards the judicial system was much greater and, therefore, there was far less collaboration between both institutions[47]. According to the CONADEP Report, "on the day of the coup d'état, the composition of the Judiciary was changed as regards the Supreme Court, the Attorney General and the Provincial High Courts (…). In order to be appointed or confirmed, all judges had to pledge loyalty to the Rules and objectives of the 'Process' led by the Military Junta"[48].

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Another fundamental variable for analyzing the judicial system's involvement in repression is its degree of independence in relation to the Executive. To this end it is necessary to ascertain whether the authoritarian regimes carried out purges in the judiciary upon taking power and whether institutional mechanisms were created to subjugate judges and limit their capacity to control political power.

In Spain, there was a sweeping purge of all professions which, logically, also affected the judicial system: "removal from service affected 6% of all judges and 12% of all prosecutors"[49]. This enabled Francoism to start securing the loyalty of judges and prosecutors.

During the early years, and in order to ensure ideological complicity, access to these professions was also controlled by reserving positions. For example, "[i]n the competitive examinations for recruitment to the judiciary in 1941, of the 130 positions available, 26 were open to all-comers and 26 were set aside for each of the following groups: a) disabled veterans; b) provisional second lieutenants; c) ex-servicemen; d) former prisoners-of-war and war orphans"[50]. Furthermore, judges had to pledge "unconditional allegiance to the Caudillo of Spain" on taking up their position, which did not leave much room for impartiality[51].

The Franco regime also created a key instrument for initial selection based on ideological criteria and subsequent political indoctrination: the Judicial School, answerable to the Ministry of Justice. The 18-month period of study undergone by all judges, senior judges and prosecutors helps to explain their subsequent conservatism, given the "moral" and "religious" education they received in addition to tuition in strictly legal matters. This school also sought to "inculcate in the students esprit de corps and due obedience to their hierarchical superiors". Even the Ministry of Justice acknowledged that it had intended to create "a *militia of Justice* (…) always willing to follow (…) the orders of the leader"[52].

Finally, other institutional mechanisms used by the Francoist Executive to limit judicial independence were: "recruitment, appointment, disciplinary sanctions, promotions, and transfers"[53]. In fact, the main founding purpose of the clandestine association Democratic Justice was to express its disapproval of the "Executive's iron grip on the judicial profession through the appointment of the most important posts" and the "widespread use of 'special leaves', which enable large numbers of court officials and public prosecution service officers to move into politics"[54].

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[45] Constable and Valenzuela, p.130.
[46] Pereira, p.4.
[47] Pereira, 2005.
[48] CONADEP Report, p.391.
[49] Lanero, p.379.
[50] Sartorius and Sabio, p.490.
[51] This oath became compulsory as from 1938 "upon qualifying as a judge or prosecutor and upon taking office". Lanero, p.273. This means that all the judges and prosecutors inherited by democracy had taken this oath.
[52] My emphasis. Lanero, pp.269; 272.
[53] Pedro Magalhães, Carlo Guarnieri and Yorgos Kaminis, "Democratic Consolidation, Judicial Reform, and the Judicialization of Politics in Southern Europe", in Richard Gunther, Nikiforos Diamandouros, and Dimitri Sotiropoulos, eds., *Democracy and the State in the New Southern Europe* (Cambridge: Cambridge University Press, 2006), pp.146-7.
[54] Ana Isabel Fernández, "El resurgir de la sociedad civil y la aparición de disensiones en el

Several judges and prosecutors held important posts at the Ministry of Justice and in other government bodies, the majority of them having previously performed "duties in special jurisdictions"; in fact, "nearly all civil servants holding ministerial posts [had] passed through the military jurisdiction"[55]. According to Lanero, having participated in repressive activities was a good way to prosper in governmental and political circles, since those who had formed part of courts-martial and other repressive special jurisdictions tended to be rewarded with high-ranking positions in the administration. As will be seen later on, this also occurred under democracy with judges who had formed part of the TOP.

In Chile the judicial system was allowed more independence because its ideological leanings were already clearly aligned with the incipient dictatorship. In fact, the legal profession had frequently aired its deep ideological disagreements during Salvador Allende's presidency. By treating judges with moderation and respect, Pinochet sought to secure their collaboration and acquiescence[56]. This explains why the Executive did not purge the Supreme Court and why the rest of the judicial system was barely tampered with[57]. In Argentina, however, no sooner had the coup d'état taken place than the Military Junta passed a decree purging all the Supreme Court judges, and further purges soon followed[58].

The irrevocability of judicial posts was respected by the Chilean political authorities, since they had faith in the Supreme Court's control over the rest of the judicial profession. However, this was not the case in Argentina, where the judicial system, despite its passiveness (barring exceptions), had a more tense relationship with the military than in the other two cases[59].

AMNESTIES, TRIALS AND TRUTH COMMISSIONS

Before analyzing the survival of amnesties, trials against human rights violators and the creation of truth commissions, a brief review of the state of the judicial system at the end of each dictatorship will provide the necessary context to understand the measures eventually adopted under democracy. In Spain, "it was the legal world that had been most reluctant to come to terms with the changing times"[60]. According to another author: "The judges who publicly expressed their Francoist ideology were few and far between, but they occupied the highest positions on the judicial ladder" and were also stubbornly reluctant to apply the new democratic legislation[61].

There is ample evidence of the judicial system's extreme conservatism during the Spanish transition and its fierce resistance to change. Take, for example, the revealing testimonies of the first socialist Minister for Justice (1982-1988), Fernando Ledesma, and his Chief of Staff (1982-1985), Mª Teresa Fernández de la Vega, both of whom stress the overriding need to democratize the field of justice and the "attacks", "pressure" and "tension" they had to withstand when trying to reform the judicial system. They also mention its strong corporate identity and the great power it wielded. But they also emphasize the need to avoid a head-on confrontation, given the extent to which these professionals were able to exert pressure on the system and how indispensable they

aparato del Estado: el caso de Justicia Democrática (1970-1978)", in Javier Tusell, ed., *Historia de la transición y consolidación democrática en España (1975-1986)*, Vol. 1 (Madrid: UNED/UNAM, 1995), p.69.

[55] Lanero, p.378.

[56] Pereira, p.23. Constable and Valenzuela, p.117.

[57] In fact, "The Supreme Court voluntarily purged its ranks of suspected Allende sympathizers (…), and stymied the career ascendance of judges deemed too far left". Alexandra Huneeus, "Judging from a Guilty Conscience: The Chilean Judiciary Human Rights Turn", *Law & Social Inquiry*, 35, 1 (2010), p.103.

[58] Alejandro M. Garro, "The Role of the Argentine Judiciary in Controlling Governmental Action under a Stage of Siege", *Human Rights Law Journal*, 4, 3 (1983), pp.315.

[59] Pereira, p.23.

[60] Sartorius and Sabio, p.485.

[61] Francisco Gor, "De la justicia franquista a la constitucional", in *Memoria de la transición* (Madrid: El País, 1996), pp.222.

were for the correct functioning of the still fragile democracy. While the former minister maintains that "a judiciary can speed up or, on the contrary, delay transformations in society, it can facilitate or hinder them, it can contribute to the modernization of a country or, on the contrary, obstruct it", the former Chief of Staff emphasizes that justice was to be responsible for "interpreting and implementing" the reforms and was therefore an "essential element for stability and political change"[62].

The judiciary's heavy involvement in Francoist repression, its ideological conservatism at the highest levels, the annoyance with which it greeted any attempted reform, and yet its absolutely central role in applying the new democratic legislation –which it often disagreed with– helps to explain why the Governments did not even dare consider the possibility of subjecting its actions under the dictatorship to public scrutiny (through a truth commission), let alone to judicial review. The democratic authorities ultimately settled for three institutional reforms: a) the creation of the Constitutional Court, an independent body that acts as a court judgment control mechanism, the idea being to "supervise an institution that entered the democratic system barely purged"[63]; b) the amendment of Organic Law 6/1985 of the Judiciary, whereby the power to elect the General Council of the Judiciary was transferred from judges and senior judges to Parliament; and c) the "early retirement of a third of the judicial hierarchy in order to remove the old regime figures from its upper echelons"[64].

Despite the importance of these reforms, it was a case of 'too little too late'. The judiciary remained fundamentally conservative[65] and neither its collaboration with political repression nor the transfer of many of its most conservative members – including the most direct collaborators, such as the TOP judges– to such important institutions as the Supreme Court, the National High Court and even the Constitutional Court has ever been publicly denounced[66].

The lack of an exhaustive purge was exacerbated by the judicial system's intrinsic endogamy[67], its internal socialization and recruitment mechanisms, and its deep-rooted esprit de corps. Such a system was hardly likely to approve of justice or truth measures that might raise doubts about its honorable conduct both during and after the dictatorship, since many judges were known to have tolerated the brutality of the forces of law and order and the far-right violence that occurred during the transition[68].

In Argentina, Raúl Alfonsín provoked the resignation of the Military Junta-appointed Supreme Court by publicly announcing his intention to purge it. There was also discussion as to whether the judges, who had sworn obedience to the Juntas, should remain in office. In the end, only a few were dismissed. Nonetheless, "the purge of the Supreme Court and the modification of military jurisdiction" would largely account for judges refusing to halt judicial proceedings after the Full Stop and Due Obedience laws and Menem's pardons[69].

There was no Supreme Court purge in Chile, but then Pinochet had also left it untouched on taking power. Its conservatism during the democratic transition is well known, likewise its initial reluctance to review the past. A number of President Aylwin's advisors "believed that Chile's civilian judiciary, especially the Supreme Court, had been unacceptably

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[62] María Antonia Iglesias, *La memoria recuperada* (Madrid: Aguilar, 2003), pp.990; 1005.

[63] Ana B. Benito, "Poder judicial, responsabilidad legal y transición a la democracia en España", *Foro Internacional*, 195, XLIX (2009), p.177.

[64] Benito, p.175.

[65] Even today, 45.2% of Spaniards think that judges are essentially conservative, whereas only 12% think they are progressive (CIS survey no. 2,861; February 2011).

[66] Bastida, p.13; Gor, p.222; Sartorius and Sabio, p.494.

[67] "[T]he degree of specific self-recruitment [judges' sons following in their fathers' footsteps] was much higher in Spain than in France or Italy". José Juan Toharia, *El juez español* (Madrid: Tecnos, 1975), p.65.

[68] Gor, p.223.

[69] Barahona de Brito, p.137.

complicit in the human rights abuses under the Pinochet regime". However, even if political leaders reached the conclusion that "they could not realistically hope to cleanse the judiciary of all those judges who had collaborated with and covered up repression (…), they could reform the procedures and architecture of the judiciary, which is what they did"[70].

* * *

In Spain, the 1977 Amnesty Law had been the most resounding demand of anti-Franco opposition groups in relation to ensuring the release of political prisoners and nullifying the negative consequences of their imprisonment. Once Franco had died, the demands intensified and partial grace measures began to be approved. The most significant precedent is the Amnesty Royal Decree-Law of July 1976 passed by the first Government of the monarchy. It included offences of a political nature, but only "provided that they had not endangered or infringed upon the life or integrity of individuals". The judges interpreted this clause in a very restrictive sense, which accounts for the subsequent continuation of pro-amnesty demonstrations.

The amnesty of 15 October 1977 was the first law passed by the recently inaugurated democratic Parliament, formed after the election held on 15 June of the same year. The initial drafts submitted by the mainly left-wing opposition parties did not provide for the amnesty of the political and administrative authorities responsible for human rights violations under Francoism, but instead for the release of political prisoners (the majority of the few remaining convicts had been sentenced on terrorism charges), the expunction of their criminal records, reinstatement to their former jobs, and the right to receive a pension should they have reached retirement age. However, during the subsequent negotiation process, the Unión de Centro Democrático (UCD), the governing party formed by Franco regime reformists, inserted two clauses that also amnestied any authorities responsible for human rights violations[71].

The law eventually passed, with almost unanimous backing, would contain these measures which, ever since, have been adduced to prevent trials from being held. Nevertheless, this law was certainly generous towards terrorists convicted of violent crimes, some committed precisely against the State security forces. In the early stages of the transition, the Army's capacity to destabilize the democratic system was considerable, and this helps to explain why the impunity of the Francoist repressors went unchallenged at the time.

In Chile, the 1978 Amnesty Law was passed, as in Argentina but unlike in Spain, by the dictatorship, but it only covers its most repressive stage: 1973-1978. During its first 15 years in force, the law was applied, barring exceptions, without any investigations being conducted. Despite the fact that the law itself states that "the judge needs to carry out an investigation before granting amnesty" in order to establish the type of participation of the individuals on trial, the Supreme Court opted for a different interpretation, granting amnesty without prior investigation, whereas Judge Carlos Cerda chose to conduct all the necessary inquiries before granting amnesty. In the 1990s, this strategy would eventually prevail: "amnesty could only be applied (…) if an investigation were conducted and if, through the latter, it were confirmed that a homicide had occurred and that the participation of those responsible could be established"[72]. This is what came to be known as "Aylwin doctrine".

The Argentine military, before ceding power to civilians in April 1983, approved an amnesty that covered both acts of "subversion" and the excesses of "repression". This law would be repealed by the new democratic government in December of the same year. President Alfonsín took measures to prosecute several former military leaders and the seven most important guerrilla chiefs. Although they

[70] Pereira, p.170.

[71] Aguilar, 2008a.

[72] Elizabeth Lira, "The Reparations Policy for Human Rights Violations in Chile", in Pablo de Greiff, ed., *The Handbook of Reparations* (Oxford: Oxford University Press, 2006), p.86.

were initially to be tried by the military establishment, when "the Supreme Council of the Armed Forces determined that the orders issued in the alleged 'fight against subversion' were 'unobjectionably legitimate', civil jurisdiction had to take charge of the case"[73]. Alfonsín struck a secret deal with the military leaders, assuring them that the trials would go no further than the nine Junta members and that they would all eventually be pardoned. However, certain judges and human rights organizations lobbied for the proceedings against rights abusers to go ahead, which triggered a series of military revolts.

The Full Stop (December 1986) and Due Obedience (June 1987) laws were passed in an attempt to put an end to these rebellious acts and thus stabilize democracy, since in December 1986 there were already some 6,000 judicial proceedings in progress.[74] The judiciary, once again paying no heed to the Executive's wishes, showed its disapproval of this legislation by speeding up the proceedings before the laws entered into force. In October 1989 and January 1991, Carlos Menem would approve a number of pardons for those tried prior to these laws.

However, crimes involving the appropriation of minors born to pregnant detainees and "disappeared" women were never covered by the aforementioned laws or by Menem's pardons, which explains why the Argentine justice system continued, during the 1990s, to bring various high-ranking officials of the dictatorship to account. Then in 1999, a series of 'Truth Trials' commenced "in different federal appeal chambers across the country", whose "purpose is not to determine the criminal liability of those involved and, therefore, they do not allow for the possibility of conviction", but to seek to protect the "right to truth and to mourn"[75].

Judicial independence in Argentina has clearly been highlighted on several occasions[76]. In 2001, the first court ruling on the unconstitutionality of the Full Stop and Due Obedience laws led to the reopening of cases concerning unlawful deprivation of liberty, tortures and murders.

Néstor Kirchner, from the start of his mandate, proved extremely willing to improve reparation for the victims and to limit the impunity of the aggressors. He ordered the military authorities to open their files so that repressive activities could be investigated and "abrogated the decree preventing the extradition of military personnel" accused of human rights violations[77]. He also urged the Supreme Court judges to declare the pardons approved by Carlos Menem unconstitutional. Once the Supreme Court finally repealed the aforementioned laws, in June 2005, the judicial proceedings gained fresh impetus.

In recent times, Argentina has taken further unprecedented steps to review the crimes of the past, as evidenced by the ongoing efforts to bring former court-martial personnel to trial and the initiation of proceedings against the senior judges who acted as accomplices both during and after the dictatorship. In April 2011, the Judicial Council decided to "clarify the role played by judges in State terrorism and how they acted years later when called upon to judge the repressors". The priority of this Council, which can "promote the dismissal of senior judges", is to find out what they did "in response to kidnappings, tortures and disappearances or when they received a habeas corpus, and what they do now if they have to judge those events"[78].

In contrast to the absence of truth commissions in Spain, both Chile and Argentina created their own as soon as the democratic process began. Their respective reports were widely disseminated and

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[73] Patricia Tappatá, "El pasado, un tema central del presente", in Gilda Pacheco, Lorena Acevedo and Guido Galli, eds., *Verdad, justicia y reparación. Desafíos para la democracia y la convivencia social* (San José: IDEA/IIDH, 2005), p.93.

[74] Barahona de Brito, p.122.

[75] Tappatá, p.97.

[76] Carlos H. Acuña, "Transitional Justice in Argentina and Chile", in Jon Elster, 2006, p.236.

[77] Tappatá, p.109.

[78] http://www.patriagrande.com.ve/temas/internacionales/investigan-argentina-magistrados-fueron-complices-opresores/

helped to shed light on the mechanisms of repression, roundly criticizing the judicial system's collaboration with the dictatorship.

* * *

In Argentina, in spite of grace measures and the Executive's attempts to stop legal prosecution, investigations and trials have been conducted almost constantly. And despite the extreme trepidation with which Spain and particularly Chile set out on the road to memory, several interesting measures have recently been approved, leading some authors to claim that both countries are embarking on a stage of 'post-transitional justice'[79].

In Chile, the late 1990s saw what has been called the "prosecutorial turn", since when "judges have sentenced more former officials of the military regime than judges of any other country in Latin America"[80]. At least three factors need to be taken into account to understand the post-transitional justice measures recently implemented in Chile. Firstly, although Eduardo Frei's Government tried to put limits on justice – albeit while continuing to support the search for the disappeared–, a reform at the Supreme Court and the appointment of new judges meant that, between 1997 and 1998, it started changing its decisions, maintaining that "international law was superior to the amnesty law and that a disappearance remains a crime until the body is found, which means that it cannot be subject to amnesty until it is resolved"[81].

Secondly, many have stressed the positive impact of Pinochet's arrest in London in 1998, requested by Judge Garzón. The Chilean judicial system felt ashamed about having failed to prosecute the crimes of its dictatorship and demanded the right to do so at home. According to one researcher, "Many judges view prosecution of Pinochet-era cases as the means to redeem the judiciary from its perceived past complicity and from its low public ratings"[82].

Finally, Collins has asked "what are the conditions under which transitional human rights settlements are likely to change?" Without denying the importance of international dynamics, she considers that internal factors have played a more decisive role in recent developments in the Chilean case, particularly the following: "strategic action by legally literate, domestic, pro-accountability actors, plus domestic judicial change over time". Also, an "improved judicial receptivity to accountability claims" has proved to be a very important factor[83].

Although Spanish policies concerning the past have also undergone recent changes[84], the situation has barely altered in terms of justice and truth, and although the Amnesty Law has acquired some significance of late, its repeal seems far from likely.

The most important qualitative leap took place during José Luis Rodríguez Zapatero's first term in office (2004-2008). The "Historical Memory Law"[85], which was passed in October 2007 and underwent regulatory development during his government's second term, rectifies some of the major enduring shortcomings in terms of material reparation for victims, grants aid to the associations engaged in exhuming corpses from mass graves, orders the removal of Francoist symbols and permits the reorganization of archives to facilitate access to documentation. However, this law did not provide for the possibility of annulling or least reviewing sentences passed by Francoist courts-martial. Although the Government initially thought the law would be able to satisfy this demand, the State Attorneys Office, upon being consulted, announced its categorical opposition to such measures. As the majority of Parliament adopted the same view, the law it eventually passed merely

[79] Paloma Aguilar, "Transitional or Post-transitional Justice? Recent Developments in the Spanish Case", *South European Society & Politics*, 13, 4 (2008b), pp.417-433; Cath Collins, *Post-Transitional Justice. Human Rights Trials in Chile and El Salvador* (University Park, The Pennsylvania State University Press, 2010).

[80] Huneeus, p.100.

[81] Barahona de Brito, p. 148.

[82] Huneeus, p.101.

[83] Collins, pp.2-3; 220.

[84] See Aguilar, 2008b.

[85] Ley 52/2007.

declared certain Francoist courts and sentences "illegitimate", as opposed to unlawful, offering those who suffered certain court judgments based on ideologically or religiously motivated laws the possibility of obtaining a "declaration of reparation and personal recognition".

This decision goes against the European Council's opinion and also that of most Spaniards[86], while also ignoring international precedents[87]. The Government's position, supported by various Supreme Court rulings and the opinion of the Constitutional Court (which invoke "legal certainty" and underline the absence of "new facts" as the main reason for objecting to the review of Francoist trials), has been challenged by a small yet eminently qualified group of legal experts who advocate the annulment of trials and sentences.

As regards the validity of the Spanish Amnesty Law, the truth is that for many years it went unnoticed. The creation in 2000 of the Association for the Recovery of Historical Memory (*Asociación para la Recuperación de la Memoria Histórica*), responsible for many of the exhumation processes carried out over the last decade in Spain, gave rise to the first formal complaints concerning the restrictions imposed by the 1977 Amnesty Law on the scope for reviewing the past and redressing victims. But what finally thrust this law into the limelight was the ruling issued by Judge Baltasar Garzón on October 16, 2008. Until then, there had been no debate about the non-prescriptibility of certain crimes, or about the obligation, according to the United Nations and various international treaties ratified by Spain, to offer reparation or moral redress to all the victims of violence during the Civil War and the dictatorship.

The recent proliferation of associations determined to carry out exhumations in numerous common graves has been extraordinary. It was these associations that, in December 2006, filed the first of various formal complaints with the National High Court regarding the "illegal detentions" and "forced disappearances" –both considered crimes against humanity– that occurred as a result of the coup d'état of June 18, 1936 led by General Francisco Franco against the legitimate government of the Second Republic (Chinchón, 2009). Judge Garzón declared himself competent to investigate the complaints. Although he subsequently declared himself incompetent once it was proved that the main perpetrators of the aforementioned crimes were no longer alive, and for this reason transferred the complaints to the regional courts, the National High Court also held that Garzón lacked jurisdiction over this matter. Months later, two private criminal lawsuits were filed against Judge Garzón claiming that his decisions to declare himself competent initially could be classified as a "prevarication". It is particularly significant that the plaintiffs are organizations with far-right links. The action is still in progress, although on May 14, 2010, following the formal order for commencement of trial, Garzón was temporarily suspended from his duties on the alleged grounds that there was sufficient evidence to claim that he had "prevaricated" by having tried to open investigations into the crimes of Francoism while knowing full well that, among other things, the Amnesty Law did not allow such a thing. This decision sparked a massive controversy both at home and abroad. A few days later, the General Council of the Judiciary allowed him to leave Spain and take up a post as external advisor to the Chief Prosecutor of the International Criminal Court in The Hague. At present, his professional future in Spain remains uncertain.

CONCLUSIONS

We have summarized the main empirical evidence for the Spanish judicial system's active and direct involvement in the intense political repression carried out by Francoism throughout the dictatorship, and

[86] In a CIS survey conducted in April 2008 (no. 2,760), the majority of Spaniards (50.4 % as compared with 19.3% against) agree that "democracy should annul the political trials that took place under Francoism".

[87] In 1998 the German Parliament passed a Federal law to annul unjust sentences passed under Nazism. Austria has also passed laws that annul unjust sentences during the German occupation.

described the institutional mechanisms created by the Executive to ensure the loyalty of the legal profession.

In the Chilean and Argentine cases, despite the ideological sympathies and complicit silence of judges, senior judges and prosecutors, they did not form part of courts-martial and, therefore, did not pass tens of thousands of death sentences, unlike their Spanish counterparts. Neither did they participate in special jurisdictions devoted to political repression. Despite judicial complicity, "comparative research on courts under military rule in Argentina and Chile would also reveal that there were judges who were resolute in their pursuit of justice even when deference appeared to be the only rational strategy for judges interested in their careers. In a number of cases, this independence cost judges their jobs"[88]. Although the Spanish and Chilean amnesties remain in force, there are notable differences between both cases. Chilean judges have helped clarify the facts without infringing the law. In many cases they have also decided to investigate crimes deemed non-prescriptible by international legislation. Finally, the Chilean amnesty only covers five years, as opposed to all 40 years of the dictatorship in the Spanish case. The restrictive interpretation of the amnesty in Spain and the absence of alternative truth-seeking mechanisms make this country a model of "absolute oblivion"[89].

It is surprising that the extensive literature on democratization processes in general, and the Spanish transition in particular, has paid so little attention to the role played by the previous regime's judicial system. However, it is a fundamental variable for understanding the complex balances between the legacies of the past and the new rules, institutions and actors entering into play. Neither has the specific literature on the determinants of transitional justice measures attached due importance to how an unpurged judicial system previously involved in political repression might hinder attempts to create truth commissions, prosecute the perpetrators of rights abuses, and even review and, where applicable, annul the unjust judicial sentences of the authoritarian past.

Although the Spanish judicial system's repressive collaboration was far greater and longer-lasting, the creation of a truth commission, let alone trials against those who violated human rights, is still quite unthinkable. And although resistance during the transition may well have been political and institutional as well as social, the available data show that today's Spanish society would be in favor of such measures[90]. Despite generational change having helped overcome the trauma of the civil war and the fear of political instability, the judicial system remains opposed to reviewing the sentences of the past. And it is one thing to undertake this task when only the military and police authorities were responsible for repressive practices, but quite another when many of their legal professional participated as direct and active collaborators.

Francoism's strategy is clear: it tried to involve as many sectors as possible in political repression. This gave rise to widespread and solid networks of complicity throughout the dictatorship, which explains why so many benefited from a generously forward-looking democratic transition. Few people had incentives to subject the past to scrutiny, and those who did, especially those who suffered repression, either out of mistrust towards the judicial and police system, or because they felt that other priorities prevailed at a time of such great uncertainty, lodged barely any formal complaints.

Those who benefited most from the agreement not to judicially review the past, or even not to publicly expose the workings of the repressive machine through a truth commission, were, logically, those most directly involved in the repression. In Spain, the intense and widespread wartime

[88] Barros, p.177.

[89] Alicia Gil, *La justicia de transición en España* (Barcelona: Atelier. 2009), p.86.

[90] In a CIS survey conducted in April 2008 (no. 2,760), the majority of Spaniards (48.7% in favor as compared with 26.7% against), agree with the following statement: "the authorities that violated human rights under Francoism should be brought to trial".

and postwar repression would not have been possible without the judicial system's active involvement. Moreover, the Francoist dictatorship, being the longest of the three, had more time to indoctrinate and perpetuate habits of ideological dependence, which explains the judicial system's conservatism and greater reluctance to review the past, as this would involve not only publicly exposing its repressive collaboration, but also subjecting to criticism bad judicial practices and the lack of safeguards in most of the political trials held under the dictatorship.

We believe our conclusions –the more "official" the repression and the greater the judicial system's involvement has been, the more resistance to approving transitional justice measures there will be–, could be extrapolated to other countries. We have also seen that when the judicial system has not been purged (or belatedly and insufficiently purged) and is characterized by a strong esprit de corps, reinforced by a certain level of endogamy, judges tend to close ranks and boycott any measure that could call their past integrity into question.

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