


Neither oblivion nor reconciliation: an analysis of post-Francoist Spanish historical memory and Transitional Justice

Ni olvido ni reconciliación: un análisis sobre la memoria histórica y la justicia transicional en la España posfranquista.

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Abstract

Authoritarian regimes seek their preservation through the systematic repression of any dissidence, leading to the perpetration of crimes against anyone who might challenge the regime's values and legitimacy. Thus, when transitioning from an authoritarian regime to a democratic system, implementing a comprehensive transitional justice process is imperative to close old wounds and ensure reconciliation and reparation between the parties. Francoism, like every authoritarian regime, was not exempt from committing serious crimes against its enemies for more than three decades. Nonetheless, when Spain transitioned from a dictatorial to a democratic model, democratization was prioritized over justice. Despite the Spanish reluctance to adopt all necessary transitional justice measures during the democratization process, the Spanish Transition has been claimed to be an exemplary case to follow and study. This article aims to overview the three legal documents that were supposed to guarantee transitional justice to the victims and the Spanish society: the 1977 Amnesty Law, the 2007 Historical Memory Law, and the recently passed 2022 Law of Democratic Memory. This article concludes that although the 2022 Law of Democratic Memory has solved some of the flaws of previous legislation, there are still some key aspects of transitional justice which remain unaddressed.

Keywords: Francoism, Transitional Justice, Historical Memory, Democratization, Democratic History.

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Resumen

Las dictaduras buscan su supervivencia a través de la represión sistemática de cualquier disidencia, conllevando la perpetración de crímenes contra todo desafío hacia sus valores y legitimidad. Ergo, al transitar de un régimen autoritario a uno democrático, es imperativo implementar un proceso integral de justicia transicional para cerrar heridas y asegurar la reconciliación. El franquismo no estuvo exento de cometer graves delitos durante más de tres décadas; sin embargo, cuando España pasó de un modelo dictatorial a uno democrático, se priorizó la democratización del sistema sobre la justicia. Pese a no haber adoptado todas las medidas de justicia transicional necesarias durante el proceso de democratización, la Transición se ha reivindicado como un caso ejemplar a seguir y estudiar. Este artículo tiene como objetivo hacer un recorrido por los tres instrumentos jurídicos que debían garantizar la justicia transicional a las víctimas y a la sociedad española: la Ley de Amnistía de 1977, la Ley de Memoria Histórica de 2007 y la reciente Ley de Memoria Democrática de 2022. Este artículo concluye que, si bien la Ley de Memoria Democrática de 2022 soluciona alguna de las fallas de la legislación anterior, todavía quedan algunos aspectos clave de la justicia transicional sin ser abordados.

Palabras clave: Franquismo, Justicia Transicional, Memoria Histórica, Democratización, Historia Democrática

1. Introduction

Transitions are always challenging. More specifically, democratization processes are particularly delicate since they entail breaking with the past and building a new identity based on unpleasant historical experiences and lessons learned. How a state remembers its history will not only determine future policies but will also condition the elaboration and consolidation of a potential narrative regarding the figures of its former regime and victims¹. Therefore, memory plays a crucial role in forging a future democratic identity and in designing and implementing adequate, accurate, comprehensive, and unbiased reparatory measures to compensate those who suffered any form of repression².

Transitioning from Franco's 36-year authoritarian regime to a Western liberal democratic model was not free from all the challenges involved in a democratization process. However, some scholars have claimed that the Spanish Transition could be an inspirational model for other countries since it represents a clear case of agreement and compromise between the parties³.

¹ Rosoux, Valérie, "The role of memory in the desecuritization of inter-societal conflicts", in Butler, Michael J. (ed.), *Securitization Revisited*, London, Routledge, 2019, pp. 194–217, <https://doi.org/10.4324/9780429054648-12>.

² Mihr, Anja, *Regime Consolidation and Transitional Justice: A Comparative Study of Germany, Spain and Turkey*, Cambridge, Cambridge University Press, 2018, <https://doi.org/10.1017/9781108394895>

³ Martín de la Guardia, Ricardo, "Modelo de cambio político", in *El Mundo*, June 15th, 2017. «<https://www.elmundo.es/espana/2017/06/15/59418777e2704e52488b4630.html>» [accessed on October 15th, 2022]; Maxwell,

Nonetheless, to properly assess the so-called meritorious nature of the Spanish Transition, some aspects cannot be forgotten, such as the transitional justice process and all the measures that ought to be implemented after nearly forty years of systematic crimes and political repression. To evaluate whether or not transitional justice was adequate in Spain and, therefore, whether or not the turn into democracy was a model to be followed, Franco’s repressive apparatus and its systematic crimes require an examination. This will be done in the first section of this paper. Moreover, to precisely examine crimes that occurred during Francoism, two periods will be reviewed separately: the post-war years, ranging from 1939 to 1947, which were characterized by Franco’s brutal repression against his opponents; and the period that comprises the years between 1947 and Franco’s death in 1975, where a reduction of political repression was observed but crimes were still committed⁴.

Hence, as has already been mentioned, carrying out a transition to democracy was both difficult and threatening for several reasons, but mainly because it required the support of Franco’s most loyal supporters -the elites, the army, and influential organizations that were privileged during Francoism- to succeed⁵. At that time, it was firmly believed that without the support of Franco’s adepts the whole process would have failed⁶. Therefore, to secure their support, the democratic transformation was built upon the idea of overcoming the conflict through reconciliation rather than recrimination⁷. This approach is explained by the general belief that the call for justice might have resulted in disadvantageous tensions that could have undermined the whole transition process⁸, which made policymakers prioritize silence and oblivion over justice, reparations, and compensations⁹.

Kenneth, “Spain’s Transition to Democracy: A Model for Eastern Europe?”, in *Proceedings of the Academy of Political Science* 38, 1 (1991), pp. 35–49, <https://doi.org/10.2307/1173811>; and Przeworski, Adam, “Some Problems in the Study of the Transition to Democracy”, in *Latin American Program Working Paper Series (51-100)* 61, 1 (1979), pp. 1–21.

⁴Kazyrytski, Leanid, “Francoist repression in Spain and the crime of genocide”, in *Criminology & Criminal Justice* 1, 1 (2021), pp. 1–18, <https://doi.org/10.1177/17488958211017385>; Escudero, Rafael, “Road to Impunity: The Absence of Transitional Justice Programs in Spain”, in *Human Rights Quarterly* 36, 1 (2014), pp. 123–146; Aguilar, Paloma *et al.*, “Determinants of Attitudes towards Transitional Justice: An Empirical Analysis of the Spanish Case”, in *Comparative Political Studies* 44, 10 (2011), pp. 1397–1430, <https://doi.org/10.1177/0010414011407468>; Tamarit-Sumalla, Josep Maria, “Transition, Historical Memory and Criminal Justice in Spain”, in *Journal of International Criminal Justice* 9, 1 (2011), pp. 729–752, <https://doi.org/10.1093/jicj/mqr029>; Aguilar, Paloma, “Transitional or Post-transitional Justice? Recent Developments in the Spanish Case”, in *South European Society and Politics* 13, 4 (2008), pp. 417–433, <https://doi.org/10.1080/13608740902735000>; and Davis, Madeleine, “Is Spain Recovering Its Memory? Breaking the Pacto del Olvido”, in *Human Rights Quarterly* 27, 3 (2005), pp. 858–880, <https://doi.org/10.1353/hrq.2005.0034>.

⁵Aguilar, Paloma *et al.*, *Determinants of Attitudes... op. cit.*, 1397–1430.

⁶Escudero, Rafael, *Road to Impunity: The Absence... op. cit.*, pp. 123–146.

⁷Encarnación, Omar G., *Democracy Without Justice in Spain: The Politics of Forgetting*, Philadelphia, University of Pennsylvania Press, 2015.

⁸Sriram, Chandra L., “Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice”, in *Global Society* 21, 4 (2007), pp. 579–591.

⁹Jimeno, Roldán, *Amnesties, Pardons and Transitional Justice: Spain’s Pact of Forgetting*, New York, Routledge, 2018, <https://doi.org/10.4324/9781315107950>; Encarnación, Omar G., *Democracy Without Justice in Spain: The Politics of Forgetting*, Philadelphia, University of Pennsylvania Press, 2015; Kovras, Iosif, “Explaining Prolonged Silences in Transitional Justice: The Disappeared in Cyprus and Spain”, in *Comparative Political Studies* 46, 6 (2013), pp. 730–756, <https://doi.org/10.1177/0010414012463879>; and Tamarit-Sumalla, Josep Maria, *Historical Memory and Criminal Justice in Spain: A Case of Late Transitional Justice*, Cambridge, Intersentia Publishing Ltd, 2013, <https://doi.org/10.1017/9781839700675>.

Thus, as can be deduced from the former paragraph, justice and compensatory measures targeting those who suffered from Franco's repressive system were far from being neither prioritized nor even conceived over the imperative of transitioning towards a democratic system. However, nearly 50 years have passed since Franco's death, tensions are gone, and there are still several reparations and compensations that are missing, which makes Spanish Transition and Post-Transitional Justice an incomplete and insufficient example of Transitional Justice. According to Mihr, the three main societal factors that stopped transitional justice measures from being implemented were the presence of Franco elites and former supporters of the regime in key political institutions, the judiciary, church and economy that, even today, some of them still hold key positions in the aforementioned bodies; the loyalty to the Franco's regime during the first years of the transition of the domestic state security institution, namely *Guardia Civil*; and the influence of the Catholic Church, which strongly showed its opposition to the presence of the socialists and communists in the new game of democratic power sharing¹⁰. These factors partly explain why it took so many years to start implementing transitional justice measures in Spain even after the death of the dictator and the so-called consolidation of the democracy. Therefore, this paper questions the Spanish Transitional Justice model and aims to analyze why it was not an exemplary case. For examining and analyzing why Spanish Transitional Justice was inadequate, three separate periods must be considered: the Spanish transitional justice during the Spanish Transition, the Spanish post-transitional justice after the implementation of the Law 52/2007, of December 26th, that recognizes and broadens the rights and establishes measures in favor of those who suffered prosecution or violence during the Civil War and the Dictatorship (Historical Memory Law), and the recently passed Law 20/2022, of October 19th, on Democratic Memory (Law of Democratic Memory)¹¹. While the first period exclusively focused on implementing material reparation measures, the Historical Memory Law, though having several flaws, aimed at democratizing Civil War memory by re-examining the past and re-shaping the public sphere to further understand Spanish violent history¹². Nonetheless, due to these flaws, further steps were demanded, and a project of law was designed and approved to tackle and improve such problems: the 2022 Law of Democratic Memory. This paper will thoroughly explore two key legal documents -the Law 46/1977, of October 15th, on Amnesty (Amnesty Law) and the 2007 Historic Memory Law- that have determined and conditioned the approach implemented in Spanish Transitional Justice and will also analyze some key features of the recently approved and passed 2022 Law of Democratic Memory.

¹⁰ Mihr, Anja, "Regime Consolidation through Transitional Justice in Europe: The Case of Germany, Spain and Turkey", in *International Journal of Transitional Justice* 11, 1 (2017), pp. 265–339, <https://doi.org/10.1093/ijtj/ijx003>

¹¹ Jimeno, Roldán, *Amnesties, Pardons and Transitional Justice: Spain's Pact of Forgetting*, New York, Routledge, 2018, <https://doi.org/10.4324/9781315107950>.

¹² Humphrey, Michael, "Law, Memory and Amnesty in Spain", in *Macquarie Law Journal* 13, 1 (2014), pp. 25–40; Aguilar, Paloma *et al.*, *Determinants of Attitudes... op. cit.*, 1397-1430.; and Golob, Stephanie R., "Volver: The Return of/to Transitional Justice Politics in Spain", in *Journal of Spanish Cultural Studies* 9, 2 (2008), pp. 127–141, <https://doi.org/10.1080/14636200802283647>.

This article has been structured as follows: first, crimes committed by the Spanish state during Francoism will be overviewed and contextualized. Second, Transitional Justice in Post-Francoist Spain, Post-Transitional Justice with the 2007 Historic Memory Law, and the 2022 Law of Democratic Memory will be examined and analyzed. Third, after having scrutinized such processes, the results will be discussed and contrasted with existing literature. And last but not least, a brief conclusion will close this paper summarizing why Spain still lacks an adequate Transitional Justice that both compensates and provides reparations to the victims of Francoism and will provide some advice for the 2022 Law of Democratic Memory.

2. Background & crimes during Francoism

Francoism was preceded by an extremely violent and fratricide conflict, the Spanish Civil War (1936-1939). During the war, several crimes and murders were committed by both sides; nonetheless, whereas the victimization during the Spanish Civil War was to some extent symmetrical, the victimization during Francoism was firmly asymmetrical and vertical, which also resulted in flagrant acts of repression and revenge carried out by the victors in retaliation for the acts of violence they underwent during the war¹³. Hence, Francoism was a 36-year dictatorship in which reconciliation between the winners and losers of the conflict was far from being achieved and in which former supporters of the Second Republic were victims of brutal repression and numerous human rights violations.

Although human rights violations occurred during the whole Francoism, the most severe repression and serious atrocities took place from 1939 to 1947, such as mass killings, slavery and forced labour of republican prisoners, babies' appropriation, imprisonments in concentration camps for political reasons, disappearances and extrajudicial executions, tortures, systematic labour expulsions, as well as systematic spoliation of assets and properties from sympathizers of the Second Republic¹⁴. Moreover, to illustrate Francoist repression, it is worth noting that, in the first half of the 1940s, more than 300,000 people were convicted in prisons, accounting for approximately 1,158 prisoners per 100,000 inhabitants, nearly ten times more than the 1936 Spain's Population¹⁵. Nonetheless, Francoist repression should not

¹³ Tamarit-Sumalla, Josep María, *Historical Memory and Criminal Justice in Spain: A Case of Late Transitional Justice*, Cambridge, Intersentia Publishing Ltd, 2013, <https://doi.org/10.1017/9781839700675>.

¹⁴ Kazyrytski, Leanid, *Francoist repression in Spain...* *op. cit.*, pp. 1–18; Escudero, Carolina, “Giving voice to the traumatic event, Spanish mothers of stolen babies. Three strategies to silence mothers during and after the dictatorship”, in *International Journal of Humanities and Social Sciences* 10, 3 (2020), pp. 1–7, <https://doi.org/10.30845/ijhss.v10n3a8>; Aguilar, Paloma *et al.*, *Determinants of Attitudes...* *op. cit.*, 1397-1430; and Aguilar, Paloma, *Transitional or Post-transitional Justice?... op. cit.*, pp. 417–433.

¹⁵ Tamarit-Sumalla, Josep María, *Historical Memory and Criminal Justice in Spain: A Case of Late Transitional Justice*, Cambridge, Intersentia Publishing Ltd, 2013, <https://doi.org/10.1017/9781839700675>.

be reduced to individuals' imprisonment since it also touched upon other spheres of Spanish society. More specifically, Franco's regime also legalized the stripping of private property from individuals associated with the Second Republic, which resulted in numerous expropriations of such goods and their consequent transfer of such properties to Francoism's supporters, as well as the implementation of purges against professors, public employees, and members of the Second Republic government, who never recovered their previous social status¹⁶. Having observed such practices, it has been claimed that this repression and its legal mechanisms, such as the 1939 Law, of February 9th, on Political Responsibilities, which illegalized political parties, trade unions, and other organizations and imposed economic penalties on businesses and people simply for having supported the Second Republic, solely aimed at physically eliminating and cleansing a social group identified by the regime as "enemies of Spain", that were represented by the "liberals", "Reds", and "separatists"¹⁷. Some scholars have thus considered Francoist repression a form of genocide, due to their alleged ultimate goal of eliminating a defined sector of the Spanish population¹⁸.

On the other hand, though the number of atrocities decreased from 1947 onwards due to increasing economic stability and international interconnectedness experienced by Spain in the 1950s, crimes were still committed, which mostly consisted of sentencing people for political purposes, using torture extensively against the enemies of the regime, as well as imposing death penalties on opponents where fair trial guarantees were not respected¹⁹. All these crimes are listed in the Rome Statute of the International Criminal Court as crimes against humanity²⁰. This categorization is relevant not only because it shows the severity of the crimes, but also because they could have had legal implications under international humanitarian law and international law if some of its customary rules were applied as forming part of the *ius cogens* in Spain²¹. Furthermore, some of the aforementioned crimes are also included in the International Covenant on Civil and Political Rights (ICCPR), which was already in force in Spain in 1977 and therefore requires states to investigate cases of disappearances when life was threatened (see

¹⁶ Escudero, Rafael, *Road to Impunity: The Absence... op. cit.*, pp. 123–146.

¹⁷ Kazyrytski, Leanid, *Francoist repression in Spain... op. cit.*, pp. 1–18; Humphrey, Michael, *Law, Memory and Amnesty... op. cit.* pp. 25–40; Encarnación, Omar G., *Democracy Without Justice in Spain: The Politics of Forgetting*, Philadelphia, University of Pennsylvania Press, 2015; Encarnación, Omar G., "Justice in Times of Transition: Lessons from the Iberian Experience", in *International Studies Quarterly* 56, 1 (2012), pp. 179–192, <https://doi.org/10.1111/j.1468-2478.2011.00688.x>; Tamarit-Sumalla, Josep María, *Historical Memory and Criminal Justice in Spain: A Case of Late Transitional Justice*, Cambridge, Intersentia Publishing Ltd, 2013, <https://doi.org/10.1017/9781839700675>; and Rodrigo, Javier, *Cautivos: campos de concentración en la España franquista, 1936-1947*, Barcelona, Crítica, 2005.

¹⁸ Kazyrytski, Leanid, *Francoist repression in Spain... op. cit.*, pp. 1–18; Miguez-Macho, Antonio, "A Genealogy of Genocide in Francoist Spain", in *Genocide Studies and Prevention* 8, 1 (2013), pp. 21–32, <http://dx.doi.org/10.5038/1911-9933.8.1.4>; and Rodrigo, Javier, *Cautivos: campos de concentración en la España franquista, 1936-1947*, Barcelona, Crítica, 2005.

¹⁹ Tamarit-Sumalla, Josep María, *Transition, Historical Memory and Criminal... op. cit.*, pp. 729–752; and Davis, Madeleine, *Is Spain Recovering Its Memory?... op. cit.*, pp. 858–880.

²⁰ International Criminal Court, 2002. Rome Statute of the International Criminal Court, C.N.

²¹ Escudero, Rafael, *Road to Impunity: The Absence... op. cit.*, pp. 123–146; and Burbidge, Peter, "Waking the Dead of the Spanish Civil War: Judge Baltasar Garzón and the Spanish Law of Historical Memory", in *Journal of International Criminal Justice* 9, 1 (2011), pp. 753–781, <https://doi.org/10.1093/jicj/mqr027>.

Article 6) and in relation to torture (see Article 7); hence, although some of the disappearances that occurred during Francoism met the characteristics for having been approached from both articles, the 1977 Amnesty Law entered into force and buried any possibility of investigating such crimes and committing to the Spanish ratification of the ICCRR²².

Alongside these repressive practices and crimes, it should be noted that Franco’s regime also adopted an asymmetrical commemoration and memorialization approach. In other words, while the nationalist who fell and died during the war were exhumated from their graves and buried with honours in local cemeteries, well-advertised pantheons, and in the crypts in the huge memorial Valley of the Fallen, the great majority of mass graves containing Republican loyalists remained either abandoned at different locations outside cemeteries or in unhallowed sections of burial grounds, thus boosting the development of an extensive official narrative that was anchored in the concepts of religious crusade, heroism, and martyrdom²³.

3. Transition & memory

The Spanish Transition covers a period between Franco’s death (11/1975) and the electoral victory of Felipe González (PSOE – Spanish Socialist Workers’ Party) in the 1982 general election²⁴. It was a state-led process that enabled its designers to foreclose the possibility of carrying out retroactive justice against the members of Franco’s regime who committed the abovementioned crimes during the dictatorship, the justice system, and its administrative apparatus²⁵. Nonetheless, despite being a state-led process, social mobilizations and clandestine organizations were key in both the democratization process and in the obtention of crucial political and legal rights that made the transition towards democracy possible²⁶. Some of these social mobilizations and demonstrations, and clandestine organizations were, for instance, several widespread pro-amnesty mobilizations, which were ultimately key in the design and

²² Burbidge, Peter, *Waking the Dead of the Spanish... op. cit.*, pp. 753–781.

²³ Ferrándiz, Francisco, “Death on the Move: Pantheons and Reburials in Spanish Civil War Exhumations”, in Antonius C. G. M. Robben (Eds.). *A Companion to the Anthropology of Death*, New Jersey, Wiley-Blackwell, 2018, pp. 189-204, <https://doi.org/10.1002/9781119222422.ch14>

²⁴ Sánchez-Cuenca, Ignacio and Aguilar, Paloma, “Terrorist Violence and Popular Mobilization: The Case of the Spanish Transition to Democracy”, in *Politics & Society* 37, 3 (2009), pp. 428–453, <https://doi.org/10.1177/0032329209338927>.

²⁵ Kovras, Iosif, *Explaining Prolonged Silences... op. cit.*, pp. 730–756; and Encarnación, Omar G., *Justice in Times of Transition... op. cit.*, pp. 179–192.

²⁶ See Sartorius, Nicolás and Alberto Sabio, *El final de la dictadura: la Conquista de la democracia en España (Noviembre de 1975- Diciembre de 1978)*, Barcelona, Espasa, 2018; Sánchez-Cuenca, Ignacio and Aguilar, Paloma, *Terrorist Violence and Popular Mobilization... op. cit.*, pp. 428–453; Aguilar, Paloma, “Collective memory of the Spanish civil war: The case of the political amnesty in the Spanish transition to democracy”, in *Democratization* 4, 4 (1997), pp. 88-109, <https://doi.org/10.1080/13510349708403537>; Hipsher, Patricia L., “Democratization and the Decline of Urban Social Movements in Chile and Spain”, in *Comparative Politics* 28, 3 (1996), pp. 273-297, <https://doi.org/10.2307/422208>.

implementation of the Amnesty Law and that clearly showed the general desire for reconciliation among Spaniards²⁷; several neighbourhood movements, which acted as amplifications for mobilizations and demonstrations²⁸; the university student movements, which turned universities into strategic pro-democratic hubs²⁹; trade unions, which accomplished several working rights and improved working conditions through the implementation of numerous strikes and demonstrations³⁰; and the clandestine *Justicia Democrática*, a group of judges that were organized clandestinely to promote and defend a transition to political liberalism³¹, among others. Moreover, during the transition, many exhumations began taking place by relatives with very little or no institutional support, initiating a process of acknowledgement and commemoration of the Republican loyalists and their relatives' suffering and marginalization during the dictatorship³².

The above-mentioned demonstrations intensified their actions and protests when the hardliner Arias Navarro was appointed as the head of government after Franco's death and he showed his unwillingness to launch the reforms already demanded by most of the society, resulting in higher levels of social unrest that consequently led to the final decision of the new king, Juan Carlos I, of replacing him with a regime reformer keener on carrying out such reforms, Adolfo Suárez³³. Thus, as has been pointed out by several scholars, the Spanish Transition comprehended several agreements, acts, and major political and social events that shaped its development³⁴; all of these occurred under high levels of social unrest, terrorist and political violence perpetrated by separatists, extreme left-wing supporters, and fascists and *vigilantes* that threatened the transition and invited a military coup³⁵. To illustrate the dimensions of political violence during the transition to democracy, Sánchez-Cuenca and Aguilar created a dataset that included all fatalities of political violence in Spain between 1975 and 1982, accounting for a total of 718 deaths, among which 504 were due to nonstate political violence and the remaining 214

²⁷ Aguilar, Paloma, *Collective memory of the Spanish civil war... op. cit.*, pp. 88-109.

²⁸ Tranche, Rafael R., "Agitación en las calles. La violencia política en la Transición española a través del fotoperiodismo", in *Historia y Comunicación Social* 27, 1 (2022), pp. 71-81, <http://dx.doi.org/10.5209/hics.81589>.

²⁹ See Sartorius, Nicolás and Alberto Sabio, *El final de la dictadura: la Conquista... op. cit.*, pp. 134-176; Carrillo-Linares, Alberto, "«y nosotros, qué?» El movimiento estudiantil durante la transición", in Quirosa-Cheyrouze y Muñoz, Rafael (eds.) *La sociedad española en la transición. Los movimientos sociales en el proceso democratizador*. Madrid, Siglo XXI, 2011, pp. 221-235.

³⁰ See Redero San Román, Manuel, "Los sindicatos en la democracia: de la movilización a la gestión", in *Historia y Política* 20 (2008), pp. 129-158.

³¹ See Hilbink, Lisa, "Politicising Law to Liberalise Politics: Anti-Francoist Judges and Prosecutors in Spain's Democratic Transition", in Halliday, Terece C., Lucien Karpik, and Malcolm Feeley (eds.), *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism*, Portland, Hart Publishing, 2007, pp. 403-437.

³² Ferrándiz, Francisco, "Death on the Move: Pantheons and Reburials in Spanish Civil War Exhumations", in Antonius C. G. M. Robben (Eds.). *A Companion to the Anthropology of Death*, New Jersey, Wiley-Blackwell, 2018, pp. 189-204, <https://doi.org/10.1002/9781119222422.ch14>

³³ Sánchez-Cuenca, Ignacio and Aguilar, Paloma, *Terrorist Violence and Popular Mobilization... op. cit.*, p. 434.

³⁴ On the major events, relevant political and social actors, and determinant institutions during the Spanish Transition, see La Moncloa, "History of Spain". «<https://www.lamoncloa.gob.es/lang/en/espana/historyandculture/history/Paginas/index.aspx#democracy>» [accessed September 5th, 2022]; and Ysàs, Pere, "La Transición española. Luces y sombras", in *Ayer* 79, 3 (2010), pp. 31-57.

³⁵ Sánchez-Cuenca, Ignacio and Aguilar, Paloma, *Terrorist Violence and Popular Mobilization... op. cit.*, pp. 428-453.

due to state repression³⁶. Other scholars have increased these figures and suggested a different total number of deaths due to state repression, such as the historian Baby, who pointed out that, between 1975 and 1982, 324 deaths were due to state and police repression, among which 178 could be linked to politics³⁷. These figures are key to understand the magnitude of the climate of tension, violence, and unrest that determined the transition to a democracy. However, among the main events that took place between 1975 and 1982, four of them are worth mentioning.

First, the 1977 Amnesty Law, which amnestied all criminal actions motivated by political reasons committed by both terrorist organizations and the public servants of the previous regime³⁸. The 1977 Amnesty Law followed two previous legal documents that initiated this period of transition, forgiveness, and oblivion: the Law 10/1976, of July 30th, on Amnesty (1976 Partial Amnesty Law), which was enacted as a royal decree and aimed to plant the seeds for what will become the central theme of the whole Spanish Transition: the usefulness of forgetting to overcome social divisions; and the Royal Decree 388/1977, of March 14th, on the General Pardon (1977 clemency grace measures)³⁹. This shows that, despite the common belief that the Amnesty Law emptied the prisons from prisoners condemned for political purposes, thousands of political prisoners had already been released before the Amnesty Law was passed on October 15th, 1977⁴⁰. The other key events that occurred in this period were the 1978 Constitution, approved in December 1978; the coup d'état of 23rd February 1981, which occurred in a moment of profound crisis and social unrest, and finally marked the consolidation of the young post-Francoist democracy by solidifying the tacit Pact of Forgetting⁴¹; and lastly, the victory of PSOE in 1982, which could be considered as the final and clean break from its dictatorial and convulse past⁴².

3.1. Transitional Justice in post-Francoist Spain

Between Franco's death in 1975 and the ratification of the 1978 Constitution, the only legal mechanisms addressing transitional justice were the concession of a wide pardon after the coronation of Juan Carlos I, which benefitted common prisoners, people imprisoned for political

³⁶ *Ibidem* p. 430.

³⁷ Baby, Sophie, *El mito de la transición pacífica. Violencia y política en España (1975- 1982)*, Madrid, Akal, 2018, pp. 473-506.

³⁸ Tamarit-Sumalla, Josep María, *Transition, Historical Memory and Criminal... op. cit.*, pp. 729–752; and Boyd, Carolyn P., “The Politics of History and Memory in Democratic Spain”, in *The Annals of the American Academy* 617, 1 (2008), pp. 133–149, <https://doi.org/10.1177/0002716207312760>.

³⁹ Jimeno, Roldán, *Amnesties, Pardons and Transitional Justice: Spain's Pact of Forgetting*, New York, Routledge, 2018, <https://doi.org/10.4324/9781315107950>; see *Boletín Oficial del Estado (BOE)*, no. 186, 4 August 1976, pp. 15097–15098, and *Boletín Oficial del Estado (BOE)*, no. 66, 18 March 1977, pp. 6301–6302.

⁴⁰ Alcántara Pérez, Pablo, “La Brigada Político Social y el “Modelo de Impunidad Español”: del Franquismo a nuestros días”, in *Historia Actual Online* 56, 3 (2021), pp. 91-104.

⁴¹ Jünke, Claudia, “23-F and/in historical memory in democratic Spain”, in *Journal of Romance Studies*, 16, 3 (2016), pp. 6–21, <https://doi.org/10.3828/jrs.2016.160302>; and Encarnación, Omar G., *Democracy Without Justice in Spain: The Politics of Forgetting*, Philadelphia, University of Pennsylvania Press, 2015.

⁴² Encarnación, Omar G., *Justice in Times of Transition... op. cit.* pp. 179–192.

conspiracy, thought-crimes, criminal syndicalism, and for challenging press censorship; the 1976 Partial Amnesty Law, which was directed at trade unions, civil servants in purged local administrations and in the Catalanian Generalitat, the media, auxiliary staff of purged courts and tribunals, and prisoners for political reasons, sedition, insurgency, and for any crime committed against the dictatorship; the 1977 clemency “grace measures”, which aimed at overcoming some technical obstacles that hindered the aforementioned amnesty; and the concluding and definitive 1977 Amnesty Law, which created a judicial narrative of forgetting, silence, and equivalence of victims from both sides to achieve the implementation of a modern and liberal democratic system in Spain⁴³. All these measures that entered into force in Spain between 1975 and 1977 indeed prioritized transitioning as peacefully as possible from an authoritarian regime that was robustly established in Spanish institutions to a democratic model. In the end, this prioritization of democracy over justice resulted in the tacit Pact of Forgetting -which can be understood as the unspoken agreement of oblivion based upon an erasure of memory due to the tangible fear of a military coup, risk-aversion intentions, and a collective sense of guilt that acted as inhibitors of any restorative measures-, which was guaranteed by the 1978 constitutional referendum that finally established the 1978 Constitution, which inaugurated and defined the new democratic institutions, basic rights, and initiated the decentralization of power⁴⁴.

Nonetheless, if there was one key legal document that ensured the success of the transition through collective silence and oblivion and facilitated the design and entry into force of the 1978 Constitution, this document was the 1977 Amnesty Law. The 1977 Amnesty Law can be considered a form of reciprocal forgiveness since it extended absolution of all the criminal actions taken due to political reasons, whatever their nature and results, thus including terrorist organizations as well as the public servants who committed crimes during the previous regime⁴⁵. This can be observed in its Article 2, which stated that the following crimes were to be amnestied: crimes of rebellion, sedition, and misdemeanours; the conscientious objection to the military service; the acts of expression of opinion, carried out through the press and any other means of communication; as well as the crimes and misdemeanours that could have been committed by the authorities, officials, and agents of public order, and the offenses committed by public order officials and agents against the exercise of the rights of individuals⁴⁶. Therefore, the 1977 Amnesty Law meant a definitive closure with the dictatorship, guaranteeing the impunity of the actors of Francoist repression⁴⁷. This was believed to be necessary to assure the cooperation of the regime supporters, which were considered at that point as the main obstacle to a return

⁴³ Jimeno, Roldán, *Amnesties, Pardons and Transitional Justice: Spain's Pact of Forgetting*, New York, Routledge, 2018, <https://doi.org/10.4324/9781315107950>; Humphrey, Michael, *Law, Memory and Amnesty... op. cit.* pp. 25-40; and Tamarit-Sumalla, Josep María, *Historical Memory and Criminal Justice in Spain: A Case of Late Transitional Justice*, Cambridge, Intersentia Publishing Ltd, 2013, <https://doi.org/10.1017/9781839700675>.

⁴⁴ Sánchez-Cuenca, Ignacio and Aguilar, Paloma, *Terrorist Violence and Popular Mobilization... op. cit.*, pp. 428-453; and Davis, Madeleine, *Is Spain Recovering Its Memory?... op. cit.*, pp. 858-880.

⁴⁵ Tamarit-Sumalla, Josep María, *Transition, Historical Memory and Criminal... op. cit.*, pp. 729-752.

⁴⁶ *Boletín Oficial del Estado (BOE)*, no. 248, 17 October 1977, p. 2.

⁴⁷ Alcántara Pérez, Pablo, *La Brigada Política... op. cit.*, p. 96.

to democracy due to all the privileges these groups had enjoyed during Franco’s regime⁴⁸. As aforementioned, if the 1978 Constitution institutionally set the tacit Pact of Forgetting, the entry into force of the 1977 Amnesty Law supposed the initial widespread consolidation of such tacit agreement, which -recapping- is understood as “an informal agreement between post-Franco reformers and the democratic anti-Franco opposition to forget past political excesses in order to avoid a repetition of bloody civil conflict”⁴⁹. Besides the challenges entailed in convincing the former regime’s devotees to respect the transition, it is worth noting the convulsing and violent socio-political context at that time⁵⁰. Therefore, this broadly supported agreement to forget the past and renounce justice can be explained by the popular fear of civil confrontation and the constant fear of a military coup, certain feelings of guilt concerning acts of mutual aggression, and the environment of political violence in which the transition was carried out⁵¹. Hence, if someone still believes that the means justify the ends, the 1977 Amnesty Law could be defined as some sort of institutionalized amnesia that ultimately aimed at reducing all potential political and social risks that could have jeopardized the ongoing process of democratization. In other words, the 1977 Amnesty Law was the means to achieve the peaceful democratization of Spain.

Although this institutionalized amnesia aided democratization⁵², it precluded any formal treatment of the past, resulting in a lack of transitional justice measures until the 2000s, when participatory demands triggered governmental response and transparency, resulting in the 2007 Historical Memory Law⁵³. In addition, the Pact of Forgetting and the 1977 Amnesty Law were too narrow, and recognition was only given to victims who were in the service of the Republican state and army, thus excluding two other categories of victims: the families of the disappeared and the condemned under the Councils of War and the military tribunals during Francoism⁵⁴. Further, measures to compensate the victims of Francoism were both limited and deficient, and other reparatory and symbolic measures, such as the creation of a truth commission, the quashing of Francoist trials, or the prosecution of perpetrators of human rights violations and crimes against humanity during the dictatorship were never applied⁵⁵. Moreover, transitional justice measures were limited to indirect actions of acknowledgement, the creation of pension

⁴⁸ Escudero, Rafael, *Road to Impunity: The Absence... op. cit.*, pp. 123–146.

⁴⁹ Shevel, Oxana, “The Politics of Memory in a Divided Society: A Comparison of Post-Franco Spain and Post-Soviet Ukraine”, in *Slavic Review* 70, 1 (2011), pp. 137–164, <https://doi.org/10.5612/slavicreview.70.1.0137>.

⁵⁰ See Sánchez-Cuenca, Ignacio and Aguilar, Paloma, *Terrorist Violence and Popular Mobilization... op. cit.*, pp. 428–453.

⁵¹ Aguilar, Paloma, “Judiciary Involvement in Authoritarian Repression and Transitional Justice: The Spanish Case in Comparative Perspective”, in *The International Journal of Transitional Justice* 7, 1 (2013), pp. 245–266, <https://doi.org/10.1093/ijtj/ijt008>; Dunbar, Ian, “Consolidated democracies and the past: transitional justice in Spain and Canada”, in *Federal Governance* 8, 2 (2011), pp. 15–28, <https://doi.org/10.24908/fg.v8i2.4374>; and Sánchez-Cuenca, Ignacio and Aguilar, Paloma, *Terrorist Violence and Popular Mobilization... op. cit.*, pp. 428–453.

⁵² Shevel, Oxana, *The Politics of Memory in a Divided Society... op. cit.*, pp. 137–164.

⁵³ Mihr, Anja, “Transitional Justice and the Quality of Democracy”, in *International Journal of Conflict and Violence* 7, 2 (2013), pp. 298–313, <https://doi.org/10.4119/ijcv-3026>.

⁵⁴ Humphrey, Michael, *Law, Memory and Amnesty... op. cit.*, pp. 25–40.

⁵⁵ Aguilar, Paloma et al., *Determinants of Attitudes... op. cit.*, 1397–1430.

funds for former political prisoners, and local memorials carried out solely by regional, local, or individual initiatives⁵⁶.

In addition to the abovementioned convulsing and violent context that helped explain the Pact of Forgetting, Mihr identified three societal factors that thwarted transitional justice measures and explain the overall delay in applying rehabilitation, reparation, and judicial investigation measures: first, the unchallenged presence of the Franco elite in key political and judiciary institutions; second, the acknowledged loyalty of the state security forces to the old regime; and third, the influence of the Catholic Church that strongly opposed the involvement of new actors in the new democratic system⁵⁷.

Although the 1977 Amnesty Law aimed to eliminate any potential resentment, it left relevant subjects unsolved, thus requiring further complementary legislation and policies⁵⁸. During the 25-year cohort that separates both stages, only a few remarkable reparatory measures were carried out: the Law 4/1986, of January 8th, on the appropriation of seized trade union assets, the Law 43/1998, of December 15th, on the Restitution or Compensation to the Political Parties of Revoked Rights and Seized Assets, which substantially benefitted democratic parties but did not include those who had suffered at the hands of the dictatorship; the Law 36/2002, of October 8th, on the modification of the Civil Code in matters nationality, which morally recognized the suffering of the exiles from the Civil War; and the motion, unanimously passed on November 2002, which, despite some objections from the PP, condemned the 1936 uprising but forced every political party that supported the motion to simultaneously endorse the 1977 Amnesty Law⁵⁹.

3.2. Post-Transitional Justice: the 2007 Historical Memory Law

The implementation of the 2007 Historical Memory Law can be understood as a response to the growing explosion of cultural demonstrations and civil society activism tackling Francoist repression⁶⁰. According to Tamarit-Sumalla, these social and cultural demonstrations are explained by four factors: first, the limits of the Spanish transition process; second, the impact

⁵⁶ Mihr, Anja, “Regime Consolidation through Transitional Justice in Europe: The Case of Germany, Spain and Turkey”, in *International Journal of Transitional Justice* 11, 1 (2017), pp. 113–131, <https://doi.org/10.1093/ijtj/ijx003>.

⁵⁷ *Ibidem*.

⁵⁸ Aguilar, Paloma, *Transitional or Post-transitional Justice?... op. cit.*, pp. 417–433.

⁵⁹ Faber, Sebastiaan, “Exhuming Franco”, in Field, Bonnie N. (eds.) *Spain’s Second Transition*, Nashville, Vanderbilt University Press, 2021, pp. 133–149, <https://doi.org/10.2307/j.ctv1kmj7sx>; Jimeno, Roldán, *Amnesties, Pardons and Transitional Justice: Spain’s Pact of Forgetting*, New York, Routledge, 2018, <https://doi.org/10.4324/9781315107950>; Tamarit-Sumalla, Josep María, *Transition, Historical Memory and Criminal... op. cit.*, pp. 729–752; and Boyd, Carolyn P., *The Politics of History and Memory... op. cit.*, pp. 133–149. See also *Boletín Oficial del Estado (BOE)*, no. 12, 14 January 1986, pp. 1944–1946; *Boletín Oficial del Estado (BOE)*, no. 300, 16 December 1998, pp. 42087–42089; and *Boletín Oficial del Estado (BOE)*, no. 242, 9 October 2002, pp. 35638–35640.

⁶⁰ Tamarit-Sumalla, Josep María, “Historical Memory and Transitional Justice in Spain: the Time as Actor of Criminal Justice”, in *Anuario Iberoamericano de Derecho Internacional Penal*, 2, 1 (2014) pp. 43–65, <https://doi.org/10.12804/anidip02.01.2014.02>; and Aguilar, Paloma et al., *Determinants of Attitudes... op. cit.*, 1397–1430.

of some global trends in Spanish society, such as the development of international criminal law or the experience of other transitions in foreign countries; third, the emergence of a new generation of social and political actors who questioned how the past had been handled by their parents; and fourth, the internal reaction provoked by some international criminal proceedings carried out in Spain⁶¹. In any case, the rise of associations for Human Rights and historical memory was quite relevant not only because it meant a considerable increase in the attempts to recover the Spanish history, but because it also questioned the whole Spanish Transition and the 1977 Amnesty Law due to all the legal, social, and political obstacles they had posed, which were ultimately stopping the aforementioned associations from accomplishing their goals and objectives⁶².

However, it was not until 2004 -when PSOE returned to power- that an Interdepartmental Commission was created to analyse the situation of the victims and provide recommendations that would become the basis of the future law⁶³. The recommendations proposed by the Interdepartmental Commission were to recognize the injustice suffered by the victims, to ensure individual reparations and compensations, to honour and support associations that aimed at searching for the truth and recovering the historical memory, to recognize those who were exiled, to provide economic aid and reparations through legislative reforms, to improve the annuities granted to the war children, and to recognize and provide reparations to those who died defending democracy between 1968 and 1977⁶⁴. Bearing those recommendations in mind, PSOE finally implemented the Historical Memory Law on December 26th, 2007, intending to recognize and expand the rights of those who suffered prosecution and violence during the Civil War and the dictatorship, as well as establishing additional measures in their favour⁶⁵. Moreover, the Historical Memory Law represented a clear break with the tacit Pact of Forgetting and the Law of Amnesty since it enhanced the victims’ rights and encouraged discussion of the Spanish Civil War Memory to achieve reconciliation through a non-adversarial, victim-as-citizen-centred, and inclusion-oriented approach⁶⁶.

The Historical Memory Law sought to improve the situation of the victims by extending their rights in four main areas: first, it rehabilitated convicted citizens by condemning every sanction and act of violence against them due to political, religious, and ideological purposes during the war and the dictatorship; second; it incorporated new reparatory measures directed to widows and relatives of the victims of the war, and to those who died in defence of the

⁶¹ Tamarit-Sumalla, Josep María, *Transition, Historical Memory and Criminal... op. cit.*, pp. 729–752.

⁶² Montoto Ugarte, Marina, “Una mirada a la crisis del relato mítico de la Transición: la “Querrela argentina” contra los crímenes del franquismo”, in *Kamchatka* 4 (2014), pp. 125-145, <https://doi.org/10.7203/KAM.4.4303>.

⁶³ Tamarit-Sumalla, Josep María, *Transition, Historical Memory and Criminal... op. cit.*, pp. 729–752.

⁶⁴ Tamarit-Sumalla, Josep María, *Historical Memory and Criminal Justice in Spain: A Case of Late Transitional Justice*, Cambridge, Intersentia Publishing Ltd, 2013, <https://doi.org/10.1017/9781839700675>.

⁶⁵ Jimeno, Roldán, *Amnesties, Pardons and Transitional Justice: Spain’s Pact of Forgetting*, New York, Routledge, 2018, <https://doi.org/10.4324/9781315107950>; and Hajji, Nadia, “Post-Transitional Justice in Spain: Passing the Historic Memory Law”, in *Columbia University Journal of Politics and Society* 1, 1 (2014), pp. 83–101, <https://doi.org/10.7916/D80000RW>.

⁶⁶ Humphrey, Michael, *Law, Memory and Amnesty... op. cit.* pp. 25-40.

democracy between 1968 and 1977; third, it issued grants to victims' associations to support them with exhumations of those who remained disappeared and unidentified; and fourth, it disclosed dictatorship-era documentation and removed Francoist symbology from the public spheres⁶⁷. All these measures were both necessary and fundamental to make some progress in achieving a proper transitional justice process; nonetheless, despite its efforts, the actions carried out as a result of the implementation of the Historical Memory Law were far from being enough.

There are several views on why the Historical Memory Law still lacks some fundamental elements of an adequate transitional justice law, but most scholars have argued that the Historical Memory Law has been insufficient because of six different reasons: first, the Law failed to annul dictatorship-political sentences; second, it failed to grant Franco's victims with the legal status of victims; third, it failed to assume the responsibility of performing the exhumations since it limited itself to merely aid associations and organizations with these tasks; fourth, it failed to guarantee the victims' right to truth through legislating for a truth commission; fifth, it failed to bring the initial date back to 1936, thus excluding both those who perished facing the dictatorship before the aforementioned period, such as the *maquis*, and families of victims of enforced disappearances; and sixth, it ended up cementing the rule of impunity⁶⁸. In other words, despite its initial intention, none of the three requirements of transitional justice were met: neither truth nor reparations nor justice were accomplished with the implementation of the law⁶⁹.

In addition to these six obstacles to transitional justice, the formal language of the law also called for the attention of experts. More specifically, the neutral language employed in the Historical Memory Law explicitly denied the responsibility of the State, excluded any official apology to restore the reputation and the rights of the victims, did not clarify the role of the judiciary in this new policy; and lastly, it deprived victims of Francoism of their moral rights since it implied that these persons were not fulfilling the moral imperatives attached to the concept of the ideal victim, which was previously given to the victims of terrorism, thus creating first-class victims (victims of terrorism) and second-class victims, that were systematically questioned by the opposition⁷⁰. Nonetheless, overall, the 2007 Historical Memory Law also failed to make

⁶⁷ See *Boletín Oficial del Estado (BOE)*, no. 310, 27 December 2007, pp. 22296–22310; Tamarit-Sumalla, Josep María, *Historical Memory and Transitional Justice in Spain... op. cit.*, pp. 43–65; and Aguilar, Paloma, *Judiciary Involvement in Authoritarian Repression... op. cit.* pp. 246–266.

⁶⁸ Jimeno, Roldán, *Amnesties, Pardons and Transitional Justice: Spain's Pact of Forgetting*, New York, Routledge, 2018, <https://doi.org/10.4324/9781315107950>; Druliolle, Vincent, "Recovering Historical Memory: A Struggle against Silence and Forgetting? The Politics of Victimhood in Spain", in *International Journal of Transitional Justice* 9, 1 (2015), pp. 316–335, <https://doi.org/10.1093/ijtj/ijv008>; and Rubin, Jonah S., "Transitional Justice against the State: Lessons from Spanish Civil Society-Led Forensic Exhumations", in *The International Journal of Transitional Justice* 8, 1 (2014), pp. 99–120, <https://doi.org/10.1093/ijtj/ijt033>.

⁶⁹ Jimeno, Roldán, *Amnesties, Pardons and Transitional Justice: Spain's Pact of Forgetting*, New York, Routledge, 2018, <https://doi.org/10.4324/9781315107950>.

⁷⁰ Escudero, Rafael, *Road to Impunity: The Absence... op. cit.*, pp. 123–146; García-Blesa, Juan J. and Víctor L. Gutiérrez-Castillo, "The Rights of the Victims of Past Atrocities in Spain: Reparation without Truth and Justice", in *Connecticut Journal of International Law* 29, 2 (2014), pp. 227–256, <http://dx.doi.org/10.2139/ssrn.2341764>;

any mention of a possible modification or derogation to the 1977 Amnesty Law, thus paving the way for maintaining impunity, and unsuccessfully implementing transitional justice⁷¹.

However, the Historical Memory Law cannot be understood without considering its political motivation, which helps explain its consequent support and rejection. It is worth remembering that it was the PSOE the political party that established an Interdepartmental Commission that aimed at analysing the situation of the victims of the dictatorship to further provide recommendations that could be used as a basis for the Historical Memory Law⁷². Hence, the establishment of such an Interdepartmental Commission meant a radical shift in PSOE’s approach to dealing with the Spanish dictatorial past in contrast to its stances during the 1980s and 1990s. According to Aguilar, the PSOE shifted the focus of its previous mandate (1982-1996) due to four different but interconnected reasons: first, the rise of a more sympathetic view from PSOE’s new generation of politicians, some of whom, such as Zapatero, had direct ties with victims of the war; second, the political need to comply with some of its previous proposals to undermine PP’s government and gain votes, which holds with Elster’s so-called vote seeking strategy⁷³; third, the coincidence of PSOE’s mandate with some key significant dates and anniversaries of the conflict; and fourth, PSOE’s minority status, which made it need the support of other parties, such as IU (Izquierda Unida) and ERC (Esquerra Republicana) that put these issues high on their political agenda⁷⁴.

In the end, besides what scholars and legal experts criticized about the shortages of the Historical Memory Law, the law also resulted to be quite contested in both the political and the public spheres⁷⁵. Among politicians, it was rejected not only by PP but also by ERC. Despite being one of the firmest advocates for the necessity of recovering historical memory, ERC voted against the law due to its failure to grant Franco’s victims their corresponding legal status⁷⁶. On the other hand, PP voted against the Law in its entirety in the final vote, although it also voted for the Articles (5, 6, 8, and 9) that were not so closely linked to the revision of the past⁷⁷. According to PP, most of the measures and recuperated memory was redundant, as well as they claimed that the Law was unconstitutional and aimed at undermining the legitimacy of the transition by reopening old wounds⁷⁸. Moreover, since 2007, PP’s position has evolved towards

and Tamarit-Sumalla, Josep María, *Historical Memory and Criminal Justice in Spain: A Case of Late Transitional Justice*, Cambridge, Intersentia Publishing Ltd, 2013, <https://doi.org/10.1017/9781839700675>.

⁷¹ Jimeno, Roldán, *Amnesties, Pardons and Transitional Justice: Spain’s Pact of Forgetting*, New York, Routledge, 2018, <https://doi.org/10.4324/9781315107950>

⁷² Shevel, Oxana, *The Politics of Memory in a Divided Society... op. cit.*, pp. 137–164.

⁷³ Elster, Jon, *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge Cambridge University Press, 2004, <https://doi.org/10.1017/CBO9780511607011>

⁷⁴ Aguilar, Paloma, *Transitional or Post-transitional Justice?... op. cit.*, pp. 417–433.

⁷⁵ Tamarit-Sumalla, Josep María, *Historical Memory and Criminal Justice in Spain: A Case of Late Transitional Justice*, Cambridge, Intersentia Publishing Ltd, 2013, <https://doi.org/10.1017/9781839700675>.

⁷⁶ Druliolle, Vincent, *Recovering Historical Memory: A Struggle... op. cit.*, pp. 316–335.

⁷⁷ Tamarit-Sumalla, Josep María, *Historical Memory and Criminal Justice in Spain: A Case of Late Transitional Justice*, Cambridge, Intersentia Publishing Ltd, 2013, <https://doi.org/10.1017/9781839700675>.

⁷⁸ Encarnación, Omar G., *Democracy Without Justice in Spain: The Politics of Forgetting*, Philadelphia, University of Pennsylvania Press, 2015; Escudero, Rafael, *Road to Impunity: The Absence... op. cit.*, pp. 123–146; and

retrenchment as can also be seen in its vote against the proposal of removing Francoist symbology in public spaces in 2015, its rejection to turn July 18th into an official Day of Condemnation of the Dictatorship in 2013, and its dismantlement of an already approved monument that named thousands of victims of the dictatorship in 2019⁷⁹. During its mandate (2011-2018), using the 2008 economic crisis as a pretext, the PP *de facto* abolished the Historical Memory Law by imposing numerous obstacles to the implementation of many of the regulations that the Law required as well as by reducing available funds and resources for memory associations⁸⁰.

Nonetheless, as has already been mentioned, the Historical Memory Law also happened to be a quite controversial law among Spaniards. Regarding the Spanish population and civil society, attitudes towards transitional justice measures have been found to be diverse. The Church positioned itself against the Law both by arguing that it endangered Spanish democracy and by beatifying their own dead of the Civil War, thus stressing their own status as a victim of anti-clerical violence⁸¹. Several organizations and associations also criticized the Law by considering it an insufficient step because of its deficient compliance with international humanitarian law in relation to exhumations and identification of the victims⁸². For instance, Amnesty International severely criticized the project of the new law and claimed that it violated international law and that it was an unacceptable setback in terms of victims' right to truth, justice and to reparations⁸³. Concerning the Spanish population, positive attitudes toward transitional justice measures are explained by a combination of individual and family-level variables, such as leftist ideology, young age, nonreligious attitudes, and familiarity with those who sided with the Second Republic, as well as the perceived aggressivity of such measures, being trials and implementation of truth commissions less supported than, for instance, the withdrawal of public symbology⁸⁴.

Moreover, the intervention of the Spanish judiciary in crimes committed abroad (see Guatemala, Chile, Argentina, etc.) and the Historical Memory Law encouraged some associations to question the passive judiciary approach adopted against crimes of Francoism⁸⁵. The only attempt for investigating crimes of Francoism was done by the Examining Magistrate Baltasar Garzón, who aimed to investigate crimes against humanity committed since 1936 in Spain,

Humblebæk, Carsten, "Party Attitudes towards the Authoritarian Past in Spanish Democracy", in *South European Society and Politics* 15, 3 (2010), pp. 413–428, <https://doi.org/10.1080/13608746.2010.513602>.

⁷⁹ Faber, Sebastiaan, "Exhuming Franco", in Field, Bonnie N. (eds.) *Spain's Second Transition*, Nashville, Vanderbilt University Press, 2021, pp. 133–149, <https://doi.org/10.2307/j.ctv1kmj7sx>.

⁸⁰ Jimeno, Roldán, *Amnesties, Pardons and Transitional Justice: Spain's Pact of Forgetting*, New York, Routledge, 2018, <https://doi.org/10.4324/9781315107950>; and Humphrey, Michael, *Law, Memory and Amnesty... op. cit.* pp. 25-40.

⁸¹ Phillips, Michael, "Walking on Water: The Catholic Church, Historical Memory, and Human Rights in Spain", in *Oxford Journal of Law and Religion* 3, 2 (2014), pp. 286–310, <https://doi.org/10.1093/ojlr/rwt040>.

⁸² Encarnación, Omar G., *Democracy Without Justice in Spain: The Politics of Forgetting*, Philadelphia, University of Pennsylvania Press, 2015.

⁸³ Amnistía Internacional, "Víctimas de la Guerra Civil y el Franquismo: No hay derecho", Madrid, Amnistía Internacional, 2006.

⁸⁴ Aguilar, Paloma *et al.*, *Determinants of Attitudes... op. cit.*, 1397-1430.

⁸⁵ Burbidge, Peter, *Waking the Dead of the Spanish... op. cit.*, pp. 753–781.

which included disappearances⁸⁶. Garzón emphasized the fact that the International Covenant on Civil and Political Rights (ICCPR) was already in force at the time of the 1977 Amnesty Law, thus requiring states to investigate cases of disappearances and torture, which was never done by the Spanish authorities⁸⁷. Nonetheless, Garzón was accused and suspended for having violated his jurisdiction and abused his powers, thus impeding further official investigations of crimes to be carried out for the sake of transitional justice and international law⁸⁸.

3.3. Further steps in Post-Transitional Justice: the 2022 Law of Democratic Memory

All the aforementioned flaws that were present in the 2007 Historical Memory Law resulted in political and social discontent, and consequently led to diverse demonstrations and protests which were partially fueled by the recent international support towards both the victims of the dictatorship and those who positioned against Franco’s regime, as well as by the publication of a United Nations report that strongly recommended the Spanish government to start implementing transitional justice measures in order to comply with its responsibility with both the 2006 Declaration on the Protection of All Persons from Enforced Disappearance and with international law⁸⁹. Further, the UN also reminded the Spanish government of its responsibility regarding its past by pointing out other similar countries that have undergone similar violent experiences and that have already implemented pertinent transitional measures in order to deal with crimes committed in the past. The UN report had a considerable impact and pushed the Spanish government to resume the design and implementation of further transitional justice measures, such as the creation of the Directorate General for the Historical Memory, the commemoration of the 80th anniversary of the Republican exile, and the exhumation of Franco’s remains from his mausoleum in the Valley of the Fallen⁹⁰.

Nonetheless, it also raised the question of whether the reigning legislation -the 2007 Historical Memory Law- was sufficient or not, which was somehow answered by the increasing new demands for suitable historic memory legislation made by some sectors of the population along with new assessments carried out by different NGOs and associations⁹¹. These demands intensified when the 1977 Amnesty Law was invoked by the Public Prosecution Office in the

⁸⁶ Escudero, Rafael, *Road to Impunity: The Absence... op. cit.*, pp. 123–146.

⁸⁷ Burbidge, Peter, *Waking the Dead of the Spanish... op. cit.*, pp. 753–781.

⁸⁸ Rubin, Jonah S., *Transitional Justice against the State: Lessons... op. cit.*, pp. 99–120.

⁸⁹ UN (United Nations), “Report of the Working Group on Enforced or Involuntary Disappearances: Mission to Spain” (No. A/HRC/27/49Add. 1), New York, United Nations, 2014.

⁹⁰ Galocha, Artur *et al.*, “La exhumación de Franco, paso a paso”, in *El País*, October 24th, 2019. <<https://elpais.com/especiales/exhumacion-de-franco/la-exhumacion-paso-a-paso/>> [accessed on October 15th, 2022]; and La Moncloa, “Comisión Interministerial para la Conmemoración del 80o aniversario del exilio republicano español” <<https://www.lamoncloa.gob.es/consejodeministros/Paginas/enlaces/161118-enlace-exilio.aspx>> [accessed October 15th, 2022].

⁹¹ Uría, Ibon, “La izquierda y las víctimas exigen ilegalizar la Fundación Franco”, in *infoLibre*, September 2nd, 2015. <https://www.infolibre.es/politica/izquierda-victimas-exigen-ilegalizar-fundacion-franco_1_1116709.html> [accessed on October 15th, 2022].

National High Court as an argument against the above-mentioned trial against the Examining Magistrate Baltasar Garzón, resulting in a declaration signed by 12 pro-memory associations requesting the derogation of the law⁹². Furthermore, the trial against Garzón and all the legal obstacles posed to the attempts to prosecute the crimes that were perpetrated during Francoism boosted the frustration of the civil society, resulting in significant legal complaints in Argentina⁹³. These complaints aimed at starting a legal examination of the crimes occurred during Francoism by applying universal jurisdiction principles in Argentinian courts with the ultimate goal of accelerating the investigations and prosecutions of such crimes in Spain⁹⁴. Ever since then, the number of memory and human rights associations representing the victims of Francoism that have joined the first complainants have unstoppably increased, thus magnifying the significance of the Argentinian complaint, and reinforcing and attracting international organizations to create and support historical counter narratives about the Civil War, Francoism, and the Spanish Transition⁹⁵. Hence, having observed the increasing transnational demands asking for transitional justice, in July 2020 the Council of Ministers launched the first draft of the project of Law of Democratic Memory, which was finally passed one year later, in July 2021, and finally approved and passed by the Spanish Senate in October 2022⁹⁶. This new law is claimed to be built upon the principles of truth, justice, reparations, and no repetition, as well as upon the democratic values of concord, coexistence, political pluralism, human rights, peace culture, and gender equality; and it is aimed at recuperating, safeguarding, and disseminating the democratic memory, as well as recognizing and compensating those who suffered prosecution and violence for political, ideological, religious, and sexual reasons between the 18th July 1936 and the entry into force of the 1978 Spanish Constitution⁹⁷.

Beyond its initial aims and ruling principles, the Law of Democratic Memory is supposed to widen transitional justice through several new measures that contrast with its predecessor: the 2007 Historic Memory Law. The first notorious difference between the 2022 Law of Democratic Memory and its predecessor is its name itself. The emphasis placed on the terms that refer directly to “democracy” makes the 2022 Law of Democratic Memory employ a different

⁹² Jimeno, Roldán, *Amnesties, Pardons and Transitional Justice: Spain's Pact of Forgetting*, New York, Routledge, 2018, <https://doi.org/10.4324/9781315107950>

⁹³ Montoto Ugarte, Marina, *Una mirada a la crisis del relato mítico de la Transición: la “Querrela argentina... op. cit. p. 133.*

⁹⁴ Capdepón, Ulrike, “The selectivity of universal jurisdiction: The history of transnational human rights prosecutions in Latin America and Spain”, in Quataert, Jean & Lora Wildenthal (eds.) *The Routledge History of Human Rights*, London, Routledge, 2019, pp. 507-522, <https://doi.org/10.4324/9780429324376-27>; Montoto Ugarte, Marina, *Una mirada a la crisis del relato mítico de la Transición: la “Querrela argentina... op. cit. pp. 133-135.*

⁹⁵ Capdepón, Ulrike, “The selectivity of universal jurisdiction: The history of transnational human rights prosecutions in Latin America and Spain”, in Quataert, Jean & Lora Wildenthal (eds.) *The Routledge History of Human Rights*, London, Routledge, 2019, pp. 507-522, <https://doi.org/10.4324/9780429324376-27>.

⁹⁶ La Moncloa, “El Senado aprueba de forma definitiva la Ley de Memoria Democrática” «<https://www.lamoncloa.gob.es/serviciosdeprensa/notasprensa/mpresidencia14/Paginas/2022/051022-bolanos-ley-memoria-democratica.aspx>» [accessed October 15th, 2022].

⁹⁷ Ministerio de la Presidencia, Relaciones con las Cortes y Memoria Democrática, “Anteproyecto de Ley de Memoria Democrática”, Madrid, 2020.

method, moving away from the historical approach implemented in the 2007 Historical Memory Law to a procedure that ultimately seeks the promotion of democracy and democratic values⁹⁸. Moreover, among the novelties that the Law of Democratic Memory is expected to bring to the Spanish scene, the following are worth noting: first, an annulment of all penal sanctions that were dictated during Francoism; second, the establishment of October 31st and May 8th as the official days for the proper tribute and memory of all victims, and the homage to the victims of the exile, respectively; third, the creation of a National Census of the Victims along with the inauguration of a National DNA Bank of the victims of the war and the dictatorship; fourth, the foundation of both the Council of Democratic Memory and the Working Commission on the Memory and Reconciliation with the Roma People in Spain; fifth, the implementation of an audit of looted property and goods during the Spanish Civil War and the consequent dictatorship; sixth, the creation of an official catalogue of noble titles between 1948 and 1978; seventh, the suppression of the Imperial Order Yoke and Arrows; eighth, the redefinition of the meaning of the Valley of the Fallen; ninth, the official declaration of the right of family members and society to know what happen; tenth, the State’s leadership in the search for and identification of the disappeared and the promotion of exhumations; eleventh, the official declaration of the right to investigate the violations of human rights occurred during the war and the dictatorship until the promulgation of the 1978 Spanish Constitution, with a possible extension until 1983; twelfth, the incorporation of an official sanctioning system; and thirteenth, the illegalization of associations and organizations that make an apology of Francoism; and fourteenth, the inclusion of memory contents in ESO and Baccalaureate teachings, as well as the promotion of academic research on democratic memory⁹⁹.

Nonetheless, although the 2022 Law of Democratic Memory has recently entered into force, some journalists, politicians, and experts have already identified some flaws that might make it insufficient. First, although the Law of Democratic Memory recognizes all victims of the dictatorship, no explicit reference was made to the perpetrators of such crimes, thus building just a partial picture of the events; second some politicians have argued that both the absence of a proper and pertinent revocation of the 1977 Amnesty Law and the acceptance of the prescription of the abovementioned crimes against humanity perpetrated during Franco’s regime will result

⁹⁸ *Boletín Oficial del Estado (BOE)*, no. 252, 20 October 2022, pp. 17099–17154.

⁹⁹ See *Boletín Oficial del Estado (BOE)*, no. 252, 20 October 2022, pp. 17099–17154; Borraz, Marta, “Del renombre del Valle de los Caídos al fin de los nobles de Franco: las claves de la Ley de Memoria Democrática”, in *elDiario.es*, October 5th, 2022. <https://www.eldiario.es/sociedad/ilegalidad-dictadura-nuevo-nombre-valle-caidos-claves-futura-ley-memoria-democratica_1_9141770.html> [accessed on October 15th, 2022]; Junquera, Natalia, “Claves de la nueva ley de memoria democrática: las lenguas catalana, gallega y vasca, víctimas del franquismo”, in *El País*, July 1st, 2022. <<https://elpais.com/espana/2022-07-01/la-alusion-a-la-ley-de-amnistia-y-el-sello-de-cataluna-y-pais-vasco-las-novedades-en-la-futura-ley-de-memoria.html#?rel=mas>> [accessed October 15th, 2022]; La Moncloa, “El Senado aprueba de forma definitiva la Ley de Memoria Democrática” <<https://www.lamoncloa.gob.es/serviciosdeprensa/notasprensa/mpresidencia14/Paginas/2022/051022-bolanos-ley-memoria-democratica.aspx>> [accessed October 15th, 2022]; and Vilató, Ainoha J., “La Ley de Memoria Democrática que llega al Congreso para su aprobación y que no termina de convencer”, in *El Salto Diario*, July 14th, 2022. <<https://www.elsaltodiario.com/ley-memoria-historica/ley-memoria-democratica-ilega-congreso-su-aprobacion-no-termina-convencer->> [accessed on October 16th, 2022].

in a deliberate denial of international law, blocking any potential criminal prosecution against the perpetrators; third, neither the cultural nor the language repression carried out by Franco's regime against Catalonia and the Basque Country were properly tackled in the document, thus leaving an important feature of Franco's repression unaddressed; fourth, despite the fact that the Spanish State will assume the leadership in the search for and identification of the disappeared and the promotion of exhumations, the Law of Democratic Memory seems to fail to judicialize the graves, reducing the State's responsibility to solely economic matters; fifth, although the Law of Democratic Memory does refer to the role of the Church as an active component during Franco's regime, it does not specifically identify and condemn the precise role of the Catholic Church in shaping the ideology of the regime and making Francoism an authoritarian model that could be defined as national-catholic dictatorship¹⁰⁰.

4. Discussion

When determining why transitional justice has not been adequate in Spain, its origin must be considered. It is true that, due to the number of different spoilers that could have ruined the process, reconciliation was prioritized over justice to avoid risks and reduce tensions. According to Stedman, who tackled spoilers' management in peace processes and whose insights can be thus applied in the Spanish case due to the comparable fragility of both the Spanish Transition and peace processes, socialization and inducement are two of the possible strategies for managing spoilers¹⁰¹. Hence, it can be argued that, by creating a judicial narrative of forgetting and equivalence of victims and by pursuing the support of all the political parties¹⁰², the 1977 Amnesty Law guaranteed the integrity of the democratization process by protecting those who could have been perceived as losers in the new-born democracy as well as by legitimizing the political presence of the whole ideological spectrum, thus adopting Stedman's strategies of inducement and socialization.

Though that approach made the transition to democracy possible, no transitional justice was implemented. This holds with Elster's and Sriram's views on the fact that stability and peace are perceived to be at odds with justice instead of being complementary and necessary

¹⁰⁰ Vilató, Ainoha J., *La Ley de Memoria Democrática que llega al Congreso... op.cit.*; and Galvalizi, Daniel, "Memoria democrática: los déficits de una ley con destino incierto en el Congreso", in *El Salto Diario*, August 2nd, 2021. «<https://www.elsaltodiario.com/ley-memoria-historica/memoria-democratica-deficits-ley-con-destino-incierto-en-congreso>» [accessed on October 17th, 2022].

¹⁰¹ Stedman, Stephen J., "Spoiler Problems in Peace Processes", in *International Security* 22, 2 (1991), pp. 5–53, <https://doi.org/10.1162/isec.22.2.5>.

¹⁰² Encarnación, Omar G., *Democracy Without Justice in Spain: The Politics of Forgetting*, Philadelphia, University of Pennsylvania Press, 2015.

for each other, leading us to all the flaws of the so-called Spanish Transitional Justice under the scope of the 1977 Amnesty Law¹⁰³. However, if those defects are justified by the risks that endangered the transition, what remains unclear is the lack of transitional justice measures in the two ulterior laws, namely the 2007 Historical Memory Law and the 2022 Law of Democratic Memory. After having examined both laws, it can be said that both the victims and the conflict itself have been politicized, thus impeding a comprehensive approach to address Francoism as well as a definitive closure of the whole issue.

By using transitional justice as a vote-seeking strategy¹⁰⁴, the PSOE clearly carried the banner for improving a deficient transition to democracy that forgot many victims. Consequently, the PP found itself in the necessity of safeguarding the Pact of Forgetting, not only to face the PSOE in political terms and justify their inaction during their mandate between 1996-2004 and 2011-2018 but also due to their close initial ties to Francoism¹⁰⁵. This may explain the PP’s ambivalent position towards the implementation of transitional justice measures, whose support was subjected to the requirement of not digging into Francoism’s repression so its past can be forgotten, and PP’s democratic legitimacy would no longer be questioned¹⁰⁶. These political dynamics have resulted in the politicization of transitional justice, making any agreed approach to achieve justice impossible not because of the presence of spoilers that might put the whole process at stake¹⁰⁷, but because of the mere political agenda and legitimacy of the parties.

Subsequently, this has had an impact on victims’ rights. Although reparatory measures were implemented, the expectations for achieving comprehensive and efficient transitional justice have been far from being met¹⁰⁸. The 2007 Historical Memory Law had several flaws that set many obstacles when honouring victims and attempting to carry out fair and proper transitional justice measures, such as compensations and reparations. Thus, several scholars argued that the main problem of the 2007 Historical Memory Law was that it should have paid more attention to other areas rather than economic compensations¹⁰⁹, such as distinguishing and identifying the nature of victims’ suffering -material, personal, and intangible- so more specific reparations and

¹⁰³ Elster, Jon, *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge Cambridge University Press, 2004, <https://doi.org/10.1017/CBO9780511607011>; and Sriram, Chandra L., “Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice”, in *Global Society* 21, 4 (2007), pp. 579–591, <https://doi.org/10.1080/13600820701562843>.

¹⁰⁴ Aguilar, Paloma, *Transitional or Post-transitional Justice?... op. cit.*, pp. 417–433; and Elster, Jon, *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge Cambridge University Press, 2004, <https://doi.org/10.1017/CBO9780511607011>.

¹⁰⁵ Faber, Sebastiaan, “Exhuming Franco”, in Field, Bonnie N. (eds.) *Spain’s Second Transition*, Nashville, Vanderbilt University Press, 2021, pp. 133–149, <https://doi.org/10.2307/j.ctv1kmj7sx>.

¹⁰⁶ Tamarit-Sumalla, Josep Maria, *Historical Memory and Criminal Justice in Spain: A Case of Late Transitional Justice*, Cambridge, Intersentia Publishing Ltd, 2013, <https://doi.org/10.1017/9781839700675>; and Encarnación, Omar G., “Reconciliation after Democratization: Coping with the past in Spain”, in *Political Science Quarterly* 123, 3 (2008), pp. 435–459, <https://doi.org/10.1002/j.1538-165X.2008.tb00630.x>.

¹⁰⁷ Sánchez-Cuenca, Ignacio and Aguilar, Paloma, *Terrorist Violence and Popular Mobilization... op. cit.*, pp. 428–453.

¹⁰⁸ Escudero, Rafael, *Road to Impunity: The Absence... op. cit.*, pp. 123–146; and Tamarit-Sumalla, Josep Maria, *Historical Memory and Criminal Justice in Spain: A Case of Late Transitional Justice*, Cambridge, Intersentia Publishing Ltd, 2013, <https://doi.org/10.1017/9781839700675>.

¹⁰⁹ Aguilar, Paloma, *Judiciary Involvement in Authoritarian Repression... op. cit.*, pp. 245–266.

compensations could be designed and implemented. Moreover, in this same line, the absence of a truth commission has also obstructed transitional and restorative justice in terms of not being able to unveil certain facts that could have been used to implement more comprehensive and precise reparatory programs as well as changing future policies, practices, and relationships. A truth commission would have shed some light on the identification of victims and on the circumstances associated with the disappearances, which are yet to be properly tackled¹¹⁰. Its implementation would have also contributed to outlining the full responsibility of the state and its institutions as well as expanding acknowledgements to the victims¹¹¹, thus improving some of the most significant flaws of both the 1977 Amnesty Law and the 2007 Historical Memory Law.

It is still too early to properly address the impact of the 2022 Law of Democratic Memory and the improvements it will bring to Spanish society; nonetheless, after having done a preliminary assessment of some of its novelties, it can be said that it has the potential to solve some of the main problems latent in previous legislations. Most of its novelties deal with the problems that were criticized about the 2007 Historical Memory Law, such as the annulment of all penal sanctions that were dictated during Francoism, the creation of a National Census of the Victims along with the inauguration of a National DNA Bank of the victims of the war and the dictatorship, the implementation of an audit of looted property and goods, the official declaration of the right to investigate the violations of human rights occurred during the war and the dictatorship until 1983, or the illegalization of contemporary pro-Francoist associations and organizations¹¹². Nonetheless, despite all the expected improvements the 2022 Law of Democratic Memory will bring along, they are yet not enough to be neither optimistic nor enthusiastic about it. This skepticism mostly is justified by the law's failure to judicialize the graves to be exhumated and its inability to revoke the 1977 Amnesty Law in order to identify and condemn the perpetrators of crimes against humanity during Francoism¹¹³. This obstruction to criminal trials and proceedings, even posthumous, has deprived the victims of Francoism of their right to justice, making the 2022 Law of Democratic Memory -as it happened with the 2007 Historical Memory Law- fail to comply with international law and its goal of definitely closing a black episode of Spanish history¹¹⁴. No real closure nor reconciliation will be accomplished until all truth, with its pertinent consequences, is unveiled.

¹¹⁰ Tamarit-Sumalla, Josep María, *Historical Memory and Criminal Justice in Spain: A Case of Late Transitional Justice*, Cambridge, Intersentia Publishing Ltd, 2013, <https://doi.org/10.1017/9781839700675>.

¹¹¹ Hayner, Priscilla B., *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, New York, Taylor & Francis Group, 2010.

¹¹² Borraz, Marta, *Del renombre del Valle de los Caídos al fin de los nobles... op. cit.*; Junquera, Natalia, *Claves de la nueva ley de memoria democrática... op. cit.*; La Moncloa, "El Senado aprueba de forma definitiva la Ley de Memoria Democrática" <<https://www.lamoncloa.gob.es/serviciosdeprensa/notasprensa/mpresidencia14/Paginas/2022/051022-bolanos-ley-memoria-democratica.aspx>> [accessed October 15th, 2022]; and Vilató, Ainoha J., *La Ley de Memoria Democrática que llega al Congreso... op. cit.*

¹¹³ Vilató, Ainoha J., *La Ley de Memoria Democrática que llega al Congreso... op. cit.*; and Galvalizi, Daniel, *Memoria democrática: los déficits de una ley... op. cit.*

¹¹⁴ Jimeno, Roldán, *Amnesties, Pardons and Transitional Justice: Spain's Pact of Forgetting*, New York, Routledge, 2018, <https://doi.org/10.4324/9781315107950>; Druliolle, Vincent, *Recovering Historical Memory: A Struggle...*

5. Conclusion

Transitioning from an authoritarian regime to a democratic system entails a process of both delegitimization and consolidation¹¹⁵. In such process, transitional justice measures are crucial tools that are believed to have the power to delegitimize previous political regimes and legitimize new ones in their course of consolidation¹¹⁶; therefore, it can be said that these legal mechanisms can play an essential role in democratizing an authoritarian regime and helping democracy consolidate. Nonetheless, they are not always employed. After undergoing a 36-year dictatorship, Spain finally succeeded in transitioning to democracy and has been considered as an exemplary case to follow; however, transitional justice measures that somehow condemned and prosecuted crimes perpetrated during Francoism and compensated the victims were initially not implemented. Consequently, due to an unaddressed traumatic past, Spain has experienced the enactment of two ulterior laws that aimed at filling the gaps concerning the scarcity of transitional justice mechanisms: the 2007 Historical Memory Law and the 2022 Law of Democratic Memory. This article has aimed to address why the Spanish Transitional Justice model is incomplete and provide a brief overview of a topic that is still controversial and debated in the political and social space.

In sum, it can be said that the Spanish Transition is a good example to be examined, not due to its inadequacy, because as Sriram indicated, there is a different range of tools that avoid choosing solely between either peace or justice¹¹⁷, but because of its limitations and the current consequences of not having properly tackled the past. Back in the 1970s, the whole socio-political context made it very difficult to carry out a peaceful transition from Francoism to a liberal democratic model. Indeed, it is worth noting that if it was not for the demonstrations carried out by the aforementioned actors and social associations, the transition after Franco's death would have been quite different as it was initially conceived to be led by the hardliners of the Regime, such as Arias Navarro, who clearly showed his unwillingness to implement any of the reforms demanded by the population¹¹⁸. Nonetheless, despite the efforts and calls for reconciliation by the majority of the population, as has already been seen, the violent atmosphere and the massive presence of spoilers in Spanish institutions and politics posed several challenges to implementing a process that could have combined democratization and transitional justice measures; therefore, it is understood that the so-called fathers of the democracy preferred to prioritize, at least in the short term, democracy over justice. However, the time has passed

op. cit., pp. 316–335; and Tamarit-Sumalla, Josep María, *Historical Memory and Transitional Justice in Spain...* *op. cit.*, pp. 43–65.

¹¹⁵ Mihr, Anja, *Regime Consolidation and Transitional Justice: A Comparative Study of Germany, Spain and Turkey*, Cambridge, Cambridge University Press, 2018, <https://doi.org/10.1017/9781108394895>

¹¹⁶ *Ibidem*, p. 65.

¹¹⁷ Sriram, Chandra L., *Justice as Peace? Liberal...* *op. cit.* pp. 579–591.

¹¹⁸ Sánchez-Cuenca, Ignacio and Aguilar, Paloma, *Terrorist Violence and Popular Mobilization...* *op. cit.*, p. 434

by and the needs to reparation, compensation, truth and justice of the families of the victims of the repression has increased. Hence, the absence of adequate transitional justice measures has pushed the families of the victims, memory associations and international organizations to request further actions to properly compensate the victims and approach the dictatorship, which has indeed been quite relevant for and determinant in the design and implementation of new laws such as the 2007 Historical Memory Law and the 2022 Law of Democratic Memory¹¹⁹.

Nonetheless, instead of designing a comprehensive project that properly addresses past crimes and misbehaviours from Franco's regime and adequately compensates the victims, the whole issue has become politicized, resulting in the inadequacy of future legislation to properly deal with the Spanish past. Moreover, the politicization of memory has increased in recent years by the emergence of new left-wing and populist radical right political parties, such as Podemos and VOX respectively, which have started questioning the hegemonic narrative of the Spanish Transition and Francoism. More specifically, the politicization of memory by such parties has been observed in the intensifying revisionism of history by parties of this kind, drawing an alternative picture of what really happened and integrating the so-called populist rhetoric of "us against them". One example of this can be observed in VOX discourses. The Spanish Populist Radical Right Party predominates a discourse that claims that Franco was not guilty of the Civil War¹²⁰, and has consequently proposed the abolition of some existing regional and provincial laws that honour and remember those who suffered the consequences of the war and Francoism¹²¹. This undoubtedly shows how the politicization of memory is already having an impact on the lives of thousands of Spaniards.

The 2022 Law of Democratic Memory is a clear example that shows that some relevant issues related to transitional justice were not covered either by the 1977 Amnesty Law nor by the 2007 Historical Memory Law. Nonetheless, despite having improved considerably the former legislation, the document still lacks some transitional justice measures that are crucial for properly closing the Spanish authoritarian and repressive past. Future legislation should be focused on finally prosecuting, even posthumously, the perpetrators of crimes against humanity and revoking the 1977 Amnesty Law.

¹¹⁹ See Montoto Ugarte, Marina, *Una mirada a la crisis del relato mítico de la Transición: la "Querrela argentina ... op. cit.* pp. 128-135; UN (United Nations), "Report of the Working Group on Enforced or Involuntary Disappearances: Mission to Spain" (No. A/HRC/27/49Add. 1), New York, United Nations, 2014; Uría, Ibon, *La izquierda y las víctimas exigen ilegalizar ... op. cit.* «https://www.infolibre.es/politica/izquierda-victimas-exigen-ilegalizar-fundacion-franco_1_1116709.html» [accessed on October 15th, 2022].

¹²⁰ Martín de la Guardia, Ricardo, *Modelo de cambio ... op. cit.* «<https://www.elmundo.es/espana/2017/06/15/59418777e2704e52488b4630.html>» [accessed on October 15th, 2022].

¹²¹ Navarro, Juan, "Las leyes que quiere tumbar Vox | Más de 500 fosas comunes con 7.000 represaliados contemplados con la norma de memoria histórica", in *El País*, April 13th, 2022. «<https://elpais.com/espana/2022-04-13/mas-de-500-fosas-comunes-con-7000-represaliados.html>» [accessed on October 17th, 2022].