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Transitional justice and impunity for fascism in southern Europe: the case of Spain in a comparative perspective

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ABSTRACT: This article addresses four cases of transitional justice practised in southern Europe from 1945 to the present day: France, Italy, Portugal, and Spain, to which special attention is paid. Representatives of what are considered the first and second wave of transitional justice, they have in common the fascist experience but the ways of facing the violent past are dissimilar due to its different national and international contexts. In France and Italy, the criminal justice, administrative purges, and economic sanctions that were applied were preceded by extra-legal repression exercised during the final phase of the war, the liberation, and the immediate postwar period in what was known as an *épuration* and in which the *Resistance* played a leading role. On the contrary, in the transitions of the late 1970s, criminal justice was applied minimally in Portugal, where administrative purges prevailed, and was non-existent in Spain, because of the Amnesty Law of 1977. Although impunity accompanied all the processes studied, the comparison reveals the singularity of the Spanish case, with a greater degree of consequence of a transition to a non-disruptive democracy with the Franco dictatorship. In the same way, in all cases, reconciliation with the past has extended into the 21st century and it has also been in Spain where it has presented the greatest difficulties.

KEYWORDS: repression; crimes against Humanity; purification; amnesty; historical memory.

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Título traducido: Justicia de transición e impunidad del fascismo en el sur de Europa: el caso de España en perspectiva comparada.

RESUMEN: Este artículo aborda cuatro casos de justicia transicional practicados en la Europa meridional desde 1945 hasta la actualidad: Francia, Italia, Portugal y España, a la que se dedica especial atención. Representativas de las consideradas primera y segunda ola de justicia transicional, tienen en común la experiencia fascista, pero las formas de afrontar el pasado violento son distintas como consecuencia de sus diferentes contextos nacionales e internacionales. En Francia e Italia, la justicia penal, depuraciones administrativas y sanciones económicas que se aplicaron vinieron precedidas por una represión extralegal durante la fase final de la guerra, la liberación y la inmediata posguerra, en lo que se conoció como *épuration* y donde la Resistencia jugó un papel de primer orden. Por el contrario, en las transiciones de finales de los setenta, la justicia penal fue aplicada de forma mínima en Portugal, donde prevalecieron las purgas administrativas, e inexistente en España, debido a la Ley de Amnistía de 1977. Aunque la impunidad acompañó a todos los procesos, la comparación revela la singularidad del caso español, con un grado mayor consecuencia de una transición a la democracia no rupturista con la dictadura. Del mismo modo, en todos los casos la reconciliación con el pasado se ha extendido hasta el siglo XXI y ha sido también en España donde ha presentado mayores dificultades.

PALABRAS CLAVE: represión; crímenes contra la humanidad; depuración; amnistía; memoria histórica.

INTRODUCTION: AUTHORITARIAN LEGACIES AND CRIMES AGAINST HUMANITY IN SOUTHERN EUROPE

Over time and as a result of international laws created for the protection of human rights and the prosecution and punishment of crimes against humanity, the so-called transitional justice has transcended its descriptive and explanatory value of the different experiences occurring after 1945. It has become a set of regulations that impose certain obligations on states and the international community when facing legacies of systematic violations of human rights in contexts of transition from war to peace or dictatorship to democracy (Méndez, 2013). These obligations are focused on a new consideration of the victims who have become a central part of transitional and restorative justice processes. This coincides with a concept of justice that has been defined as anamnestic and which acknowledges the relevance of all of the injustice suffered in the past until the rights of the victims have been restored (Zamora and Mate, 2011).

This article addresses the different experiences of transitional justice practised in southern Europe from 1945 to the present day and takes into account both meanings of the word. Four cases are studied (France, Italy, Portugal, and Spain), representative of what historiography has considered the first and second wave of transitional justice, derived from the Fascist experiences in the inter-war period (Teitel, 2003; González Calleja, 2018), which scarred twentieth-century Europe and its memory (Judt, 2006, pp. 1147-1152; Wouters, 2017). Based on this common foundation, we can identify two groups, clearly differentiated, first, by the outcome of this experience: the defeat of fascism in the cases of France and Italy and an evolution towards long-lasting authoritarian dictatorships in the case of the Iberian Peninsula. This factor undoubtedly had a decisive influence on the design of the measures with which to confront the violent past in their national and international contexts. In the first two cases, there was a context of transition from war to peace, marked by the defeat of Nazism and the role played by the *Resistance*, and the innovations that the Nuremberg trials introduced into international criminal law. In the second case, there was a transition of authoritarian regimes towards democracy in the dictatorships of southern Europe, with a view to their future integration into the CEE (Huntington, 1994).

France and Italy constitute two of the most significant examples of how the countries of Western Europe that had experienced German occupation and collaborationism sought to attribute accountability for the recent fascist experience (Alegre, 2022). In both cases, the criminal justice, administrative purges and economic sanctions that were applied were preceded (and sometimes followed) by extra-legal repression exercised during the final phase of the war, the liberation, and the immediate postwar period in what was known as a "purification" and in which the Resistance played a leading role (Ledesma, 2014; Lowe, 2012). Contrary to France and Italy, which initially gave priority to court proceedings, in the transitions of the late 1970s, criminal justice was applied minimally in the case of Portugal, where professional and administrative purges prevailed (Raimundo and Costa Pinto, 2017), and not at all in the case of Spain, where there was a complete absence of transitional justice measures which in practice was sanctioned by the Amnesty Law of 1977. Precisely, this law has continued to be invoked each time attempts have been made to apply the international regulations referring to transitional justice in Spain. This is particularly the case concerning the international law of human rights which not only declares the imprescriptibility of crimes against humanity but obliges the states to fight against the barriers that prevent a response from being given to the victims who have suffered severe violations of these rights (Pérez González, 2013). This law enables the prosecution and conviction of executioners, such as the SS and head of the local Gestapo of Lyon, Klaus Barbie in 1987 or the ex-minister Maurice Papon in 1998 in the case of France and the SS Erich Priebke, responsible for the Fosse Ardeatine massacre by the Italian justice system. These events, in turn, reveal how the purification was carried out and its limitations in the two countries and the non-existent role played by the crimes resulting from collaborating in the extermination of European Jews.

One thing that can be confirmed from a comparative analysis of transitional justice is that, despite the more or less common problems that each nation faced, each experience is unique (Elster, 2004; Huyse, 2017). This is true not only in the responses that they gave to these problems but also in the political contexts within which their transitions toward peace and democracy were carried out. Of the four cases presented in this study, contrary to France, that of Italy was determined by the long fascist experience and, particularly, after September 1943, the civil war, German occupation, and the repressive policies and indiscriminate massacres of civilians carried out by the German army in the final months of the war, sometimes aided by local fascist agents.[1] Meanwhile, the Spanish transition was determined by the agreed rupture and the control by the elites from the dictatorship regime and Portugal began its rupturist process as a result of the deterioration caused by the colonial war, the intervention of the Army and a deep State crisis (Costa Pinto, 2006). However, the two experiences are most differentiated in the origin of their respective dictatorship regimes. In Spain, this resulted from the victory of a devastating civil war initiated by the winning side, and which took advantage of its victory to conclude

1 Many studies have addressed this approach: Pavone, 1991; Crainz, 2007; Klinkhammer, 1993; Battini and Pezzino, 1997; Gribaudi, 2003; Baldissara and Pezzino, 2004.

with overwhelming success its political cleansing operation. This was an extremely violent reality that left deep and long-lasting scars on society and constituted a profound traumatic experience that Portugal did not suffer (Aróstegui, 2006). In the final analysis, the comparison between the processes studied reveals the singularity of the Spanish case, with a higher degree of impunity, a consequence of a transition to non-disruptive democracy with the Franco dictatorship.

CRIMINAL JUSTICE AND PURIFICATION IN FRANCE AND ITALY

The French and Italian experiences constitute a paradigmatic example of the purging of responsibilities and its limitations in Nazi-occupied Europe. Unlike Spain and Portugal, France and Italy were among those nations that defeated fascism in the Second World War, after a period marked by German occupation and collaborationism between 1940 and 1944 in the case of France and by the twenty-year period of fascist rule, the occupation and the civil war between 1943 and 1945 in the case of Italy.[2] In both cases, finding accountability for the recent fascist experience, known as *purification*, cannot be understood outside of the context of war, as it began with the repression exercised by the *Resistance* outside of the State judicial system, continued during the liberation in the months leading up to the end of the war and carried on in the post-war period with criminal justice, the administrative purges, and the economic sanctions applied by the institutional apparatus.

The scope of this process has been debated in France practically since the early post-war years, when media supporting right-wing extremism disproportionately inflated the figures of the repression, giving rise to the "black legend of the purge." Meanwhile, others, including the communists, considered that the process had hardly reached a few second-rank officials, allowing the most heinous criminals to escape, favouring the privileged classes and the "restoration of the bourgeois State" (Rioux, 2001, pp. 205-207). This debate subsequently had different phases and gained momentum in the mid-1990s, as a result of the trial and conviction of the ex-militiaman Paul Touvier for crimes against humanity, preceded by that of the ex-head of the Gestapo of Lyon, Klaus Barbie, prosecuted in 1987 and followed by the ex-minister Maurice Papon in 1998 (Chalandon and Nivelle, 1998; Conan, 1998). The existence of these trials revealed, on the one hand, the deficiencies and shadows of the purification process, fundamentally concerning the Shoah as those primarily responsible from France for the final solution, such as Jean Leguay or René Bousquet had escaped justice (Wieviorka, 2018, p. 126). On the other hand, this judicialisation of memory entailed a re-reading of the Vichy period in terms of the historical interpretation of public memory which gave rise to symbolic and economic reparation measures (Rousso, 2006).

Although there are still no local monographs analysing the dynamics, attitudes, motivations, and various forms of responsibility (Koreman, 1997; Farmer, 2000), the figures of the punitive purge in France are sufficiently confirmed and amount to more than 10,000 executions, of which between 8,000 and 9,000 corresponded to the so-called "savage" purge, that is 80% of the total which occurred before or during the liberation. The rest, between 1,500 and 1,600, accounted for the death penalties finally executed by the French justice system after the liberation, of which approximately half corresponded to the sentences of the military courts. The other half corresponded to the approximately 7,000 sentences handed down by the special *Cours de justice* created for the purpose. Their activity also included more than 38,000 forced labour, detention, or prison sentences and 50,223 for national degradation (46,645 of which were resolved by the *Civic chambers*, created to address the lesser crimes of collaboration).[3] This punitive action was completed with a professional purge which affected between 1,000,000 and 1,500,000 French citizens of which around 120,000 were subject to administrative sanctions. Furthermore, around 20,000 women suffered a "clandestine purge" through acts of public humiliation such as head shaving, which soon became part of the collective imagination of the French *l'épuration* (Virgili, 2000). In the words of Olivier Wieviorka (2018, pp. 128-129), these figures show that the legal purge "was indisputably a mass phenomenon that affected hundreds of thousands of French citizens," which clearly differentiates it from the Italian case, where there was a greater incidence of "savage" purging, sometimes as a direct response to the complicit inaction of a justice system formed during the twenty-year fascist period, which barely undertook any purging activity and was more concerned about the so-called "resistance process" (Neppi Modona, 2001).

In fact, even without all of the definitive data, according to the sources, the figures for Italy indicate that the extrajudicial executions and those resulting from summary trials held before partisan courts amounted

2 Some authors consider that the concept of civil war can also be applied to the French case, while for others this is, evidently inappropriate. See, for example, the positions respectively in favour and against in Rousso, 1990; Wieviorka, 2006.

3 The military court data, for which we do not know the prison sentences, are derived from the study of 77 of the 90 French departments, with a total of 767 executions. Meanwhile, those executed by the *Cours de justicie*, according to government sources of 1948 and 1951, varied between 791 and 767 (with 7,093 and 6,763 death sentences passed respectively). The "savage" purge figures correspond to 84 of the 90 departments (Rousso, 1992).

to between 12,000 and 15,000.[4] We should take into account that in the Italian case, and unlike France, this punishment would have essentially been applied after the end of the (civil) war, immediately after the national insurrection of April 1945 in parallel with and in response to the institutional indulgence from which many fascists benefited and the limited purge which had been carried out in the south of the country after 8 September 1943. We should also bear in mind the level of hate and the desire for revenge that had accumulated due to the recent experiences and the last indiscriminate killings committed by the German and Fascist troops as they withdrew from Salò, and also that derived from the more than twenty years of fascist violence, particularly in rural areas such as Emilia Romagna (Dondi, 2004b; Storchi, 1998, 2008). Meanwhile, and still to be confirmed with further research, the Extraordinary Criminal Courts (*Corti d'Assise Straordinarie, Sezione specili di Corte d'assise and Corti d'assise ordinarie*) would have dealt with around 43,000 cases, of which 23,000 would have been amnestied in the pre-trial phases and only between 4,676 and 5,928 would have concluded with a firm conviction (Nubola, Pezzino, and Rovatti, 2019, p. 13; Martini, 2019, p. 323; Franzinelli, 2006, p. 259). Of these, a minimum of 259 were sentenced to death, although only 91 were executed (Franzinelli, 2006, p. 259), a proportional number that is shockingly lower than the rest of the neighbouring countries, even though Italy experienced some of the worst atrocities of Western Europe (Lowe, 2012, p. 191). This is not surprising, if we take into account that the majority of the magistrates of the Court of Cassation were the same as those who served during the fascist regime and sought the impunity of their crimes through the review of the sentences passed by the Extraordinary Courts (Franzinelli, 2006; Neppi Modona, 2017). In addition to the 91 death penalties carried out was that of the Chief of Police of Rome, Pietro Caruso, co-responsible for the Fosse Ardeatine massacre, the only death penalty executed in southern-central Italy before 25 April 1945 (Crainz, 2007, p. 76). Although they agree with the number of death penalties finally executed, other authors calculate the total number of death sentences handed down by the *Corti d'Assisi Straordinarie* at 500-550 and 1,000 (Martini, 2019, p. 324; Dondi, 2004b, p. 48; Woller, 1997, p. 419). And they did this by concealing even some of the worst tortures and atrocities, considering that, those responsible could be granted amnesty, as rape, torture applied to the prisoners' genitals or nails, "did not constitute particularly inhuman acts" (Pezzino, 2018, p. 144).

Concerning the civil servants, only 1,580 of the 394,041 subject to investigation had been dismissed in February 1946, although they soon recovered their positions (Domenico, 1996, p. 238). The result was a "cosmetic" purge that hardly affected those most responsible for the fascist crimes (those who had not been brought to justice by the partisan courts) and was marked by the successive amnesties that put an end to the transitional justice. With these amnesties, all of those who had been convicted of crimes related to fascism or collaborationism with the Germans, even though they were very serious, were released at the end of the 1950s (Pezzino, 2018, p. 144).

Nevertheless, the purge in France, which was unequal depending on the place and time elapsing after the end of the war, soon shifted also towards a more indulgent justice followed by pardons, reduced sentences, and amnesties in an attempt to move on in 1947, 1951 and 1953 in favour of a patriotic memory that would give shape to the myth of national unity (Lagrou, 2000). Few examples show the true scope of the purge better than the pardon that General de Gaulle granted in November 1962 to executioners such as Carl Oberg and Helmut Knochen, the Germans responsible for the Final Solution in France. We would have to wait until the 1990s for the first French citizens to be convicted for their collaboration in the deportation, with two of the examples referred to above, and for the French to truly confront the past and its responsibility in the Shoah, facing up to what has been known as the Vichy syndrome, which forms the basis of the contradictions of the purging process (Rousso, 1990). In this sense, Jacques Chirac's speech in 1995 recognizing the collaboration of the French State in the deportation during the 53rd anniversary of the raid of French Jews in the *Vel d'Hiv* was institutionally completed by the declaration of the Council of State, the highest body of administrative justice in France, which confirmed in February 2009 that the French state had the moral and legal responsibility for the deportation of almost 76,000 Jews during the nation's occupation in World War II. The circle was closing 65 years after the end of the collaborationist experience (Baruch, 2017, p. 90).

Meanwhile, and aside from the extrajudicial executions referred to above, the post-war purge in Italy failed to convict the principal German war criminals and fascist collaborators, whose retaliatory actions and terrorism among the civilian population resulted in more than 12,700 civilian assassinations after the occupation of half of the Italian peninsula by the German army after the armistice of 8 September.[5] No trials took place

4 Lowe (2012, pp. 183-188) talks of between 12,000 and 20,000 victims of the "savage" purge, referring to the figures provided by Pavone (1991, p. 512) who talks about 12,000 to 15,000, and the 20,000 mentioned by the journalist Giampaolo Pansa (2005), which were a source of controversy in Italy and criticised due to their lack of rigour and misalignment with the historical method. Responding to Pansa in De Luna (2004, pp. 87-94) and Dondi (2004a).

5 A recent state of the question, fruit of a project financed by the Federal Republic of Germany in which 130 researchers collaborated between 2013 and 2015 in: Fulvetti and Pezzino, 2016; particularly Pezzino and Fulvetti, 2016; Dogliotti, 2016. Precisely, the civil victims amounted to 12,773, to which we must add 6,881 partisans after their capture and hundreds more belonging to other categories such as antifascists, deserters of the RSI, priests... There is no doubt that the latter were also

for the deportation of the 6,806 Italian Jews to the concentration and extermination camps either. Again, we had to wait until the 1990s for the Italian justice system to open a series of cases on German war criminals, as a consequence of the discovery in 1995 of what was known as the "armoire of shame," hundreds of files documenting war crimes committed against the Italian population, illegally filed in 1960 by the Military General Attorney Enrico Santacroce (Franzinelli, 2002).

This illustrates the long and difficult path that the criminal justice system has had to follow from 1945 until today to prosecute some of the fascist and German crimes committed against Italy's civilian population between September 1943 and April 1945. A criminal justice which, throughout this time, involved three judicial agents: the Allies until 1947, the Italian courts, and the German justice system, although only marginally (Pezzino, 2018). The punishment policies of the Allies for the Nazi crimes in Italy largely fell into British hands and, as in other places, had a short lifespan, due to the interests of the State in the new cold war climate and the deep-rooted way of understanding the chain of command which, despite Nuremberg, continued to allow the evasion of responsibility based on the compliance with superior orders (Battini, 2003). One fact that would cause a scandal today related to the contradictions of an International Law which had already criminalised crime against humanity in Nuremberg is that of the six generals sentenced to death, only two were executed, those accused of war crimes against soldiers and officials. Those who had been accused of crimes against the civilian population, including top-ranking generals such as Albert Kesselring, Commander in Chief of the German Armed Forces in southern Europe and Eberhanr von Mackensen, Commander of the 14th Army, had their sentences commuted by General Harding, Commander in Chief of the Mediterranean Forces, who reduced them first to a life sentence and then to lower sentences and in 1962 they were released (Pezzino, 2007). As highlighted by Paolo Pezzino, Harding acknowledged Kesselring's "right to protect his troops from the partisan activities. He added that, in the Second World War, it had been difficult to distinguish between civilians and combatants, given that it was a global war and, due to the partisan activity, civilians could be involved in actions that supported the partisans" (Pezzino, 2018, p. 138).

Concerning the actions of the Italian judicial authorities, these should be divided into two-time sequences. The first was from 1947 until the early 1950s when they acted in a similar way to the Allies. After holding trials against some German generals and officials, at the beginning of the 1950s, a liberation policy began and the only two leaders retained in Italian military prisons were the SS Lieutenant Colonel and chief of the German police and Security Service in Rome, Herbert Kappler and the SS Lieutenant Commander Waler Reder, who were directly responsible for the Fosse Ardeatine and Marzabotto massacres. It was a policy conditioned by the attitude of the Italian government, more concerned about protecting their countrymen accused of war crimes committed before 8 September in Yugoslavia, Greece, Ethiopia, and France (they systematically denied all of the extradition requests), than arresting and prosecuting German military leaders for crimes which they considered to belong to the past (Pezzino, 2018, p. 141).

The phase beginning in 1994 was different. It began with the discovery of files illegally filed away in 1960 by the Military General Attorney Santacroce and the extradition from Argentina, prosecution, and final conviction of Erich Priebke in 1998 for the Fosse Ardeatine massacre. Paolo Pezzino divides this phase into two sub-periods, 1994-2002 and 2003 until the present day, marked by the action of the then Military Attorney of La Spezia, Marco de Paolis, an authoritative expert in the massacres carried out in the regions of Tuscany and Emilia in 1944. The final conviction of Priebke had required two trials as the attenuating circumstance of following orders was admitted by the court which absolved him in 1996. This legal culture inherited from the post-war suffered a strong setback when Paolis considered that the actions carried out in the civilian massacre formed part of a preconceived extermination plan of which all individuals with commanding roles were aware (De Paolis and Pezzino, 2016). The result was that the five sentences handed down between 1994 and 2002 grew to 18 between 2003 and 2013, the year of the last conviction of a fight for justice which, concludes Pezzino, was "difficult, incomplete and belated," particularly for victims who, given the failed and incapable response of the criminal law, only have left "the promotion of critical policies of memory based on the rigorousness of historical knowledge" (Pezzino, 2018, p. 153).

PORTUGAL: PURGING, MEMORY AND REPARATION

The approach taken to the memory and reparation of the victims of the *Estado Novo* in Portugal presents notable differences with concerning the Spanish case, which we will see below, even though, as is the case in Spain, it has also consisted in a series of legislative measures implemented over a lengthy period of forty years. Portugal did not have the traumatic experience of a civil war or the extreme subsequent repression that led to thousands of executions and deaths in Spanish prisons during the immediate post-war period. The victims to

civilians; in this sense, the authors include in the category of "civil" victims only those selected as such in retaliations and indiscriminate killings (which also includes women and children), aside from other victims (also civilians) who displayed some opposing activity. In total, there were 23,669 defenceless victims, of which 15,115 were the consequence of the actions of retaliation and German terrorism. The rest correspond to the actions of the fascists of the RSI (2,893) or Nazi-fascists as a whole (4,672) with 989 undetermined, pp. 43-54.

which the transitional justice measures apply in terms of reparation are grouped into the categories of political prisoners (30,000 in the 48 years of the dictatorship, according to estimates of the *Comissão do Livro Negro sobre o Regime Fascista*), purging and the dismissal of civil servants and exiles (Raimundo and Costa Pinto, 2018). Also, contrary to the Spanish case, there was no controversy concerning its former authoritarian regime. It concentrated on the political discrepancies related to the reading of the specific processes of the transition to democracy, particularly in its "revolutionary" phase from April 1974 to November 1975 (Raimundo and Costa Pinto, 2018, p. 106). It was a "rupturist" transition with no pacts or negotiations which translated into the elimination of the authoritarian legacy, including the rapid dissolution of the repressive institutions and the criminalisation of their political elites. This enabled a "window of opportunity" to be opened to settle scores with the past, within a context of distinct radicalisation characterised by the military coup, the crisis of the State, the intervention of the army and the intense activity of social movements. In this sense, the punishment process itself acted as an element to stimulate the transition to democracy (Costa Pinto, 2006, p. 176). Between April 1974 and February 1975, the purge process driven by this "revolutionary justice" affected more than 12,000 people, which reached 20,000 in November. (Raimundo and Costa Pinto, 2017, p. 180). Although these purges had focused initially on the purging of the more visible members of the political elite and certain conservative officials of the army, soon they extended to civil servants and the private sector with a differentiation between what Antònio Costa Pinto (2006) classifies as "legal" purges and "savage" purges which affected most of all public and private companies.

From then and to the present day, the democratic legislation concerning transitional justice in Portugal has significantly stood out in terms of the reparation and recognition of the victims of the *Estado Novo,* within a framework completed by another three areas of transitional justice, according to the classification of Filipa Raimundo and Antònio Costa Pinto (2018, pp. 109-110): research and files, justice and punishment and memory and truth. For the first of these latter three aspects, two commissions were constituted, the afore-mentioned *Comissão do Livro Negro sobre o Regime Fascista*, which was a kind of truth commission responsible for investigating the repression during the *Estado Novo* and another which had the task of supervising the dissolution of what had been the principal tool of repression of the dictatorship: the political police. The second element, justice and punishment, addressed the measures relating to the settling of scores with those responsible for this repression. In this respect, the afore-mentioned authors highlight the legislative intensity that emerged in the two years following 25 April 1974 which translated into the removal from service or retirement of those who had cooperated with the former regime but also the prosecution of the civil servants of the political police and the limitation of their political rights. Finally, the "reparation and recognition" element encompassed the measures for the compensation or reparation of the victims and for paying tribute to their fight for freedom, which is where the parliamentary activity was greatest.

In their analysis of these four elements and based on the distinction between the legislation approved referring to transitional justice (including the measures resulting from executive and legislative action from 1974) and, within these, those that directly emanated from parliamentary initiative from 1976 after the formation of the *Assembleia da República*, the authors extract some conclusions: the predominance of the measures of justice and punishment, fundamentally driven by the executive of the period between 1974 and 1976, followed by the reparation and recognition measures, the most important element of the legislative initiatives. This, in turn, is related to the weight of the governments before the entry into force of the *Assembleia da República*, which approved more than half of the laws referring to transitional justice until the present day, 50 of 88. Finally, although the laws arising from the parliamentary initiative only constitute 18% of all of those approved in terms of transitional justice (16 of 88), their activity has not ceased since 1976. So much so that the afore-mentioned authors conclude, "We can infer that the parliamentary activity in aspects of transitional justice in Portugal between April 1976 and August 2015 was not particularly intense but was constant, which is contrary to the theory largely disseminated by the literature of the 1990s and the first decade of the twenty-first century, according to which the matters relating to the non-democratic past would have been resolved during the period of transition to democracy" (Raimundo and Costa Pinto, 2018, p. 112).

SPAIN: TOWARDS MEMORIAL JUSTICE

The origin of the Spanish problem is rooted in the annihilating violence applied by the rebels and subsequent dictatorship during the years of the civil war and the immediate post-war period, resulting in around 140,000 mortal victims in a process that had three stages.[6] The extrajudicial executions of the first months of the war gradually gave way to firing squads after urgent summary trials with no type of procedural guarantees and their resulting sentences in war councils. This enabled the rebel forces to continue to eliminate enemies with less international scandal and advance in their institutionalisation process after February 1937 (Gil Vico, 2010; Anderson, 2016). After the end of the war and without interruption, the revenge in the form of justice applied by

6 Rodrigo, 2008; Prada Rodríguez, 2010; Gómez Bravo and Marco, 2011; Vega Sombría, 2011; Preston, 2011; Aróstegui, 2012; Gómez Bravo, 2017. A state of the question that provides the number of victims per province in Espinosa Maestre, 2022, which brings them to 140,159.

the winning side continued to find in the military code of justice and the laws prevailing during the war period the tools to continue applying violence so as to conduct a political cleansing. A special role was reserved in the system for neighbours and local authorities who collaborated in the effective application of the violence and consolidation of the dictatorship (Anderson, 2010; Payá López, 2017).

This institutional violence was accompanied by persistent abuse of memory during the dictatorship with narratives that left tens of thousands of victims buried in institutional and social oblivion that did not begin to be confronted by the democracy until the victims' associations emerged on the Spanish public scene, from the year 2000, with their vindications for truth, justice, and reparation (Richards, 2013; Rodrigo, 2008). Since then, the political response given by the Spanish State that these associations and civic movements has evolved to the same colour as the government teams that have succeeded each other in Moncloa in a context of continuous polarization, and had a first realization in the controversial Law approved by the socialist government of Rodríguez Zapatero, known as "Historical Memory."[7] A law that, although it was a turning point in the process of institutionalization of public policies of democratic memory in the key of transitional justice and declared illegitimate the summary processes for which 28,000-29,000 people were sentenced to death and executed only in the post-war period (Payá López, 2023, pp. 76-79), it did not respond to the majority of the victims who were not subject of these judicial proceedings and who remained buried in mass graves waiting to be identified.

Those victims of forced disappearances and their families (also considered as victims of serious violations of human rights due to the torture that their waiting entails), had to wait for another decade and a half or a political or judicial response that satisfies their legitimate demands for the truth, justice and reparation, in partly due to the inaction of the legislative power, which has shown itself incapable of formulating resolute transitional justice rules in this regard during forty years of democracy, and partly due to the particular way of ignoring international law and the obligations that it imposes in terms of the serious violation of human rights by the Spanish judiciary, which has found an insurmountable obstacle in the Amnesty Law of 1977 which prevents a satisfactory response to these rights to the truth, justice and reparation (Escudero Alday, 2013). The centre of this problem resides in how the political transition was carried out and the ensuing debate on whether or not to review the laws applied at that time but remain in force in a completely different context, which for practical purposes entailed a recurrent refusal to satisfy the rights of the victims.

In this respect, the response that the State institutions have given over the forty years of democracy to the victims of the violence of the civil war and the dictatorship has been instrumental to the political debate that has emerged in democratic Spain about the violence of the civil war and Franco's repression, characterised by a profound and persistent ideological and political fracture concerning the recent past, which has simply highlighted the instability of some of the foundations on which the political transition was based. This debate is chronologically framed between three laws, the Amnesty Law of 1977, the Historical Memory Law of 2007, and the Democratic Memory Law of 2022, which has placed on the table the relevance and discussion of concepts and historical experiences such as historical memory, human rights, the imprescriptibility of crimes against humanity, the meaning of the political consensus during the transition and the condemnation of the Franco regime (Sánchez Recio, 2018, p. 62).

The process has taken more than forty years and is clearly divided into two stages with a caesura determined by the emergence onto the public scene of the *Asociación para la Recuperación de la Memoria Histórica* (Association for the Recovery of Historical Memory) in December 2000, in a transnational context of the "justice cascade" (Sikkink, 2011), and the minimum agreement of the political forces represented in parliament to mildly condemn the Franco regime in the Constitutional Committee of the Congress on 20 November 2002 (Aguilar Fernández, 2006). The citizen mobilisation concentrated in the victims' associations not only pressured the conservative parliamentary group PP to sign this agreement, obtaining an absolute majority but also presented a distressing reality that had not been previously addressed and from which there would be no turning back: that of the *disappeared persons*. This should oblige any self-respecting democratic government (which is respectful of the international laws on human rights) to go to any lengths to find them, exhume them, identify them, give them a dignified burial and recover their memory. In fact, the term *disappeared* is not only highly emotionally charged but enables us to group the victims under a legal category, that of forced disappearances. This is covered by the international law of human rights which imposes obligations on the States towards the victims of serious human rights violations in response to their claims for the truth, justice, and reparation (Escudero Alday, 2013, p. 142).

Precisely, the second stage of a debate that continued open until the approval of the new Democratic Memory Law in 2022,[8] was developed around two issues not

7 *Ley 52/2007, de 26 de diciembre, por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la guerra civil y la dictadura*. BOE, 310, 27/12/2007. Available at: https://www.boe.es/eli/es/l/2007/12/26/52/con [Accessed 15 Jan. 2020].

8 During its processing, in the parliamentary session of October 14, 2021, in which the Minister of the Presidency, Relations with the Courts and Democratic Memory, Félix Bolaños, presented the text of the *Democratic Memory Law Project*, the right and extreme right groups, PP and VOX, as well as ERC, presented both amendments to the whole, and although these could not prosper because they did not have a majority in the chamber, they anticipated the intense negotiation

satisfied by the Historical Memory Law at the end of 2007: that relating to the nullity of the sentences handed down by the war councils and special courts of the dictatorship and that referring to the *disappeared persons* or, in other words, the *imprescriptible rights of the victims*. The first aspect was soon responded to by experts such as, among others, the jurist and ex-anti-corruption prosecutor Carlos Jiménez Villarejo and the ex-magistrate of the Supreme Court José Antonio Martín Pallín, for whom the law should have opted for nullity instead of terms such as illegitimacy, which lack legal value (Martín Pallín, 2008). The second was also immediately addressed after the passing of the law, as it was confirmed that it did not respond to the demands of the Associations for the Recovery of Historical Memory and the relatives of the victims, however much the vice-president of the socialist government, María Teresa Fernández de la Vega declared on behalf of this, the day that the Draft Law was presented to the plenary session of the Congress, that "this is a law that responds to the victims and their families,"[9] who were, obliged to find other ways to search for the remains of their loved ones.

The afore-mentioned Historical Memory Law opted for a middle way after following a path that had met with the radical opposition of the PP, which in the words of its spokesperson in the congress described as "unnecessary, irrelevant and lies" and as being contrary to the "spirit of concord of the Transition,"[10] exactly the same arguments that kept using, although in a more hardened way and with touches of historical revisionism, fourteen years later and together with the far-right group VOX against the Democratic Memory Law.[11] It was also opposed by IU and ERC who argued that it did not sufficiently recognise the democratic legacy of the Second Republic or declare as null "the summary trials arising from an illegitimate regime,"[12] following the arguments, with some additions focused on the repeal or revision of the 1977 Amnesty Law, which ERC also persevered fourteen years later.[13] In fact, this political and legal debate gained great momentum since 2017. First, with the approval of the Parliament of Catalonia with all of the groups in favour of Law 11/2017 regarding "the legal reparation to the victims of the Franco regime," which "declared military courts illegal and the sentences and resolutions of proceedings instructed for political reasons handed down in Catalonia by the Franco regime symbolically null and void."[14] And later, although with the PP voting against, the Congress approved the non-legislative proposal presented by the Socialist Group regarding the nullity of the sentences handed down by the courts of the Franco dictatorship against the President of the Generalitat de Cataluña, Lluís Companys.[15] However, as indicated by the professor Rafael Escudero Aday, the value of both of these measures, although important, it had been more symbolic than legal. This is true in the first case because the Catalonian Parliament does not have the authority to adopt a nullity decision and in the second case because it constitutes little more than a well-intentioned declaration being a non-legislative proposal. What the case really required -concluded Escudero- was a "specific law similar to the one implemented twice by Germany: one for the sentences of the Nazi courts and another for the courts of the GDR. Either this or a reform of the Criminal Prosecution Law; there is no other way."[16]

Along these lines, two legislative initiatives were carried out. The first, on 14 November 2017, when the Congress approved the Draft Law presented by the Mixed Group to modify Article 3 of the Law of Historical Memory to incorporate the illegality of the

through which it would have to pass until its approval. Not only because ERC's votes will be presumably necessary but also because Unidas Podemos, one of the partners of the coalition government, also presented several partial amendments. The new Democratic Memory Law was finally approved on July 14, 2022, by the Congress of Deputies and awaiting its passage through the Senate with the votes against from PP, VOX and Ciudadanos, in addition to the Catalan parties CUP and JxCat, and with abstention of ERC and BNG. The Senate definitively approved the Law on October 5, 2022, came into effect on October 21. BOE, Núm. 252, 20/10/2022, pp. 1-55, p. 20. Available at: Disposición 17099 del BOE núm. 252 de 2022 [Accessed 21 Oct. 2022].

9 Cortes Generales. Diario de Sesiones del Congreso de los Diputados, Pleno y Diputación Permanente. Año 2007 - VIII Legislatura - Núm. 296, Sesión plenaria núm. 274, 31 de octubre de 2007, pp. 14611-14633, p, 14611. Available at http://www.congreso.es/portal/page/portal/Congreso/Congreso/Publicaciones/DiaSes [Accessed 15 Jan. 2020].

10 Cué, C. E. "El PP rechaza la ley de memoria y dice que rompe el pacto de concordia sobre el pasado," en *El País*, 6 de diciembre de 2006. Available at: El PP rechaza la ley de memoria y dice que rompe el pacto de concordia sobre el pasado | España | EL PAÍS (elpais.com) [Accessed 15 Feb. 2020].

11 Monforte Jaén, M "Revisionismo histórico: las derechas intentan impedir los avances en memoria democrática." *Público*, 20 de julio de 2021. Available at: PP: Revisionismo histórico: las derechas intentan impedir los avances en memoria democrática | Público (publico.es) [Accessed 26 Oct. 2021].

12 Cué, C.E. "IU exige que el Estado asuma en la ley la memoria republicana," en *El País*, 5 de diciembre de 2006. Available at: IU exige que el Estado asuma en la ley la memoria republicana | España | EL PAÍS (elpais.com) [Accessed 15 Feb. 2020].

13 Hermida, X. "ERC echa un pulso al gobierno con la ley de memoria." *El País*, 17 de septiembre de 2021. Available at: ERC echa un pulso al Gobierno con la ley de memoria | España | EL PAÍS (elpais.com) [Accessed 26 Oct. 2021].

14 Ríos, P. "Aprobada por unanimidad la ley que anula las condenas franquistas." *EL País*, 29 de junio de 2017. Available at: Aprobada por unanimidad la ley que anula las condenas franquistas | Cataluña | EL PAÍS (elpais.com) [Accessed 15 Feb. 2020].

15 Cortes Generales. Diario de Sesiones del Congreso de los Diputados, Pleno y Diputación Permanente. Año 2017 - XII Legislatura - Núm. 72, Sesión plenaria núm. 68, 12 de septiembre de 2017, pp. 33-39. Available at: Diario de Sesiones de Pleno y Diputación Permanente (congreso.es) [Accessed 15 Feb. 2020].

16 Declarations compiled by Carlos Hernández, "Ilegitimidad frente a nulidad: 40 años cargando con las sentencias franquistas," *eldiario.es*, 12 September 2017. Available at: Ilegitimidad frente a nulidad: 40 años cargando con las sentencias franquistas (eldiario.es) [Accessed 18 Feb. 2020].

courts and consequently the nullity of the sentences.[17] The second was the law proposal to reform Law 52/2007 presented to the Board of the Congress by the Socialist Group on 19 December 2017, "to extend the legal effects of this declaration to the nullity of these judicial resolutions."[18] Both law proposals would have remained a useless piece of paper as they were presented in times of a minority government of the PP. However, months later and after the change of government arising from a motion of no confidence presented by the Socialist Group, the Minister of Justice, Dolores Delgado, insisted and announced in a public appearance on 11 July 2018, among other measures which we will return to later, that "it is the intention of this Government to carry out a comprehensive reform of the Law of Historical Memory to declare the nullity of Franco's exceptional courts and their rulings and judgements."[19] A line that was finally specified four years later, in the new Democratic Memory Law of the coalition government PSOE-Unidas Podemos, which in its Title I "De las víctimas," art. 4 and 5, declares "the illegitimacy, illegality and radical nullity" of the criminal and administrative courts, and their resolutions "because they are contrary to the law and violate the most elementary requirements of the right to a fair trial."[20]

Another aspect to highlight of the momentum recovered in 2018 is the modification that, with great determination, the Historical Memory Law undergone in Article 16 by way of the Royal Decree Law proceeded a year later the withdrawal of the remains of the dictator Francisco Franco from the Valle de los Caídos.[21] In this way, the government of Pedro Sánchez gave a decisive response to the parliamentary mandate which, in May 2017 approved a non-legislative proposal of the Socialist Group for this exhumation and transfer. Likewise, the mandate referred to the relocation of the remains of the leader of the FE-JONS José Antonio Primo de Rivera in a non-prominent place on the premises or where designated by the family, to which Article 54, Chapter IV, Fourth Section, Title II of the new Democratic Memory Law[22], also gives a definitive answer. These actions were already considered essential at the time for the resignification of the *Valle de Cuelgamuros*[23] by the commission of experts named during José Luis Rodríguez Zapatero's government, which presented its report in November 2011, one week after the PP won the elections, and by The UN Working Group on Enforced or Involuntary Disappearances, in a damning report which included several of the recommendations presented to Mariano Rajoy's government.[24]

Over the years, the legal debate has been most intense in the second of the aspects derived from the Law of Historical Memory, relating to the *disappeared persons* and the *imprescriptibility of crimes against humanity*. With the delay and slowness with which this law was applied by José Luis Rodríguez Zapatero's government and its subsequent paralysis by the PP government, the associations and families of the victims resorted to the criminal law system, where they found a positive response in the initiative of the Magistrate of the High National Court of Spain, Baltasar Garzón. Due to the intense debate generated, the institutions involved, their

17 Cortes Generales. *Diario de Sesiones del Congreso de los Diputados, Pleno y Diputación Permanente*. Año 2017 - XII Legislatura - Núm. 89, Sesión plenaria núm. 85, 14 de noviembre de 2017, pp. 7-15. Available at: *Diario de Sesiones de Pleno y Diputación Permanente* (congreso.es) [Accessed 15 Feb. 2020].

18 *Proposición de Ley para la reforma de la Ley 52/2007, de 26 de diciembre, por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la guerra civil y la dictadura*. Boletín Oficial de las Cortes Generales. Congreso de los Diputados. XII Legislatura. 22 de diciembre de 2017, Núm. 190-1, pp. 1-31, p. 6. Available at: 122/000157 Proposición de Ley para la reforma de la Ley 52/2007, de 26 de diciembre, por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la guerra civil y la dictadura. (congreso.es) [Accessed 15 Feb. 2020].

19 Ruíz Sierra, J. "El gobierno anulará las sentencias franquistas y creará una comisión de la verdad sobre la dictadura," *El mundo*, 11 de julio de 2018.

20 *Ley 20/2022, de 19 de octubre, de Memoria Democrática*. BOE, Núm. 252, 20/10/2022, pp. 1-55, pp. 20-21. Available at: Ley 20/2022, de 19 de octubre, de Memoria Democrática. (boe.es) [Accessed 21 Oct. 2022].

21 *Real Decreto-ley 10/2018, de 24 de agosto de 2018, por el que se modifica la Ley 52/2007, de 26 de diciembre, por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la Guerra Civil y la Dictadura*. BOE, Núm. 206, 25/08/2018, pp. 84607-84610. Available at: https://www.boe.es/eli/es/rdl/2018/08/24/10 [Accessed 20 Jan. 2020].

22 *Ley 20/2022, de 19 de octubre, de Memoria Democrática*, *op. cit,* p. 37-38, where in point 4 it is specified that "the mortal remains that occupy a preeminent place in the enclosure will be relocated," and whose procedure is regulated in the Second Additional Provision, pp. 42-43. In fact, after the final approval of the *Democratic Memory Law* by the Senate on October 5, 2022, the family of the former founder of FE anticipated the above-mentioned procedure and requested the exhumation of his remains through the corresponding channels. *El País*, October 10, 2022. Available at: Memoria Histórica: La familia de Primo de Rivera pide exhumar sus restos con discreción del Valle de los Caídos | España | EL PAÍS (elpais.com) [Accessed 10 Oct. 2022]. The remains of José Antonio Primo de Rivera were finally transferred to the Madrid cemetery of San Isidro on April 24, 2023.

23 New name was acquired by the Valle de los Caídos after the coming into effect (taking effect) of the Democratic Memory Law, which in its article 54 modifies the name of the monument. *Ley 20/2022, de 19 de octubre, de Memoria Democrática, op. cit.*, pp. 37-38.

24 Ministerio de la Presidencia (2011) *Informe de la Comisión de Expertos para el Futuro del Valle de los Caídos*. Madrid, 29 de noviembre, p. 21. Available at: http://hdl.handle.net/10261/85710 [Accessed 15 Jun. 2020]. *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non.recurrence, Pablo de Greiff. Mission to Spain.* United Nations, General Assembly, Human Rights Council. Twenty-Seventh session, 22 July 2014. A/HRC/27/56/Add. Available at: Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff (un.org) [Accessed 18. Ap. 2020].

resolution, and the repercussion that it had on national and international public opinion, what followed was the culminating point of the contradictions whereby Spain's democracy and its institutional system were (un) dealing the legacy of the crimes of the dictatorship and the satisfaction of the victims' rights to know the truth about what happened to their loved ones, find them, exhume them, identify them, give them a dignified burial and repair their memory. These recommendations were continued to be made years after the approval of the Law of Historical Memory, on 22 July 2014, by the United Nations Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of non-Recurrence, in the already mentioned Report on Spain in which he spoke expressly about the obligation of the State to search for disappeared persons of the civil war and the dictatorship and to adopt measures to prevent forced disappearances from being declared amnestied crimes and to prevent the Amnesty Law of October 1977 from having legal effect.[25]

The so-called "Garzón case" had a first phase in the debate arising from the acceptance for processing and subsequent opening of an investigation by the judge of the National High Court in response to the claims presented by the associations and families of the victims which was opposed by Chief Prosecutor of the National High Court, Javier Zaragoza, who lodged an appeal before the Criminal Division of the National High Court. In addition to the first hurdle that the judge had to overcome by declaring himself competent in the case, the problems resided in the pertinence of considering the facts as crimes against humanity, which would lead to their imprescriptibility, the non-derogable nature of the violated rights of the victims, including the right to life and the impossibility of applying, in accordance with international law, amnesty laws. Meanwhile, the Prosecutor based his appeal on the consideration that the facts in question were covered by the Amnesty Law of 1977 and did not constitute crimes against humanity as they were not specified in the Criminal Code of 1932. The Judicial Chamber for Criminal Cases eventually ruled in favour of the application for annulment on 2 December 2008, denying the competence of the National High Court to hear the case, which had already been adopted by Judge Garzón in a court order of 18 November, declining jurisdiction in favour of the regional courts (Tébar, 2018).

With this resolution, the National High Court, one of the highest bodies of the State Court Administration, guaranteed the impunity in Spain of the crimes of Francoism, contrary to the human rights agreements signed by Spain in 1966, although consistent with the position of a judicial system which formerly constituted, unlike other dictatorship experiences, one of the pillars of repression (Aguilar Fernández, 2013). One thing is to declare this impunity but another is the extreme action taken to try as a defendant the judge who had attempted to try the crimes of the Franco regime so as to satisfy the rights of the victims. But this was precisely what happened when another high judicial body of the State Court Administration, the Supreme Court, accepted for processing in January 2009 an accusation of corrupt practices filed against Judge Garzón by the extreme right-wing pseudo-trade union, "Manos Limpias" for the proceedings against the Franco regime. A significant fact is that the reporting judge who admitted the case, Adolfo Prego De Oliver was an honorary patron of a foundation similar to Manos Limpias, the author of several articles for the Revista de la Hermandad del Valle de los Caídos, and a signatory of a manifesto against the Law of Historical Memory.

Also involved in the controversy was the instructor of the case, Judge Luciano Varela Castro, who collaborated with the private prosecution through an order that indicated to Falange Española (which had tried to join the cause) and Manos Limpias those points to modify in the accusation so that it would not be revoked. Neither did he allow as witnesses of the defence jurists such as Carla Ponte, ex-chief prosecutor of the International Criminal Court of The Hague, Juan Guzmán, who in 1999 had prosecuted Augusto Pinochet, the Argentine Raúl Zaffaroni, who annulled the clean slate laws of his country and the two judges of the National High Court who had supported Baltasar Garzón with their dissenting votes (Tébar, 2018, pp. 92-93).

On 27 February 2012, when Judge Garzón had been sentenced by the Supreme Court to eleven years of disqualification from judicial activity for wiretapping in the Gurtel case, this court absolved him of corruption crime.[26] But it did so maintaining the arguments of the instructor who had once again resorted to the non-retroactivity of criminal laws and the Amnesty Law of 1977 and again endorsed the impunity of the crimes of the Franco regime, leaving the victims no possibility of appealing through the legal channels to satisfy their rights. In fact,

25 *Ibídem.* Likewise, amid the debate on the content of the Draft of the new Law on Democratic Memory, the UN Committee on Enforced Disappearances issued a report dated September 27, 2021, in which it recommended that the Spanish government adopt the necessary measures to overcome legal obstacles, including the Amnesty Law, that could prevent the criminal investigation of enforced disappearances. See United Nations. UN News, September 30, 2021. Available at: Un Comité de la ONU urge a España a aprobar la Ley de Memoria Democrática | Noticias ONU [Accessed 26 Oct. 2021] This was also emphasized by the new UN Special Rapporteur, Fabian Salvioli, in statements to the press. See Natalia Junquera, "Salvioli, relator de la ONU, tras el debate de la ley de memoria: 'No es una elección, es una obligación jurídica internacional'." *El País*, 15 de octubre de 2021. Available at: Salvioli, relator de la ONU, tras el debate de la ley de memoria: "No es una elección. Es una obligación jurídica internacional" | España | EL PAÍS (elpais.com) [Accessed 26 Oct. 2021].

26 Despite this, according to the Opinion of the UN Human Rights Committee on July 13, 2021, both trials were arbitrary and did not fulfil the principles of judicial independence and impartiality. United Nations. Human Rights. Traty Bodies. CCPR/C/132/D/2844/2016. Available at: Treaty bodies Download (ohchr.org) [Accessed 26 Oct. 2021] and United Nations. UN News, 26 de agosto de 2021. Available at: Los juicios del Tribunal Supremo español contra Baltasar Garzón por los casos Franquismo y Gürtel fueron arbitrarios | Noticias ONU [Accessed 16 Oct. 2021].

although in its sentence the Supreme Court acknowledged that "the search for the truth is both legitimate and necessary," it placed this responsibility upon the State, "through other bodies with the concurrence of all disciplines and professions, particularly historians."[27] The legal consequence of the sentence came about immediately and all of the open cases or those that were due to be opened in the provincial courts were cancelled (Tébar, 2018, p. 95). They were referred to administrative channels that included a Historical Memory Law which had "privatised" the search, location, exhumation, and identification of the disappeared persons and the matter remained in the hands of the associations and families of the victims (Sáez, 2013).

In contrast, some autonomous communities began to respond to the legitimate claims of the victims' relatives through the approval of their own democratic memory laws, which partially overcame the shortcomings of the 2007 Law of Historical Memory regarding the exhumation of graves (Chaves Palacios, 2019, pp. 528-534; Etxeberría y Solé, 2019, pp. 416-425). However, it took a decade and a half since the approval of this law, and almost a decade after the UN special rapporteur, for this issue demanded by victims' associations, civic movements, and international organizations, to also receive a committed response from the State Government, embodied in the articles of the new Democratic Memory Law of 2022. This should include, in addition to the previously mentioned nullity of the sentences of Franco's exceptional courts, the assumption by the State of the investigation, search, location, exhumation, and identification of the remains of the disappeared buried in mass graves, to which it gives judicial character through the creation of a "Fiscal de Sala de Derechos Humanos y Memoria Democrática" (Prosecutor of the Chamber of Human Rights and Democratic Memory), as specified, respectively, in Title II, Chapter I, First Section, "Localización e identificación de personas desaparecidas" (art. 16-24) and Chapter II, "De la justicia" (art. 28-29).[28] However, regarding this last aspect, as long as the Amnesty Law is not reviewed, the possible judicial investigations carried out by the Prosecutor's Office may not have criminal character or consequences.[29] They will continue to be reduced, as until now, to a memorial justice.

27 Tribunal Supremo, Sala de lo Penal, STS 101/2012 de 27 de febrero de 2012 (CAUSA ESPECIAL 20048 de 2009). Available at: C.G.P.J - Actualidad Jurisprudencial (poderjudicial.es) [Accessed 18 Feb. 2020].

28 *Ley 20/2022, de 19 de octubre, de Memoria Democrática*, *op. cit*.. pp. 24-26 and 29.

29 Moreno Pérez, A. "Proyecto de Ley de Memoria Democrática: insuficiente en justicia para las víctimas." Público, 21 de octubre de 2021. Available at: Proyecto de Ley de Memoria Democrática: insuficiente en justicia para las víctimas – Otras miradas (publico.es) [Accessed 26 Oct. 2021].

FINAL CONSIDERATIONS: OVERCOMING THE PAST

The fascism prevailing in southern Europe was characterised by the use of a broad coercive state apparatus that combined massive attacks against the civilian population with selective repression, in a spiral of violence that caused hundreds of thousands of victims in these countries.

The political transitions of authoritative states to democratic systems were carried out by applying the principles, yet to be fully developed, of an incipient transitional justice with a view to achieving national reconstruction within the framework of a discourse that emphasised the virtues of democracy and the rule of law. Essentially seeking to facilitate the peace processes and promote solutions in the new democratic regime, wherever possible settling scores with the past was avoided. In France and Italy, the criminal justice, administrative purges, and economic sanctions that were applied were preceded by extra-legal repression that was exercised during the final phase of the war, the liberation and the immediate postwar period in what was known as "purification" and in which the *Resistance* played a leading role. With the passing of time and largely as a consequence of the pressure of public opinion, in France and Italy the need arose to carry out criminal proceedings, at least against those principally responsible for the most serious crimes, processes of uncovering the truth regarding the violation of human rights by non-judicial bodies and legal and institutional reform that affected the police, justice and the army.

On the contrary, in the transitions of the late 1970s, criminal justice was applied minimally in the case of Portugal, where professional and administrative purges prevailed, and was non-existent in the case of Spain, where there was a complete absence of transitional justice measures sanctioned in the Amnesty Law of 1977. In this Law, the result of a non-disruptive transitional process with the violent past, explains the greater degree of impunity in Spain, although we find it to a different extent in all the countries studied.

In them, we observe, with a greater or lesser intensity, few or no criminal convictions for the crimes of the violation of human rights. In all cases, and always with the pretext of achieving the social and political stability necessary for democratic normalisation, justice has not been applied or has been applied in a clearly inadequate way and the total or partial amnesty of those responsible has been systematically imposed. Therefore, democracy brought with it both impunity and injustice. If there is one thing that those who have studied the transitional processes experienced in recent decades stand out, it is that without justice it is difficult to achieve reconciliation. This can only be achieved after completing a restorative cycle made up of the knowledge of the truth and the application of justice in favour of the victims, which includes reparation, rehabilitation, and measures to ensure non-recurrence. Only at the end of this cycle can

there be forgiveness and a reuniting of society. In short, overcoming the past or reconciliation cannot be achieved without criminal law. And the greater the extent to which it is applied, the greater the level of reconciliation (Bloomfield, Barnes, and Huyse, 2003). Therefore, particularly in the Iberian countries, we find fractured and conflicting societies in which different realities coexist and democratic states with weaknesses that, in the political sphere, reproduce the forces that fought against one another in the fascist era.

In Spain, the political class inherited from the Franco regime is usually a propagandist of reconciliation but of a reconciliation process based on forgetting and impunity, often called for with the pretext of not revisiting the past. Thus, the climate of impunity resulting from the low level of allegations fosters political and social radicalism. Impunity encourages confrontation and physical or verbal violence becomes the logical product of a political culture that attributes advantages to its application over other forms of conflict resolution such as negotiation or the formal application of criminal or restorative justice. If the barriers to apply for justice such as those we have seen continue to prevail and the political or legal institutions continue to oppose change, the spiral of tension and conflict situations will increase. Hence, among other consequences, populisms emerge that incite hate, violence, and confrontation, aggravating the social crisis and hindering the attainment of a full democracy, laying bare some of the loose ends of the transition.

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