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Transitional Justice in the Spanish, Argentinian and Chilean Case

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**WORKSHOP 10
REPORT**

TRANSITIONAL JUSTICE IN THE SPANISH, ARGENTINIAN AND CHILEAN CASE¹

Paloma Aguilar

ABSTRACT: Transitional Justice in the Spanish, Argentinian & Chilean Case

This document aims to give an account of the presence and absence of policies on reparation, truth and justice in Spain from a comparative perspective. First of all, the main rules on material reparation that have been approved in Spain since Franco's death will be introduced. This will be followed by a comparison of the transitional measures of justice adopted in Spain, Chile and Argentina. The intention is to examine how different countries have responded to the similar challenges that emerge in the inevitably awkward and uncertain process of transition to democracy.

¹ I would like to thank Katie Hite, Alfredo Joignant, Patricia Valdez and Valeria Barbuto for their useful comments on matters relating to Chile and Argentina.

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1. INTRODUCTION

It is not necessary to focus here on the serious and prolonged acts of injustice inflicted by the Francoist regime, both upon those who participated in or sympathised with the faction that was defeated in the Spanish Civil War (1936-1939), and upon all those who did not subject themselves to the regime's dictates (1939-1975).

Throughout the struggle, there were tens of thousands of deaths on both sides due to both legal and extralegal executions. However, the political violence also continued during the first post-war years. It is estimated that during the post-war years around 50,000 people were executed through military tribunals and summary indictments, without even the barest of guarantees, and by applying unjust and discriminatory legislation, causing, in this way, more victims than the Nazi regime in Germany or the fascist regime in Italy during peacetime (Cazorla, 2002). The number of people put into Francoist concentration camps amounted to 200,000 (Rodrigo, 2005), similar to the number of those forced to seek asylum after the civil war (Alted, 2005).

During the almost forty years that Franco remained in power, he refused to restore the jobs of the tens of thousands of people who had been removed from them as a consequence of the struggle. Franco also refused to grant pensions or any kind of compensation to those mutilated in the war, be they civilians or military personnel, or to the widows and orphans of combatants from the defeated faction. The property of members of other parties or trade unions and of civilians was confiscated simply because they had defended or sympathised with the legal regime that was in place prior to the war. This was the Second Republic, which the dictatorship had ousted with their weapons. In the meantime, those who had fought or sympathised with the winners enjoyed the goods and perks associated with privileges (jobs in the public and private sectors). These opportunities arose as a direct result of the huge labour purge already mentioned, and provided: pensions; compensation payments; healthcare and sanitation; the possibility of exhuming relatives from mass graves to give them a proper burial; constant and highly visible signs of symbolic and moral acknowledgement, etc.

Nor can it be denied that, throughout the struggle, unjust trials and extralegal executions were also carried out among the ranks of the defeated party. Yet besides the debate over the number of deaths caused by any one of the parties and the specific nature of the repression carried out by each², only the heirs of the Francoist party are responsible for the acts of violence inflicted during the dictatorship.

In the transitional period, we find that traumatic memories of the civil war and the obsessive desire to avoid its repetition stimulate the main political actors and

² According to more detailed studies, the Francoist party was responsible for more deaths than the Republican side. On the other hand, the acts of violence carried out by the former were more systematic and exhaustive. There is evidence that the Republican authorities tried much earlier and more directly to stop uncontrolled acts of violence during the first months of the war and even approved measures that considered personal revenge and acts of retaliation a crime. Finally, in the most recent publication on the administration of justice during the war, more concern can be detected on the part of the Republican party than the Francoists for maintaining forms and guarantees. See Juliá et al. (1999) and Cancio (2006).

Spanish society at large to look toward the future, leaving aside the thorniest aspects of the past. There was a firm conviction that only in this way was it possible at long last to peacefully move toward democracy. It is true that, given the correlation of political forces that existed, clearly in favour of the reformists of the dictatorship, it would have proved extremely difficult to judge on those responsible for the main violations of human rights. But it is also true that not a single political actor of importance or one single social organisation with a minimum of support came upon the idea at that moment of demanding any kind of punitive measure against such violations. The maximum that was proposed then, both in the political as well as in the social sphere, was to compensate with measures of the material kind those who had lost the war and their relatives. It is also true that many international bodies that are today actively committed to combating impunity did not exist in 1975 or hardly had the capacity at that time of exerting pressure in a transition to democracy.

The Spanish transition was characterised, among other things, by the fact that the most important rules of the new democratic game were adopted through consensus between those who reformed Francoism and the main political forces of the democratic opposition. Tacitly, what amounted to "gag rules" were agreed upon, which consisted in leaving the dictatorial and bellicose past out of the public debate and, in a rule called "Ley de Amnistía de 1977" (Law of Amnesty 1977), to shield it from any judicial process. These moves, together with measures to provide material reparations for the defeated faction, would later become known collectively as "the national reconciliation policy". This policy could not have been made earlier, given that Francoism had long marginalised the losing side in the civil war and their ideological heirs. One of the main points of agreement that laid the foundations for Spanish democracy was the principle of "never again". In contrast to such principles in other countries, this does not refer to the dictatorship or its crimes, but instead to the civil war for whose atrocities the guilt is generally shared between the two adversaries.

2. POLICIES OF MATERIAL REPARATION IN SPAIN

As a consequence both of repressive activities and omissions regarding reparation during the dictatorship, an array of situations emerged upon Franco's death (20 November 1975) that needed to be dealt with urgently if winners and losers were to have equal rights. This translated into a stormy legislative process which on many occasions had to be reformed or added to shortly after approval given that, in accordance with the spirit of the law, some collectives who needed to be incorporated into the reparation measures had not been. The casuistry was very extensive and extremely complex.

In the beginning, partial grace measures were approved, such as the granting of a pardon on 25 November 1975, prompted by the coronation of King Juan Carlos I, which appealed to "Concordia" while also paying "tribute to the memory of the eminent figure of Generalissimo Franco, architect of the progressive development leading to the peace that Spain had been enjoying during the past decades". As a consequence of this pardon, prison population went from 14,764 in 1974 to 8,440 in 1975. Five hundred and twenty-eight of the more than 6,000 people released had been imprisoned for political reasons. The pardon only allowed for half the political prisoners to come out of prison, causing the mobilisation of multiple and very diverse sectors of society in an attempt to obtain the release of the rest. The vindication of the amnesty was one of the most

important events in the country's transition, with the greatest ability to mobilise the populace.

In July 1976, the first government of the monarchy approved the Real Decreto Ley de Amnistia (Royal Decree Amnesty Law), which covered crimes related to acts of political intentionality "as long as these (acts) had not endangered or harmed the lives or integrity of the people (affected)". This clause was interpreted in such a restrictive sense by the judges – the vast majority of whom were conservative – that in 1977 it was necessary to add both a general law of pardon and grace measures that made it possible to circumvent the obstacles. The Royal Decree Amnesty Law, was intended as a culmination of "the diverse legislative measures, beginning in the 1940s, that had helped to overcome the differences among the Spanish people".

The amnesty of 15 October 1977 was the first law approved by the new democratic parliament in its first session, the fruit of the elections on 15 June of the same year (Aguilar, 1997 and 2002). It is a fundamental instrument that affects to crimes and faults of a political nature. This instrument restored active rights – reintegration into the workforce, except for military posts – and passive rights for those who had been sentenced, as well as eliminating their criminal records. The most progressive part of this measure is that it included crimes that involved bloodshed up to 15 December 1976 (date when the Law for Political Reform was passed), and between this and 15 June 1977, as long as there was a relationship between the crime and the intention to "re-establish public liberties" or to vindicate autonomies. This clause proved useful because it allowed to free prisoners from the terrorist organisation ETA; in fact, this was one of the law's main objectives³.

But in its second article, the law also contained two paragraphs that practically passed unnoticed, both in the parliamentary debate on the law and in most of the media commentaries prompted by its approval. They spoke of amnesty being extended to "crimes and faults that may have been committed by the authorities, officials and guardians of public order on the occasion and as a result of the investigation and persecution of acts covered by this law", as well as "crimes committed by officials and guardians of public order against the people exercising their rights". These are the aspects that converted the Law of Amnesty into a "Full Stop Law": in exchange for the liberation of political prisoners who had committed violent crimes (it should be remembered that ETA and GRAPO and other minor terrorist organisations of the extreme left had committed 95 murders between the 1960s and the time the amnesty was approved)⁴, the impunity of the Francoist regime was established as its perpetrators could no longer be taken to court.

In the parliamentary debate on this law, both the UCD (Centre Democratic Union), which was in government with a minority, and the left and nationalist formations (Catalan and Basque) appealed for the need to overcome the past, leaving aside hatred derived from the Civil War and the dictatorship, in order to achieve among other things the installation and stabilisation of democracy in

³ In the early days of November 1977, 118 prisoners were released. The following month, many celebrated because the last Basque prisoner, convicted for crimes of a political nature, had been released.

⁴ This figure was derived from the database on political violence during the transition compiled by Ignacio Sánchez-Cuenca with my collaboration.

Spain. This law, supported by all but the main party of the right (then the AP - Alianza Popular, now the PP - Partido Popular), was widely welcomed both by members of parliament and the citizenry, since there had been major, and often dramatic, rallies to call for its approval. However, the inclusion of the two articles that established impunity in the dictatorship had not been publicly defended by any figure in politics or society, and this inclusion is now the main obstacle that today's democracy faces on its way to a legal review of the Francoist past.

Stephen Holmes has defended the convenience of adopting "gag rules" on particularly divisive and polemic issues, especially during such sensitive and uncertain periods as transitions to democracy, and cites the laws of amnesty as especially illustrative of his argument. According to him: *"[b]y closing the books on the past, keeping retribution for former crimes off the political agenda, the organizers of a new democracy can secure the compliance of strategically located elites – cooperation may be indispensable for a successful transition from dictatorship to self-government"*. However, Holmes himself acknowledges the provisional nature of "gag rules"; it may be that a legislative body – such as the Spanish Congress – decides to adopt them, *"but it could not gag the public or the press"*. He also indicates that "gag rules" *"are seldom neutral; they implicitly support one policy and undermine alternatives (...). To prevent overload, all individuals and groups must suppress some controversial problems (...). But issue-avoidance, however attractive, will always be one-sided and potentially dangerous"* (Holmes, [1988] 1993: 27; 43; 59).

This is precisely what happened in the Spanish case: the ideological heirs of the dictatorship ended up benefiting much more from the agreement not to stir up the past than those who had directly suffered retaliation during the dictatorship. It was true that, during the war, both parties in conflict committed intolerable abuses (although some had been prosecuted as a result and others had not). However, throughout the dictatorship, a clear distinction was made between victims and aggressors. On the other hand, those who benefited from the veil used to cover the past in the political sphere were mainly those who had held posts of political responsibility under Franco and those who supported his dictatorship.

Paradoxically, the amnesty of 1977 did not help to stop killings by ETA (in fact, its most violent phase began two years later), nor to prevent further coup attempts. This issue will be dealt with below.

The fact that the Law of Amnesty left important issues pending is demonstrated by the mass of complementary legislation that followed. First, there came the Royal Decree Law of 6 March 1978, which grants retirement pensions to members of the military and of the Republican Public Order Forces, or to their heirs, who were fully qualified as professional before 18 July 1936. Second, in May 1978, the application for amnesty was dealt with by officials at the Generalitat de Catalunya. Third, in December 1978 a Royal Decree-Law was approved on the extension of amnesty to purged justice officials. Fourth, in September 1979 came a law that provided pensions, medical care and social assistance to the widows and relatives of those who had died or had been wounded during the war, or "as a consequence of political or trade-unionist activities", when death "had not been the consequence of the execution of a sentence, nor derived from a violent action on the part of the person causing it". This provision left a fundamental vacuum, which will be discussed later. Fifth, in June 1984, based on the assumptions provided for by the Law of Amnesty, years

spent in prison are acknowledged in terms of contributions to Social Security. Sixth, in October 1984 a qualitative leap was made in terms of the rhetoric used, in that "services rendered" were acknowledged. This was also true of pensions and assistance to those who had joined the army or public order forces during the war, that is, those who were not covered before under this law because they were not qualified professionals. The law reads: "Now that, with the approval of the Constitution of 1978, we are fortunate to have overcome the emotional motivations that had prevented finding a full solution to the problem a year before, in October 1977, that is, with the Law of Amnesty, it is essential to adjust the laws to the precepts of our fundamental rule". It is rather revealing that the above preamble acknowledges that limitations exist during the transition in terms of doing justice to certain collectives.

Finally, it was not until December 1986 – the date when condemned members of the military regained their active rights – that the most important vacuum left by the Law of Amnesty was filled. It was this vacuum that had, for instance, prevented the reincorporation into the army of those who had belonged to the UMD (Democratic Military Union)⁵. In fact, in the preamble of the 1986 law, it is acknowledged that the amnesty had "unfairly treated those who, in spite of falling within its field of application, held the rank of professional military serviceman or civil servant (...). The principle of non-discrimination, firmly embedded in Article 14 of the Constitution, as well as the principle of equality of all the Spanish people before the law, makes reparation of those differences an obligation." What is significant is that it took nine years after the Law of Amnesty was approved, and eight years after the Constitution was adopted, for legislators to sanction such a reparation measure. This illustrates the degree of influence that members of the military had at the time in terms of opposing any policy that could affect their internal organisation.

Indeed, some other groups remained temporarily excluded from the amnesty. These were the groups usually overlooked, i.e. those punished for homosexuality, adultery, cohabitation or the use of contraception, which were at the time considered crimes.

In the first Spanish rules of reparation, nothing was said about the suffering of those who had fought for a legitimate regime or for the reestablishment of democracy. What was mentioned practically in every case was the desire to overcome the consequences of war and the inequalities generated by it, as well as the need to offer protection to certain collectives and for their members to be integrated as citizens with full rights. Almost every time, it was said that these situations of inequality had been caused by "acts of political intention", extended, as we have seen, only in the case of one of the assumptions in the Law of Amnesty of 1977 to the motive of "reestablishment of public liberties" and of "vindication of autonomies". The real aim during the first years of the democracy was to acknowledge that those on the losing side had been treated unfairly, in order to grant them the same rights as those on the winning side. So it was not about vindicating their motives or recognising the justness of their cause; the word

⁵ A clandestine organisation which emerged in 1974 amidst the Francoist armed forces with the aim of helping spread democratic ideas there. Some UMD members who belonged to the military were judged, sent to prison and expelled from the army. The latter specifically refused to reincorporate them, although, under the protection of the law of amnesty of 1977, the rest of the Spanish population could be reintegrated if they had lost their job for political reasons.

"reconciliation" amounted to "granting the same level of rights", which no one was against, especially if reference was made to the Civil War. Also fundamental was the fact that neither the regime or the people who had caused these situations of injustice were ever disqualified or even mentioned.

This is precisely what has changed now. In recent years, reparation measures have tried to pay moral tribute to the victims, acknowledging the justness of their cause and their contribution to the reestablishment of liberties. Recent measures also refer, for the first time, and from a negative perspective, to the decisions and people responsible for situations of discrimination. If both sets of reparation measures are examined from the same angle, no one can deny the depth of the differences.

The first time a "fight for freedom" is mentioned is in the Law of 8 June 1984. However, in the 1990 and 1991 laws, which specify the first compensation payments for a minimum period spent in prison during Franco's regime, there is no mention of the justness of the cause or the unfairness of people losing their freedom. Surprisingly enough, the first exceptional declaration is one concerning the International Brigadiers. The Royal Decree of 9 January 1996, which makes provisions for granting them Spanish nationality, states that: "it is an important part of justice to acknowledge work intended to promote freedom and democracy, carried out by volunteers from the International Brigades", and mentions "the gratitude of the Nation" towards them. Later, in the 1998 law which reinstated goods confiscated from the political parties, a criticism of some of the actions carried out during the dictatorship appears for the first time, albeit indirectly, as it talks of "restoring the legal situation that had been affected by illegitimate decisions made with the protection of an unfair rule". This rule is presented as a historical act and it is said that the legacy had been "snatched". However, none of these formulations appeared anywhere in the law of devolution of trade union patrimony, passed ten years before. What seems odd is that this measure derives from the first legislative period under the PP, a party which, despite ruling with a minority, managed to win the support of the moderate Basque and Catalan nationalists. The PSOE (Spanish socialist workers' party), precisely the political party from which the most patrimony was confiscated, voted against the law. In fact, the draft that was presented by the PP qualified the rule that had given rise to the seizures as "equivocal", a term that was later changed to "unfair" on the initiative of the nationalist Basque party Eusko Alkartasuna, EA.

The huge quantitative leap in the way the rules of reparation are articulated took place in the current legislative period (beginning in 2004)⁶. The Royal Decree of 2004, through which the "Interministerial Commission to study the situation of the victims of the Civil War and of Francoism"⁷ was created, speaks of the need to examine the situation of the "victims" – referred to using this term for the first time – who, "suffered repressive acts as a consequence of their democratic commitment". The law proposes measures of "acknowledgement" and "moral satisfaction". The change in tone is huge; we are now talking about "suffering",

⁶ I would like to remind the reader that I am talking about rules and, therefore, other parliamentary initiatives, as motions, are excluded. This question has already been discussed in other studies (Aguilar, 2006A).

⁷ Said commission is responsible for the Law Project on Reparations, currently in parliamentary discussion, regarding the acknowledgement and extension of rights and measures to those who "suffered persecution or violence during the civil war and the dictatorship".

"acknowledgement" and "moral satisfaction", and the measures are furthermore referred to as a "sign of the awareness of Spanish society and its wish to compensate, at least in part, for the shortages experienced by a group of citizens who saw their personal and professional prospects curtailed as a consequence of the military takeover that gave rise to the Civil War from 1936 to 1939, against the legally constituted government". This is the first acknowledgement of the "historic debt that Spain owes these citizens", the first reference to the legitimacy of the Republic and, finally, the first time that those who had risen up against the Civil War were recognised for it. With the 2005 law that approved the restitution of documents seized from the *Generalitat de Catalunya* and made provisions for the creation of the Historical Memory Document Centre, the expression "historical memory" is not only used for the first time in legislation - the Law on Historical Memory was sanctioned in July 2006 - but the "injustice" and "illegitimacy" of the Francoist legislation is mentioned once again. Those currently requesting the annulment of indictments that took place during Francoism base their claims on these two concepts.

Under the current government, headed by José Luis Rodríguez Zapatero, other types of financial and health measures are being provided for the "war kids".⁸ Subsidies directed to associations that carry out activities related to reparations for the victims of war and Francoism have been approved for the first time. Never before had the importance of the endeavours of associations working for the "dignity of the victims" been recognised. Moreover, their activities are considered worthy of "praise and public respect".

3. TRANSITIONAL JUSTICE IN SPAIN, CHILE AND ARGENTINA

After giving an account of the evolution of the relevant Spanish legislation – from the equalisation of rights for the two sides in the Civil War, an issue which was presented as a simple question of justice, to the recognition of the illegitimacy and injustice of Francoism, the moral rehabilitation of the victims and the exaltation of their motivation to fight – I will now reflect briefly on the respective cases of Argentina, Chile and Spain. I will not consider the provisions made by the Law Project on Reparations (mentioned in footnote 7), which was subject to parliamentary debate at the time of writing.

The processes of change undergone by these three countries were the subject of various types of constrictions⁹. The repressive violence exercised by the dictatorships in the South Cone was very different from that of the Spanish dictatorship. The length of the dictatorships was very different, as was the nearness of its worst crimes at the time the transition took place. Finally, judges and human rights associations played different roles. But in the middle of the transition process to democracy, decisions had to be made in all three countries

⁸ The "War Kids" are children of Republicans, who were evacuated before the Francoist troops advanced. The countries that welcomed them in large numbers were France, Belgium, Mexico, Great Britain and the former USSR. It is estimated that, during the war alone, around 30,000 children were evacuated. It took many years before some of them could get back to Spain and meet their relatives. Many stayed in their country of refuge.

⁹ A comparison between the policies of memory in Chile and Spain can be found in Aguilar and Hite (2004).

about the legacy of human rights violations inherited from the previous regime.¹⁰ We will look below at the corresponding reparation, truth and justice policies.¹¹

3.1. Symbolic reparation (monuments, clarification of the truth, condemnation of the past and pardon of the victims)

From the beginning in Argentina, "initiatives of symbolic character that put an emphasis on acknowledging the past or on paying tribute to the victims were promoted in different parts of the country" (Tappatá de Valdez, 2005: 104). Nowadays there are many important commemorative sites such as the Parque de la Memoria on the Bank of the Rio de la Plata. Many of the victims were thrown into this river, lending this monument a very special symbolic value. In Buenos Aires, some of the buildings where people were arrested and tortured have been declared "historic sites". Since 1998, the city of Rosario has housed the Museo de la Memoria, dedicated to condemning terrorism by the state and to paying tribute to the detained and disappeared. Finally, president Nestor Kirchner created the National Archive for Historical Memory to house documents related to human rights violations, including documents produced by the Truth Commission (Comisión de la Verdad) and by the investigations that followed the end of the regime. Furthermore, the former Navy Sub-Officers Mechanics School (ESMA) – the main centre of detection, torture and assassination committed under the military juntas – will soon be converted into a museum paying tribute to the memory of the victims.

In Chile in 1991, the government accepted a joint initiative by the Association of Relatives of the Disappeared Detainees (Agrupación de Familiares de Detenidos Desaparecidos) and the Association of Relatives of People Executed for Political Reasons (Agrupación de Familiares de Ejecutados Políticos) to build a memorial and a mausoleum consecrated to pay tribute to the memory of and to give a dignified burial to the victims of the dictatorship; both sites are located in Santiago de Chile's general cemetery. During the first year of Patricio Aylwin's presidency, Allende's body was transferred from its private tomb, and funeral rites in the Cathedral took place.¹² "[Allende's] coffin was carried by the funeral entourage and buried once again, this time at the General Cemetery, where other democratic presidents of the country are also laid to rest" (Wilde, 1999: 483).

Several symbolic acts also took place under the presidency of Ricardo Lagos. The National Stadium, the former centre of illegal detention, torture and assassination, was declared a national monument in 2003, displaying a permanent exhibition about the events that took place at the same location. The football stadium formerly known as the Estadio Chile now bears the name Estadio Víctor Jara. Several other monuments have also been built to pay tribute to the victims and to prevent the more turbulent aspects of the past from vanishing popular memory. Among them is Villa Grimaldi, an old clandestine detention and torture centre. Michelle Bachelet is the first president to visit this precinct. She is also the first to visit the head office of the Association of Relatives of Disappeared Detainees.

¹⁰ See Barahona de Brito, González Enríquez and Aguilar (2001).

¹¹ A detailed description of the policies of material reparation in Argentina and Chile can be found in Guembe (2006) and Lira (2006), respectively.

¹² The monument to Salvador Allende (2000) and the museum, Museo de la Solidaridad Salvador Allende (rededicated in 1991), also deserve a mention here.

The fact is that in Spain, during the constituent term (1977-1979), the senate approved a legislative proposal for the transfer of the mortal remains of the three heads of state who died in exile: Alfonso XIII, King of Spain until the establishment of the Second Republic in 1931, and former presidents of the Republic, Niceto Alcalá-Zamora and Manuel Azaña. However, Alfonso XIII was not transferred to the Escorial until 1980. Alcalá-Zamora, whose grandchild's application to have his remains transferred from Argentina with the honours befitting a head of state was unsuccessful, was eventually transferred by private arrangement in 1977. Finally, the remains of Azaña, the last president of the Republic, still lie in the small French cemetery of Montauban. Marshal Petain forbade him being honoured as head of state at this burial, and prevented his body from being wrapped in the Republican flag. While it appears that Azaña had expressly stipulated his wish not to be removed from his burial place, I have found no evidence that either the current head of state nor any other Spanish prime minister has ever visited the cemetery to pay official tribute to the man who was the president of a legally constituted regime, and who was illegally and forcibly deposed. For Azaña, in contrast to Allende, there is no statue to honour him in the capital city, nor a museum named after him. Only one statute has been erected, in the place where he was born (Alcalá de Henares) – where a roundabout also bears his name.

In Spain, with the exception of the Valle de los Caídos (the Valley of the Fallen), which of course does not pay tribute to the dead of both sides, there is no other monument to the victims of war which has similar status and public symbolism to those of the Chilean and Argentinean people. The only monument which pretends to a nationwide scope, situated in the Plaza de la Lealtad in Madrid, lacks the strong symbolism of the Estadio Nacional or ESMA, and is very inconspicuous. After all, it is a monument from the 19th century, recycled in 1985 on the occasion of the tenth anniversary of the crowning of the King, which pays tribute to all the fallen in Spain in any kind of struggle. The only change that was made for its reinauguration was the addition of a votive flame. On the other hand, the fact that the Valle de los Caídos has been left almost intact after the dictatorship is in itself very significant since it is a legacy of that era. Also, in contrast to the other two countries, nowhere in Spain is there a national monument that commemorates the victims of the Francoist dictatorship.

In fact, it took thirty years after Franco's death for a head of the Spanish government, Rodríguez Zapatero, to visit the Mauthausen concentration camp to pay tribute to the Spanish people who had been imprisoned there. This took place on the occasion of the 60th anniversary of their liberation. One might ask why in 1995, fifty years after these events had taken place, the government – also socialist – did not see fit to make such a gesture, given that 8,000 Spaniards had been imprisoned at Mauthausen, of whom 6,000 lost their lives. It should be noted that this very president met with the "war kids" in Moscow twice, and that their situation improved under his government.

As for the elimination of monuments and symbols of the previous government, the procedure has been particularly slow in Spain, especially if one considers the omnipresence of the Francoist iconography that existed in Spain on his death. The statue of the dictator in Madrid was not pulled down until March 2005, against the PP party's will. A similar statue was retained in the military academy in Zaragoza until August 2006, and the equestrian statues in Santander and Melilla are still standing today. In several provincial capitals and in numerous towns, an array of streets, plaques and monuments bear Franco's name, still

paying tribute to the dictator and his regime. Many churches and cathedrals continue to display a list of the "fallen for God and Spain", thus paying an excessive tribute to the winning side.

In Santiago de Chile, a public avenue is still called Avenida 11 de Septiembre, named after the date of the coup by Pinochet. Proposals were made at the beginning of the 1990s to change the name. The meaning of this date has changed over time, from one of victory to one of tragedy. Only in August 1998 did the Chilean government manage to win a vote in congress to stop 11 September being a national holiday. In this sense, the Chilean people have taken much longer than the Spanish to free themselves from a national holiday related to their dictatorship, since both 18 July (the date of the coup against the Second Republic in Spain) and 20 November (the anniversary of both Antonio Primo de Rivera's and Francisco Franco's deaths) lost their status as official holidays a few years after Franco's death (Aguilar and Humlebaek, 2002). As for Argentina, it seems that few symbols from the dictatorship remain, except for a few street names in small cities or plaques in memory of the "fallen in the fight against subversion" in a small number of barracks.

As regards official efforts aimed at clarifying violations of rights, in contrast to the developments in Spain, truth commissions were created in the early days of political change in this two Southern Cone countries. They gathered the testimonies of the victims and publicly acknowledged the crimes of the dictatorships.

In Argentina, CONADEP - the National Commission on the Disappeared (Comisión Nacional para la Desaparición de Personas) was created at the behest of President Raul Alfonsín. In 1984 a report titled "Nunca Más" (Never Again) appeared. It documents the lives of nearly 8,963 people who "disappeared" (by 1999, however, more than 3,000 new cases had been documented and some human rights organisations speak of a total of around 30,000 cases). The existence of more than 340 secret detention centres is acknowledged, and the names of 1,351 people are given, including medical doctors, judges, journalists, bishops and priests "who cooperated with the regime's repression measures". Official investigations of the circumstances behind the disappearances have continued after said report was released by the Human Rights Sub-Secretariat, a department of the Ministry of the Interior (Barahona de Brito, 2001: 121). The Argentinean Commission did not officially publish the names of the oppressors, but a list of their names was leaked to the press and published to coincide with the publication of the report.

In Chile, the creation of the National Commission for Truth and Reconciliation was also ordered by the President, Patricio Aylwin, and the "Rettig Report", named after the lawyer who presided over, was published in 1991. In contrast to Argentina, in Chile the press did not publish the names of the perpetrators. The most concerted action Chile has recently taken on this issue was to create the National Commission on Prison and Torture Policy (Comisión Nacional sobre la Prisión y Tortura), which has gathered the testimonies of 28,000 people who were tortured. In an emotional speech, President Lagos informed the country of the findings of this report, published in November 2004. It revealed that torture was not carried out by just a few individuals in isolated cases, but that it was an institutional activity, a state policy used systematically by the dictatorship (94% of detainees confirmed that they had been tortured). Thanks to this commission,

lifelong pension payments have been adopted for the victims, as well as favourable conditions for access to health care, education and housing.

In respect of official acts to condemn the dictatorship, in September 1999 a motion was approved in the Spanish parliament. The PP – which was in government with a minority – abstained, and the majority from the left and nationalist parties (Catalonian and Basque) were in favour. The law was a "commemoration of the 60th anniversary of the exile", to "condemn the military uprising against the legitimate, constitutional regime". A second step in a similar direction was attempted in December 2000, when the PP was already established with a comfortable parliamentary majority. The opposition presented another motion to "condemn the military uprising of 18 July 1936". It was rejected in February of the following year.

Among the references made to the past in the Spanish congress, one has attracted more attention than all the rest. In the debate that took place at the constitutional commission on 20 November 2002, seven legislative proposals concerning the acknowledgement of the victims of the Civil War and Francoism were passed. Some of the people who had made the proposals were also asking for a condemnation of the dictatorship. In the end, a motion was unanimously approved. It agreed to "extend moral acknowledgment to every man and woman who was a victim of the Spanish Civil War, as well as to those who suffered later under the Francoist dictatorship". The text also included an expression of generic disapproval of totalitarian regimes, which did not explicitly mention Francoism. Thus we find ourselves today in a situation where the PP has yet to explicitly condemn either the military coup of 1936 or the dictatorship that followed it.

On 4 March 1991, President Aylwin presented to the Chilean public the results of the report by the National Commission for Truth and Reconciliation. He asked in the name of the nation for "forgiveness from the relatives of the victims", requesting "solemnly of the armed forces, forces of law and order, and everyone who participated actively in the excesses committed, that they make gestures of acknowledgement for the pain caused and that they help alleviate it". In addition, Aylwin promoted the approval of moral and material reparation measures to indemnify the victims. In Spain, neither a head of state nor a prime minister has ever asked the victims of the war or the repressive Francoist regime for forgiveness on behalf of the Spanish state. Neither has anyone officially requested the assistance of those who might have information to help locate the whereabouts of several thousand executed republicans whose remains are still resting in unmarked mass graves, so that their relatives can at long last proceed with the exhumation, identification and burial of their dead.

Several laws that have been passed since in Argentina contain an explicit rejection of the dictatorship. In addition to this, an official National Remembrance Day has been declared to commemorate the victims of that period.

A further type of moral reparation can come in the form of contrition and revelation of the truth. In 1995 came some well-known cases of repentance by torturers and assassins in Argentina. The head of the army, Lieutenant General Martín Balza, and the head of the Navy, Admiral Enrique Molina, have both expressed criticism of the violations of human rights that took place during the dictatorship. The former has asked for forgiveness from the relatives of the oppressed for the deeds carried out by the military. In a document published on 25 April 1995, the Army High Command admitted that the armed forces had

participated in torture and assassination. "The document had an important domino effect on the Army, the Navy and the Catholic Church, in spite of the degree of clarity with which they had already admitted in their own public documents the role their members had played in both carrying out acts of terror and collaborating with the state on such acts during the dictatorship" (Acuña, 2006: 207). That same year, Naval Captain Adolfo Scilingo admitted that between 1,500 and 2,000 prisoners had been thrown into the sea from planes in "death flights".

In Chile, the change in judicial strategy produced through the detention of Pinochet in London, which consisted of considering the cases of the disappeared as imprescriptible crimes and therefore not subject to amnesty, forced military officials to draft the first report in which they admitted to throwing the bodies of prisoners into the sea, even going so far as to name some of the victims in a desperate attempt to redeem themselves. Although it soon came to light that the report contained many untruths, it was the first time that officials from the Chilean military had publicly admitted to having committed such acts. One of the lessons that can be learned from the Argentinean and Chilean cases is that, without a certain degree of social and political pressure on the perpetrators (produced, among other means, by the publication of the reports by the truth commissions), they would never have admitted to having taken part in the crimes in question.

In Spain, a long time has now passed since the war and its immediate aftermath, which is when the worst atrocities were committed, but there have been no cases of public repentance for the crimes perpetrated during the struggle, or for the brutal retaliation by Francoists in the post-war period, in which judges and military officials actively participated. Moreover, in contrast to the Argentinean Church, the Spanish Church has not apologised for its connivance with the winning side, nor for its complicit silence, with a few exceptions, under the dictatorship. The Argentinean Church publicly asked forgiveness for the "culpable silence and effective participation (...) in the abuse of liberties, in torture and denunciation", while the Chilean Church never offered its support to the dictatorship in the first place, but tried instead to protect and help the victims and their relatives. In painful contrast, the Spanish Church, which pretended to the role of "crusader" in the Civil War, missed every opportunity it has had to date to ask for forgiveness for all of the acts described above. Only once did it come close to doing so, at the Joint Assembly of Bishops and Priests in 1971, but the proposal did not obtain the majority needed to see it through. It is hard to believe that the Spanish Church has failed to grasp this initiative, nearly approved towards the end of the dictatorship, more than 30 years since Franco's death.

Another issue related to the moral reparation of the victims and the restitution of the truth has already been mentioned, and concerns mass graves and people who 'disappeared' as a result of dictatorships. In contrast to the events during Francoism, in democratic Spain the initiative to locate, exhume and identify remains has been almost private. The first subsidies to the associations responsible for this task were not granted, as already said, until September 2006, although most of the graves date back to 1936.¹³ The number of organisations

¹³ Although the exact figure has not been established, it is known that several thousand people from the Republican side were buried in mass graves as a result of extralegal executions that were carried out by the Francoist side, mainly during the first months of the civil war.

dedicated to paying tribute to the victims increased between 2003 and 2005 from 30 to almost 170, enabling us to speak of a real "associative explosion" (Gálvez, 2006: 34). This does not mean to say that this type of organisation did not exist before,¹⁴ but it did not have the social prestige that some organisations enjoy today, in particular the Association for the Recovery of Historical Memory - Asociación para la Recuperación de la Memoria Histórica (ARMH). ARMH ensured the UN's acceptance of the cases of two Spanish people who disappeared after 1945 (in the period prior to this date, for which the UN is not responsible, there were many more). Generational change, along with developments in international criminal law and the change in the correlation of political forces, have all helped to give fresh impetus to these vindications. Impunity and injustice towards the victims certainly seem to be tolerated much less readily than they were in the past.

In Chile, the state is responsible for locating and exhuming bodies, a task that is carried out by forensic experts and the legal medical service, under the direction of a judge. In Argentina, a human rights body – the Argentinean Team of Forensic Medicine – is responsible for the exhumation and identification of remains. This body, although independent, works in conjunction with the judiciary, helping to provide evidence for causes related to these issues.

In order to complement the work of CONADEP, the Argentinean government created the Human Rights Sub-Secretariat, which has since become a full secretariat and currently reports to the Ministry of Justice and Human Rights. Among its functions, it must "watch over and systematise the archive consisting of the bundle of documents generated from the demands that CONADEP has accepted", and supervise "compliance with international legislation on human rights to which Argentina is a signatory". Within this secretariat, the government created the National Commission for the Right to Identity (Comisión Nacional por el Derecho a la Identidad) in 1992, with the aim of identifying more than 600 children who had been kidnapped (Tappatá de Valdez, 2005: 100). The commission has a database of generic data, and its work has been "fundamental to tracing disappeared children" (Barahona de Brito, 2001: 138). No equivalent body exists in Spain, although an unknown number of women and children on the Republican side were kidnapped and put in prison (Vinyes et al., 2002).

3.2. Material reparations to the victims (pensions, indemnisation payments and other kinds of assistance)

In Argentina four pieces of fundamental legislation were approved between 1991 and 1995 to "provide economic assistance to all political detainees during the dictatorship, as well as to the parents and children of the disappeared" (Barahona de Brito, 2001: 138). In addition, "workers dismissed on political grounds" were indemnified (Tappatá de Valdez, 2005: 101). We have already mentioned that a measure providing for economic reparations to the victims of torture was recently approved in Chile, but in fact a law of reparation has been in place for the relatives of the disappeared since 1992. This was the year the National Corporation for Reparation and Reconciliation was created, "to legally establish the 'inalienable rights' of relatives to find disappeared family members (...). The reparations included a monthly wage (...) for each family affected by disappearance or death (...) and diverse health and education benefits, as well as

¹⁴ For example, as early as January 1976 there were reports of the first attempts to create associations of former political prisoners (*ABC*, 9 January 1976, p. 8).

an exemption from military service for the victims and their relatives". In addition there was "an Office of Repatriation to help people in exile return,¹⁵ and a law for the exonerated¹⁶ which approved the extension of provisional benefits to 58,000 public sector employees dismissed between 1973 and 1990" (Barahona de Brito, 2001: 131-2). Economic reparations for children born to mothers in captivity and for all detainees in secret detention centres were also considered (Acuña, 2006: 215ff).

As already mentioned at the beginning of this paper, various rules were approved in Spain that aimed at the material reparation of the victims of war and their relatives, as well as those whose suffering in prison was politically motivated. However, in addition to the vacuum that still exists – which will be dealt with later in this paper – no measures aimed at facilitating the return of tens of thousands of people in exile or rules that offered reparation to the victims of torture were ever approved.

3.3. Transitional justice, amnesties and pardons

In terms of grace and justice measures, in Argentina the military approved an amnesty in April 1983 – that is, before power was handed over – which tried to cover both acts of "subversion" as well as the excesses of the "repression". This law was revoked by the new democratic government in December of the same year. President Alfonsín adopted measures to simultaneously take to trial several military leaders of the Junta and the seven top guerrilla leaders. The country became the "first and only country in Latin America that, in the mid of a democratisation process, took to trial nine military junta leaders for the murder and disappearance of citizens in their country during the dictatorship from 1976 to 1983" (Hite, 2005). After a trial that was televised, although the voices of the protagonists could not be heard, five of the accused were sentenced and four absolved. Judicial proceedings against human rights violations continued, creating a certain amount of anxiety among the military rank and file – to the extent that the known as "painted faces" organised some revolts. The laws known as Final Point and Due Obedience, which date back to December 1986 and June 1987 respectively, were approved in an effort to put an end to the military revolts and to stabilise democracy. Later, in October 1989 and January 1991, Carlos Menem was responsible for the approval of a series of pardons targeted at those towards whom the laws had been directed in the first place.

The proof that "gag rules" are not irrevocable, even though they play a fundamental role in the processes of political change, is that in June 2005 the Supreme Court revoked the Final Point and Due Obedience laws because they were considered unconstitutional. From the beginning of his mandate, Kirchner has shown a firm will when it comes to reparations for the victims. On the occasion of the 30th anniversary of the military coup, the Argentinean president "abolished the decree that prevented the extradition of military servicemen" who had been accused of human rights violations (Tappatá de Valdez, 2005: 109). Finally, he urged judges to declare unconstitutional the pardons that had been approved by Carlos Menem, from which a large proportion of the leaders of the military junta had benefited, because they related to imprescriptible crimes.

¹⁵ From which 52,557 people have benefited; Lira, 2006: 73.

¹⁶ Removed or purged from their jobs.

The crimes of stealing children from detained women and pregnant women who disappeared were never covered by any of the laws already mentioned or by the pardons granted by Menem, which explains why, during the 1990s, the Argentinean justice system continued taking action against some of the leading members of the dictatorship. Throughout these years, "associations of human rights activists, journalists and judges concentrated on the crimes excluded by the Law of Due Obedience (...) in an effort to obtain new trials" (Hite, 2005).

On the other hand, the so-called "Truth Trials" have been taking place from 1999 onwards "in different federal chambers of the country, because this is where the criminal causes for the events that took place during the military dictatorship were carried forward (...). Its final aim is not to establish the criminal responsibility of those involved and thus they did not contemplate the possibility of a sentence" (Tappatá de Valdez, 2005: 97). Instead, these trials constitute a novel and original measure through which "the right to truth" and "the right to mourn", rights that are increasingly recognised by international legislation, are taking shape in an effective form. The Argentinean government, thanks to pressure from human rights organisations, recognised this right and even created a truth commission in 1996 to this end.

In Chile, the 1978 Law of Amnesty (which, as in Argentina, but in contrast to Spain, was approved during the dictatorship) was applied rigorously until Pinochet's arrest in London. This fortuitous event forced Chileans to review some of the agreements on which their process of political change was based. From then on, judges began to reinterpret the law and many considered that the cases of the disappeared constituted, in accordance with international law, "imprescriptible crimes", a fact that authorised them to re-open cases prior to 1978. In Chile, as in Spain, the Law of Amnesty is still valid, although in Chile, and not in Spain, parliamentary debates have been held over this issue. In addition, some declarations by Bachelet indicate that it could be abolished soon.

In any case, from a very early date and in spite of the Law of Amnesty, some judges in Chile opted to investigate to the end the cases of forced disappearances or tortures, although they were then forced to grant amnesty to the accused. In this way, they helped clarify the facts without contravening the law.

The fact that in Spain – in contrast to the other two countries – military leaders did not see the need to approve an auto-amnesty prior to the change of regime, is probably due to three factors. Firstly, as has already been pointed out several times, the context in which the transitional period took place in Spain was not as sensitive to the international climate – which runs counter to the impunity forged in the following years. This explains why those who held posts of power during the dictatorship displayed less apprehension. Secondly, it illustrates the confidence that the elite - which had its origins in the time of the Francoist dictatorship- had in their ability to control the process of change. Finally, it must also be pointed out that the power of the Francoist dictatorship, in contrast to the dictatorships of the South Cone, did not lie with the military servicemen; however, the Francoist army had played a direct role in the repression of thousands of people linked to the Republican side through military tribunals, both during and in the postwar.

I will now deal with a very different issue: the amnesty for the political prisoners of the dictatorship, an issue which was also approved in the three countries, albeit implemented at very different times. In Chile, it took more than four years

to get 400 political prisoners freed. We have seen that in Spain, however, grace measures were being approved from the beginning, and the 1977 amnesty law (the first law passed by the democratic parliament) was approved less than two years after Franco's death. Something very similar happened in Argentina, where the liberation of political prisoners was the first measure adopted by President Raúl Alfonsín. Both in Chile and in Spain, the military deeply opposed the liberation of prisoners who had committed violent crimes.

As the Law of Amnesty continues to be in effect in Spain, it has not been possible to open any judicial case for violations of human rights from the time of the war or the dictatorship. In Spain, in contrast to what has happened in other cases, no judge has cited the international legislation in the aim of bypassing the limits of the Law of Amnesty. The boldest initiative in legal terms has been that of the attorney general, Conde Pumpido, who has shown an inclination in favour of revising the military trials during Francoism, including court martial trials. This is not a question of legally persecuting those who handed down tens of thousands of death sentences in trials without any kind of guarantees, but of succeeding in subjecting their actions to revision to demonstrate that these trials were unfair (nothing has been done, for the moment, to this respect, though the Government seems be willing to pass a law in which summary trials could be declared unfair, not cancelled).

It must be emphasised that the type of repression which Francoism practised was much less clandestine and much more protected by the regime's legislation than in the other two cases analysed. There were extrajudicial executions and forced disappearances during the war and the post-war period and torture and trials were carried out without the due guarantees throughout the entire regime. In the South Cone, the repression was basically "clandestine and illegal, even when the dictatorship's own rules were followed closely" (Barahona de Brito, 2001: 119).

In fact, surprisingly enough, although the death penalty had been re-established it was never practised during the Argentinean dictatorship. Under Pinochet's dictatorship, the death penalty was only applied in four cases, for reasons which had nothing to do with politics. In contrast, although it is not known exactly how many death sentences were carried out by the dictatorship in Spain, they are believed to amount to 50,000, without taking into account those that took place during the Civil War.¹⁷

Although Jon Elster refuses to submit a general theory about transitional justice, the following regularity is observed: "*When the pre-democratic regime has been of short duration, memories of wrongdoing and suffering tend to be vivid and (other things being equal) emotions correspondingly strong. If it has been of long duration, the intensity of emotion and of the demands for retribution will depend (other things being equal) on when the worst atrocities took place.*" (Elster, 2004: 75)

On the one hand, the fact that the worst crimes of the Argentinean and Chilean dictatorship were more recent and more clandestine made them much more awkward to address, but also more difficult to ignore. In Argentina, even though some policymaking regarding the past began with great determination,

¹⁷ In Spain the death sentence was abolished for common crimes in 1978 and for all types of crimes in 1995 (although Article 15 of the Constitution still makes reference to it). In Chile and in Argentina it was only abolished for common crimes in 2001 and 1984 respectively.

circumstances forced the official reparation process into an impasse. This fact was not an obstacle either in Chile or Argentina for some sectors of society, who continued to mobilise against impunity and in favour of justice and memory. This included some of the judges. This explains the subsequent developments in justice in both countries.

On the other hand, the fact that repression in the South Cone was fundamentally clandestine explains why demands for truth and justice were raised with much more insistence than in Spain, where the trials that led to tens of thousands of executions during the first years of the dictatorship were granted an official character. Nevertheless, it is surprising that, despite the time that has elapsed, no inventory has been taken of these executions; this explains why we still do not know their exact number. A truth commission would have helped clarify all these matters. It is not the case, as has been said erroneously on occasion, that history should be made by the State, but that the State should put its abundant material and human resources into investigating the main violations of human rights that took place in the country as a whole. We also have a lot to learn about the extrajudicial murders that were perpetrated in Spain by the winning side during the war and the first phase of Francoism given that, although they were not committed as systematically as in the other two countries examined, they did take place.

It seems obvious that there is a great deal of data that, either because of its dimensions (huge and on a national scale) or because of the difficulty of accessing it (especially during the birth of democracy), historians would need decades to compile. Hence the enormous practical utility of truth commissions: they make information that is extremely difficult to compile, but essential, accessible in a brief period of time. And this is indispensable to draw up a coherent and trustworthy account of a past marked by violence, which is indeed a task for historians. These institutional mechanisms also have symbolic or moral utility: not only do they give voice to the victims who wish to present their testimony – which usually has a restorative effect in itself – but they also allow the public exposure on a large scale of the worst episodes of rights violations, as well as the documentation of the way dictatorships operate. And all of the above is done with the prestige and credibility that such commissions and their members generally enjoy.

4. CONCLUSIONS

In general, if we compare the transitional justice measures that have been taken in these three countries, it can be said that Argentina and Chile have gone further in terms of public clarification of the truth (commissions to this end have been created in both cases). They have succeeded in bringing to trial and imprisoning some of those responsible for the worst violations of human rights, even when the laws valid at the time supposedly prevented it (the Law of Amnesty in Chile and the Final Point Law in Argentina). These laws were circumvented with more efficiency than in Spain, thanks to the pressure exerted by society and to the attitude of some judges – who did not hesitate to take recourse to international law – and to a resolute political will. These countries have also carried out a more convincing and visible symbolic reparation of the victims than in Spain. However, in Chile the institutional reforms took longer and were more incomplete than in the other two countries. All in all, regardless of the undoubted political stability that Spanish society enjoys today, the absence of deep-rooted reforms in several key institutions, such as the police and the judiciary, explains

the high figures with regard to the state's repression throughout the transitional period, as well as the impunity with which the extreme right acted during this time. There are abundant examples of connivance between the extreme right, the judges and the state security forces. Moreover, so far the Supreme Tribunal has rejected all applications for a review of the trials that took place during Francoism.

As far as material reparations are concerned, the main group of victims in each of the three countries has been awarded pensions or indemnisation payments, but in the Spanish case the process has taken longer and there are some important vacuums yet to be filled. To outline the main vacuums in terms of material and moral reparations: there are those who died for political reasons, but not during the Civil War or as a consequence of it (for example, people died through violent acts of the civil guard or the police throughout the entire dictatorship). If the victims are not directly connected to the Civil War or its immediate consequences, neither do their relatives receive a pension, nor is their death acknowledged in any way. Similarly, there is no measure of any kind in place for relatives of those executed through a judicial ruling of the dictatorship, regardless of whether the act being punished was linked to the war. As this has been maintained until nowadays, it could give the impression that the Spanish democracy consider these judicial rulings were just, since none of the relatives has been offered reparation, none of the victims acknowledged, nor any the sentences revoked. Finally, in contrast to other cases, the tortured have not been paid any kind of pension, nor have those in exile received any help to assist them in their return.

One would think that the great political and economic stability which Spain has enjoyed in the past twenty years – greater in any case than that of Chile and Argentina – would have allowed it to undertake bolder reparation policies. But the truth is that in Spain the social impetus has been very weak, especially if we compare it with that in the other two countries. Although things have begun to change very recently in Spain, no groups there have the competence and mobilising capacity of many human rights organisations, past and present, in the South Cone. Furthermore, as stated previously, judges have not played the same role in Spain as in the two other countries. They have not interpreted the rules in a flexible way, nor have they resorted to international law to prosecute those crimes that are considered imprescriptible, such as extrajudicial executions and forced disappearances, which they could have done by invoking conventions and treaties Spain has signed. In addition to resorting to international criminal law, many Argentinean and Chilean judges have worked very closely with human rights organisations to try to find loopholes in their national legislation, with the aim of promoting some judicial causes.

Another particularity of the Spanish case was the fact that the Spanish Law of Amnesty preceded all coups by military leaders, while the Due Obedience and Final Point laws in Argentina were sanctioned precisely to end such uprisings. Whereas in Argentina the Final Point Law was useful to calm military leaders, in Spain the amnesty did not succeed in making military leaders abandon their intentions to oust the democratic rule of law. It has already been explained that this was not the fundamental purpose of the rule, but it is nevertheless clear that the impunity which it consecrated could have also served the purpose of deactivating military leaders and the extreme right, given that only in this way can the inclusion of such impunity be understood. The outcome was the opposite: four years after the Law of Amnesty, there was a serious coup attempt (preceded

and followed by other frustrated ones) and the extreme right notoriously increased their levels of political violence, leading to the deaths of 52 people between 1978 and 1982.¹⁸

It seems surprising that in Spain, after having talked for the past two decades about mass graves, the disappeared, kidnapped children and imprescriptible crimes that should have been the target of judicial prosecution, we still tend to feel as if we are referring to foreign, distant cases. The efficiency with which the Francoist regime hid part of their crimes, the length of time which has passed since the most repressive phase of the regime and the general wish, not just on the part of politicians but also the majority of citizens, not to delve into such a tragic past, explains the surprise with which some of the most recent revelations related to the above-mentioned misdeeds were received. The great satisfaction and pride that, even today, the model of the Spanish transition arouses among its citizens, is not incompatible with the recognition that Spain can go forward in directions that were previously vetoed or simply impossible. It is true that the transitional period achieved its main and most important objective: the consolidation of democracy in Spain. But there is now a sector of society that proposes going beyond complacency in the process of political change. Many of the achievements are praiseworthy, especially if we take the circumstances into account, but more is now possible and we should be moving more forward in the area of reparation, and even that of justice. The relevance of such measures would be endorsed both in the national context, with a clearly consolidated democracy and growing social demands, and internationally, with the climate increasingly opposed to impunity. Such measures would not mean a break with the founding agreement of Spanish democracy (as rumoured on the conservative benches), but would instead be the culmination of a process of national reconciliation that has its roots in the country's democracy.

It seems that in the Spanish case the problem lies with a society still not ready to promote measures as bold as those taken in the other two countries. If this is true of the whole society, then it is even more true (according to my analysis of a 2005 survey by the Centre of Sociological Research/Centro de Investigaciones Sociológicas on this issue) of the inhabitants in the rural areas – where there is strong resistance to digging up the past – and, curiously enough, of the generation who played a key role in the process of political change, that is, those born between 1941 and 1950. One has the impression that this cohort attributes a large part of the success of the transitional period precisely to the fact that the past was left out of the political debate. Perhaps this helps to explain why it is less predisposed to promoting additional reparation policies, irrespective of a high level of education, and even of ideology.

I would like to conclude with a reflection on the vicissitudes of the debate on memory and oblivion.¹⁹ The transitional period may only be understood as a combination of the obsessive persistence of memory together with the equally obsessive wish to ignore it and avoid its recurrence. The disapproval of oblivion, so common nowadays, usually blames the political elites for what was favoured by the vast majority of the Spanish people. But what also underlies this disapproval is a verification of the existing vacuums with regard to material and symbolic reparations for the victims of the Republican side and of the

¹⁸ Database on the political violence of the transitional period, prepared by Ignacio Sánchez-Cuenca with my help.

¹⁹ More on this issue in Aguilar (2006A).

dictatorship. There are many more deaths to be clarified and documented,²⁰ many graves to be exhumed, many symbols from the past which perpetuate discrimination against the vanquished, and the Spanish democracy has not made yet any statement on the many unjust judicial processes from the past.

Francoism has not even been explicitly condemned by all of the political powers in parliament. And the impunity from which the perpetrators of human rights violations benefited during the dictatorship was also extended throughout the transitional period. This is not only a question of the already-cited police connivance with the violence of the extreme right, but also of the government's own brutality in repressing demonstrations led by groups opposed to the dictatorship. The number of fatalities that resulted from police repression in the transitional period (1975-1982) amounts to a minimum of 140.²¹ None of the relatives of the dead has been economically or morally compensated to date.

It is true that in some areas, such as culture, the past was an important presence during the transitional period (Aguilar, 2006B); but it is also true that the Spanish victims have been paid less attention and given less acknowledgement than victims in other countries – far less than the levels recommended by international human rights law. When the past is pushed aside before it has been clarified, discussed and dealt with, sooner or later it will invade a nation's political life, forcing governments to face it, though not always under the most favourable conditions.²²

Gag rules exist precisely because there is no agreement over the past. What has been agreed, at least in the Spanish case, is to leave the past aside. There are times when, in order not to expose irreconcilable interpretations of the past, it is agreed to forge an explicit consensus of the general kind, the type we find in Spain: "we were all guilty for the atrocities committed during the Civil War" without entering into a debate over who mobilised against a legally constituted regime, thus unleashing the Civil War, who committed more crimes, or what type of violence was used by either side. After Franco's death no one called for a revision of the past, not only because the correlation of forces was averse to this task, but also because the majority in society was afraid of reviving wartime enmities. There were priorities which were considered more important at that time, although this argument has repeatedly been used by governments, in general, to avoid implementing transitional justice measures. Once time has gone by, when democracy has been consolidated, what is usually appealed to is "opportunity cost": it is not worth investing so much effort and the subsequent political wear and tear in accomplishing these kinds of measures when the same effort could be directed toward policies considered more significant for the correct functioning of democracy. The problem in the Spanish case is that during the transitional period everyone thought that it was too early to adopt certain measures of transitional justice, while today many think that it is too late to do so. The paradox is that, if it is true to say that times of political change are extremely unstable and uncertain, they also seem ideal times at which to elicit

²⁰ According to the most recent and complete study on the issue, the events that took place in the Spanish provinces during the war have not been sufficiently investigated. See Santos Juliá et al. (1999).

²¹ According to a database on political violence during the transition prepared by Ignacio Sánchez-Cuenca, with my help.

²² We owe the concept of "memory irruptions", applied to Chile, to Wilde (1999). Holmes ([1988] 1993: 57) also reminds us that: "Self-gagging may be a short-lived experiment (...). From moment to moment, there can be a return of the repressed."

agreements on delicate issues. When democracy is stable and the unique spirit which, on occasions, accompanies transitions is a thing of the past, it is not so easy for the political forces to rediscover the impetus needed to come together around certain reparation measures, avoiding the temptation to turn the past into a weapon.

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