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Justice in Times of Transition: Lessons from the Iberian Experience

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Abstract

A key contention of the transitional justice movement is that the more comprehensive and vigorous the effort to bring justice to a departed authoritarian regime the better the democratizing outcome will be. This essay challenges this view with empirical evidence from the Iberian Peninsula. In Portugal, a sweeping policy of purges intended to cleanse the state and society of the authoritarian past nearly derailed the transition to democracy by descending into a veritable witch-hunt. In Spain, by contrast, letting bygones be bygones, became a foundation for democratic consolidation. These counter-intuitive examples suggest that there is no pre-ordained outcome to transitional justice, and that confronting an evil past is neither a requirement nor a pre-condition for democratization. This is primarily because the principal factors driving the impulse toward justice against the old regime are political rather than ethical or moral. In Portugal, the rise of transitional justice mirrored the anarchic politics of the revolution that lunched the transition to democracy. In Spain, the absence of transitional justice reflected the pragmatism of a democratic transition anchored on compromise and consensus.

It is practically an article of faith that holding a departed authoritarian regime accountable for its political crimes through any of the available political and legal means is a pre-requisite for nations attempting to consolidate democratic rule. This positive link between justice and democratization has been embraced most vigorously by the "transitional justice movement," the influential cadre of human rights activists, legal scholars, political theorists and international organizations, such as the New York-based International Center for Transitional Justice, that in recent decades has made confronting the legacy of a difficult and painful past a rite of passage for many newly democratic states (Benomar 1993; McAdams 1997; Garton Ash 1998; Kritz 1995; de Brito, et al., 2001; Hayner 2002; Elster 2004; Friedman and Kenney 2005; Elster 2006; and Borneman 2007). Two broad arguments anchor the case for the pursuit of justice in the context of a democratic transition. Each one finds support in separate but complementary wings of the transitional justice movement.

On the one hand are the political benefits for democracy that flow from prosecuting human rights abusers. This argument is defended primarily by the "retributive" wing of the transitional justice movement, and takes its inspiration from the landmark Nuremberg trials staged in Germany following the end of World War II, which successfully convicted major and lesser Nazi officials on charges of crimes against humanity. It contends that prosecuting violators of human rights abuses serves to advance democratization by acting as some kind of teachable moment that can anchor the rule of law since it demonstrates that no one is above the law, including the state. This argument clearly presupposes the capacity of the law to engender liberal democratic values to an extent capable of dramatically transforming the public political culture.

According to the legal theorist Ruti Teitel (2000: 3), transitional justice contributes to “the defining feature” of democratic transitions by “grounding within society of a normative shift in the principles underlying and legitimizing the exercise of state power.”

On the other hand are the psychological blessings inherent in confronting the legacy of an evil history. This argument is made most frequently by the “reconciliation” wing of the transitional justice movement, which generally espouses non-prosecutorial means of addressing the past, such as a truth commission, designed to expose the “factual” truth about past abuses. Attaining societal catharsis is the explicit objective. But wielders of the term reconciliation also incorporate more elusive things drawn largely from the Christian tradition, like contrition, repentance, and forgiveness.¹ In either case, the failure to reconcile with the past is usually seen as likely to prevent nations from moving toward a new future (with that future usually a stand-in for democracy) and to condemn them to being forever haunted by the horrors of the past, and worse yet, to repeat historical mistakes. The political commentator Tina Rosenberg (1996: xviii), who is fond of characterizing post-authoritarian societies as victims of post-traumatic stress, writes that: “Nations, like individuals, need to face up to and understand traumatic past events before they can put them aside and move on to a normal life. This is important for the victims but it is just as important for the collaborators.”

Unsurprisingly, a key transitional justice assumption, shared by supporters of both retribution and reconciliation, is that the more comprehensive and vigorous the application of the law in confronting the past during the transition to democracy the better

¹This infusion of religion into discussions of reconciliation is credited to Archbishop Desmond Tutu, whose performance as chairman of South Africa’s Truth and Reconciliation Commission (TRC) is thought to have delivered reconciliation its global fame. See Philpott (2007).

the democratizing outcome will be. Implied in this argument is the warning that democracy itself might be imperiled by the lack of justice during the process of democratic transition. Stephanie Golob (2008: 127) writes that the message from what can be called “the transitional justice culture,” is that “the moment of transition is the golden opportunity to forge a new, democratic social contract, and that the new democratic future envisaged by that contract will be possible, and will last, only by using the law to confront and overcome the repressive and abusive past.”

So widely accepted are the arguments advanced by the transitional justice movement that to date they remain largely empirically unchallenged.² This essay assumes this task by exploring the experience with transitional justice in the Iberian Peninsula, where the so-called “Third Wave” of democratization was born in the mid-1970s (Huntington 1992). To no small degree, the combined experience of Spain and Portugal turns upside down virtually every aspect of the conventional wisdom promoted by the transitional justice movement. It suggests that transitional justice is not an unmitigated good for democratization, and certainly not a requirement or a precondition for a successful transition to democracy. Oddly enough, the search for accountability and justice can itself serve to undermine democracy and the rule of law by descending into political revenge, while forgetting and moving on can in their own right become a foundation for democratic consolidation.

Since undertaking to democratize in the mid-1970s, Spain and Portugal have constructed democratic systems that are the envy of the democratizing world, but the actual legacy of transitional justice to democratization in these countries is the exact

²Critics of transitional justice do exist, but their work focuses largely on conceptual problems. See Crocker (1999) and Moellendorf (2007).

opposite of what the transitional justice literature would lead one to expect. In Portugal, an ambitious policy of bureaucratic purges and political trials intended to cleanse the state and society of the authoritarian past did not strengthen the rule of law or engender democratic values; instead, it turned into a veritable witch-hunt that dispensed justice so arbitrarily and radically that it nearly derailed the project of democratization, the primary reason why it was eventually abandoned. In Spain, by contrast, a breathtakingly inadequate process of transitional justice premised on letting bygones be bygones, and which mirrored the handling of an evil past in other Western European nations prior to the advent of transitional justice in the mid-1980s, became a pillar of democratization by integrating the political class around the reconstruction of democratic institutions and reassuring the public that the country would be spared the pain of reliving the costly polarization that ushered in the Spanish Civil War and the Franco dictatorship.³

This analysis proceeds in four steps. Part one examines how different modes of democratic transition in two similar authoritarian regimes created divergent opportunities for transitional justice. Part two and three examine, separately, the consequences for democratization of Portugal's policy of "cleansing" and Spain's politics of "forgetting." Part four explains the counterintuitive experiences with transitional justice in the Iberian Peninsula. It contends that these cases highlight a point overlooked by the transitional justice movement: the primacy of politics over ethics or morality in how nations confront a difficult and painful past. In particular, they reflect the very different visions of democracy that prevailed during the democratic transition. In Portugal, the possibility for

³In France, Austria, and Italy democracy was successfully restored following the end of World War II with little if any transitional justice. Instead, as in post-Franco Spain, forgetting ruled the day. On the broad Western European experience with forgetting the past, see Garton Ash (1998) and Judt (2005).

radical economic and political change suggested by a revolutionary model of regime transition encouraged the emergence of an “anarchic” view of democracy. In Spain, a “pragmatic” view of democracy prevailed that stressed stability and order, even at the expense of accountability and justice, which was shaped by the constraints of a negotiated democratic transition and the political learning that the political class and society at large took from previous failed attempts at democratization.

Part 1. Divergent Transitions in Twin Dictatorships

Spain and Portugal provide as close to a perfect laboratory one can find for exploring contrasting dynamics of transitional justice during the process of democratic transition. For starters, it is difficult to ignore the striking historical parallels in the political development of both countries. Spain and Portugal undertook to democratize almost simultaneously, in the mid-1970s, in the wake of the demise of Western Europe’s sturdiest 20th century dictatorships. The Salazar regime in Portugal and the Franco regime in Spain were established during the interwar years, both born out of military coups that ended chaotic experiences with democracy. Salazar’s coup in 1926 put an end to Portugal’s First Republic (1911-1926); Franco’s coup in 1936 brought about the collapse of Spain’s Second Republic (1931-1936), which in turn ushered in the Spanish Civil War (1936-1939). The longevity of both regimes into the 1970s, well after democracy had been firmly established in Western Europe, made the Iberian Peninsula the odd man out in West European politics, and gave the Iberian people a reputation for having a distinct fondness for despots. More important still are the similarities in political structures between the two dictatorial regimes.

The Salazar and Franco regimes are generally viewed as “twin dictatorships,” since both “Salazarism” and “Francoism” are recognized as ideal-types of “authoritarianism.” According to Juan Linz’s classic analysis (2004), Franco’s Spain and Salazar’s Portugal were neither “totalitarian” (notwithstanding the common fascist origins of both regimes) nor “democratic,” but instead were “authoritarian,” a regime type distinguished by certain governing “mentalities” like the absence of an elaborate regime ideology and a strong party structure, “limited pluralism” in the organization of state-society relations, and low reliance on mass mobilization to cultivate regime support. Adherence to these signposts of classic authoritarianism injected a strong sense of pragmatism into both regimes, which goes a long way toward explaining their amazing longevity. Furthermore, in the twilight years of authoritarian rule, neither Salazar’s Portugal nor Franco’s Spain was, strictly speaking, a military regime. Instead, and despite their military origins, these regimes developed into “civilianized authoritarian regimes,” a categorization that acknowledges the replacement of the military by civilian leaders in the day-to-day operations of the government (Linz and Stepan 1996: 117).

Transitional justice, however, could not have played out more differently in both cases. In Portugal, a sweeping policy of *saneamento* (cleansing or purging), in place between 1974 and 1976, sought to remove from power the most visible members of the authoritarian elite (especially conservative military officers), and managed to find its way through the lower ranks of the military, the civil service, and even the members of the entrepreneurial class, the education system, the media, and the church. In Spain, by contrast, forgetting and moving on prevailed. After Franco’s passing, the government expeditiously enacted reparation legislation for those victimized by the Franco regime,

especially those fired from public jobs because of their political beliefs, and soon thereafter organized the so-called *Pacto del Olvido* (Pact of Forgetting or Pact of Oblivion), an unwritten agreement between the left and the right that sought nothing short of introducing collective amnesia about past political excesses. This pact was effectively institutionalized with a broad amnesty law enacted in 1977. As a consequence of this law, there would be no meaningful transitional justice of any kind in Spain: no truth and reconciliation commission, no bureaucratic purges, and no military trials.

Why was transitional justice pursued so vigorously in Portugal? Why was transitional justice so grossly shortchanged in Spain? To no small degree these experiences contradict the prevailing view about when and how far transitional justice is carried out in a post-authoritarian situation. This literature suggests that the higher the level of repression of the old regime the more likely the probability of some kind of transitional justice under the new regime (see, especially, Borneman 1997; de Brito, et. al., 2001; and Hite and Cesarini 2004). According to this assumption, it was Spain rather than Portugal that was destined for a more vigorous experience with transitional justice. The Portuguese dictatorship was certainly repressive. The control of civil society by the state in Portugal was “profound and widespread,” with police files kept on an estimated three million people (Bermeo 2007: 396). This is a staggering figure considering that Portugal’s population at the end of the authoritarian era stood at approximately eight million. But the repression in Portugal “was not especially bloody” (Bermeo 2007: 396), and certainly not by the standards set by Franco’s Spain. Despite the often-noted relative openness of the late Franco years (1959-1975), authoritarianism was a vastly more violent affair in Spain than in Portugal. As remarked by Mary Vincent (2007: 157), “The

Francoist regime was born in violence and depended on violence. Killing was essential to its initial display of power.”

Franco’s Nationalist army is directly responsible for the bulk of the violence occasioned by the Spanish Civil War, whose total human casualty has been placed as high as one million people, making this war the deadliest of all civil conflicts in interwar Europe.⁴ After the end of the Civil War in 1939, the Franco regime turned especially vindictive toward the Republicans. The 1939 Law of Political Responsibilities, enacted for the sole purpose of cleansing Spain once and for all of any trace of left-wing influence, resulted in the imprisonment of more than 400,000 Spaniards, since it was applied retroactively to anyone who had actively supported the Republican side (Preston 1995: 230). As many as 280,000 of those convicted under the 1939 law were forced into “slave labor” in the construction of public works, including monuments to Franco, as a form of expiation for their political sins.⁵ As many as 200,000 people are believed to have died of execution, hunger, and disease in concentration camps established by the regime after 1939, twice as many as those who perished in the battlefields (Jackson 1965: 539). Thousands of children from Republican families, perhaps as many as 30,000, were

⁴The one million mark is popularly accepted in Spain since it was adopted, for very different reasons, by both the Franco regime and its opposition. For Franco, the figure underscored his claim of having saved Spain from chaos and destruction. For the opposition, it highlighted the very violent nature of the dictatorship. Historians of the Spanish Civil War, however, have questioned the veracity of the one million figure, arguing that the real figure is about 580,000, which includes those who perished in Franco’s prisons after the end of the war. For a broader discussion of the killings of the Civil War see Jackson (1965: 526-540). In any case, the human cost of the Civil War in Spain far exceeds that of similar conflicts of the era. Ireland’s civil war resulted in 3,000 casualties, Finland’s in 30,000, Hungary’s in 6,000 and Greece’s in 60,000 (Kissane and Sitter 2005: 186-8).

⁵Like many other figures about the Francoist repression, the number of people forced to work in “slave camps” is all over the place. The figure cited here is reported in “Franco’s Slaves,” *The Financial Times* (July 5, 2003).

snatched by officers from Auxilio Social (Social Aid), a Francoist social agency, and placed in state orphanages, where they were mistreated both physically and mentally, in an effort to cure them of the so-called “red” gene (Alted 2003). Approximately 500,000 people were forced into exile, mostly to Western Europe and Latin America, with about a one third choosing never to return to Spain (Rubio 1977: 207).

Last but not least, it is important to note that the openness of the late Franco years was not extended to the entire nation. An obvious exception was the rebellious region of the Basque Country, which Franco treated as an occupied foreign territory in an attempt to stamp out separatist sentiments. At the infamous Burgos trial of 1970, the Franco regime collectively court-martialed and sentenced to death sixteen members of the Basque separatist organization Euskadi Ta Askatasuna (ETA), including two women and two priests. International outrage spared them their lives. Decidedly less fortunate were the two ETA members and three Communist leaders executed by the Franco regime in 1975, just as the democratic transition was about to start. No fewer than 13 countries withdrew their Ambassadors from Madrid in protest against the killings.

It is the nature of the transition to democracy--the one significant difference in the political development of Spain and Portugal during the phase of late authoritarianism--rather than the level of repression that explains why transitional justice was dispensed so unevenly across the Iberian Peninsula. The peculiarities of each transition created different configurations in the balance of political power between the old authoritarian regime and its democratic opposition in society with important consequences for transitional justice. In Portugal, where the transition to democracy began about a year before Franco’s death, the authoritarian regime completely collapsed. This sent the state

into a full crisis mode, thereby allowing the democratic opposition, led by the Portuguese Communist party, to seek to punish the members of the old regime and to ban them from public life, and to mobilize the citizenry around an ambitious agenda designed to challenge the political order established by the old regime, including the social and economic status quo, by contesting property rights in the countryside and the major urban centers. In Spain, by contrast, the authoritarian state staged its own democratic reinvention, which was anchored in negotiations between representatives of the outgoing authoritarian regime and its democratic opposition. A consequence of these dynamics of regime change was to make the Francoist state the steward of the transition to democracy, thereby foreclosing any possibility for meaningful transitional justice.

Revolution versus Reform

The origins of the Portuguese transition to democracy can be traced to a military coup of April 25, 1974. It ended Western Europe's oldest dictatorship, which at the time was headed by Marcelo Caetano, who had replaced António de Oliveira Salazar in 1968 due to the latter's ill health. Junior and middle-rank military officers upset at the refusal by the authoritarian state to let go of Portugal's colonies in Africa led the revolt. Unlike other European colonial powers, such as Britain and France, Portugal stubbornly refused to de-colonize its possessions in Africa during the 1950s, contending that its overseas provinces (*províncias ultramarinas*) were an integral part of the Portuguese territory and an essential component of the country's national identity. Between 1961 and 1974, Portugal fought "colonial wars" against independence movements, first in Angola, and later in Portuguese Guinea in West Africa, and then in Mozambique in East Africa. The

cost of these wars for Portuguese society was tremendously high and this bears a direct connection to the origins of the military coup that ended the Salazar-Caetano regime. By 1974 one in four Portuguese men of military age was in the armed forces.⁶ The army alone had 170,000 men, of whom 135,000 were in Africa. Collectively, the armed forces represented (at a low estimate) a proportion per 1,000 of the population (30.83) exceeded only by Israel (40.09) and North and South Vietnam (31.66, and 55.35 respectively); five times that of the United Kingdom and three times that of the United States. The military budget represented at least 7 percent of the gross national product (GDP), yet individual soldiers were poorly trained and equipped, and pay for officers and troops was abysmal. Unsurprisingly, as noted by Kenneth Maxwell (1986a: 110), overseas officers in the Portuguese army “became unreliable in military action” and at home ready to take a stand against the political regime.

Although regime change in Portugal was brought about by the actions of the military rather than by the mobilization of civil society, the masses played an important role in shaping subsequent events.⁷ In the immediate aftermath of the coup, the masses rose in support of the coup plotters, whose bravery was rewarded by ordinary Portuguese citizens with carnations, giving rise to the so-called *Revolução dos Cravos* (the revolution of the carnations). This popular reception legitimized the actions of military rebels. By and large a quick and bloodless event, the 1974 overthrow of the Salazar-Caetano dictatorship ushered in a revolutionary period (1974-1976) dominated by the Movement of the Armed Forces (MFA), which incorporated some of the pivotal figures behind the April 1974 coup. Members of the MFA staffed the first post-authoritarian government,

⁶The data cited in this section is found in Maxwell (1986a: 110-111).

⁷This section borrows from Bruneau (1990) and Graham (1992).

the National Salvation Junta (JSN), which was presided by General António de Spínola, the intellectual father of the coup. The publication of his book *Portugal and the Future* (1973), a far-ranging critique of the colonial wars, was “the first major and public challenge to the regime by a high-ranking figure from within the system” (Solsten 2008). And the fact that Spínola was a veteran of the colonial wars added credibility to his anti-war arguments.

A radical form of participatory democracy, led by the Portuguese Communist party, which had close ties to Moscow, was the most important legacy of the revolutionary period (Bermeo 1986). It combined a genuine attempt at democratizing society through various civic mobilization initiatives, such as the Campanhas de Dinamização Cultural (CDC, Cultural Action Campaign) and the Serviço Cívico Estudantil (SCE, Student Civic Service), with a revolutionary agenda consisting of expropriations of private property, nationalizations of key industrial sectors, and, as seen shortly, a far-reaching process of bureaucratic purges and political trials. Despite the vigorous reformist zeal of the revolutionary government, (or perhaps because of it) the prospects for the rise of a viable democracy remained compromised for years to come in Portugal. Under the rule of the MFA and its commitment to the three D’s (democratization, development, and decolonization), Portugal endured a period of severe political uncertainty, which saw the creation of no fewer than five interim governments, all of them heavily staffed by military leaders and greatly influenced by the Communist party, which accounts for Portugal’s reputation as a case of “difficult transition” (Casper 2000). In the midst of political upheaval and increasing popular mobilization, a successful counter-coup took place on November 25, 1975, encouraged by the United

States and the major European powers, which were worried by the rise of a radical left-wing regime in a NATO country at the peak of the Cold War (Maxwell 1986a: 123). The 1975 counter-coup would greatly influence the democratic development in Portugal by, among other things, bringing an abrupt end to Portugal's chaotic experience with transitional justice.

The transition to democracy in Spain was as orderly as Portugal's transition was chaotic. Dictating this type of transition in Spain was, interestingly enough, the desire of Spanish politicians to avoid a Portuguese-style transition out of authoritarian rule. As noted by Linz and Stepan (1996: 117), the Portuguese revolution taught the Spanish political class "how not to make a transition." Maxwell (1986a: 131) observes that, in Spain, "the Portuguese experience was sobering for both Left and Right." But long before the unfolding of the Portuguese revolution, whose disturbing images of workers illegally taking over shops, factories, and farmland must have reminded the Spaniards of their own chaos during the years leading to the Civil War, several signs pointed to a negotiated democratic transition in Spain. For one thing, Franco had avoided overseas military ventures of the Portuguese kind, so dissent within the armed forces of the like witnessed in Portugal and that led to war was never really a possibility in Spain. After all, Spain had long before the transition to democracy abandoned any dreams of empire. This came with the 1898 Spanish-American War, which Spain lost to the upstart United States. In any case, the Spanish military, which enjoyed greater internal cohesion and professionalism than the Portuguese military, remained fully supportive of the authoritarian state until the formal dismantling of the Franco dictatorship in 1977 (Agüero 1995).

More importantly, by the mid-1970s, Franco's democratic opposition had mellowed significantly. Unlike the Portuguese Communist party, which remained wedded to Moscow during the transition to democracy, by the time democracy was restored in Spain the Spanish Communist party had effectively divorced itself from Moscow by embracing "Eurocomunism," a political movement that mixed Marxist thinking with the institutional trappings of democracy. Indeed, Santiago Carrillo, the head of the Spanish Communists, was a leading theoretician of "Eurocommunism." This put him directly at odds with his Portuguese counterpart Álvaro Cunhal, who was, "of all Western European communists, Moscow's staunchest henchman" (Maxwell 1986b: 265). Not surprisingly, by the time of Franco's death in 1975, Spanish Communists were no longer openly advocating the defeat of the Franco regime by means of a popular revolt. This had been the party's official stance since 1939, rooted in the belief that Francoism could not be reformed. But by the early 1970s, Communist leaders were formally embracing the idea of a peaceful end to Francoism. With the 1970 Pacto por la libertad (Pact of Freedom) the Spanish Communist party joined other political forces in Spain in declaring its "willingness to reach agreements with virtually all parties, including those on the right," and "committed the party to reconciliation with the army and the church and to the ultimate construction of Socialism gradually through democratic means" (Gunther et al., 2004: 93).

Such a shift in political tactics brought Spanish Communists in line with an influential Republican exile community, led by the French-based Spanish Socialist party, which had long espoused the idea of a non-violent form of regime transition in Spain. Well before the actual transition to democracy, prominent figures of the Socialist-

Republican exile attending the Munich Congress of 1962, had declared the desire for “political prudence,” by renouncing all active and passive violence, before, during and after the process of regime change (Aguilar 2002: 103). This kind of thinking pointedly suggested what would become a powerful *leitmotif* of the Spanish transition: the powerful role played by the political lessons from the past in the crafting of the conditions that shaped the return of democracy in Spain. The opposition to the Franco regime both inside and outside of Spain was keenly aware that the political misfortunes of the past, especially the democratic breakdown of the interwar years, were rooted in too much political polarization and too little willingness to compromise. Accordingly, pragmatism would trump ideology in the restoration of Spanish democracy.

The collective result of the changes afoot within the Franco regime and Spanish society at large as democracy was approaching was a broad agreement within the national political class to seek a compromised solution to the challenge posed by Franco’s imminent demise. This effort was led by Adolfo Suárez, a Francoist insider and former head of the Movimiento Nacional, the closest thing to a political party within the Franco regime, and a young King Juan Carlos, who assumed absolute control of Spain following Franco’s death. In 1976, the King appointed Suárez to manage the transition to democracy, a complete reversal of his earlier commitment to “Francoism without Franco.” Suárez was ideally suited for reforming the Franco regime from the inside out. He was “masterful in domestic diplomacy” and in a very short period of time had developed close ties and considerable trust with both the reformist wing of Francoism and the democratic opposition (Malefakis 1995: 75). Suárez was especially deferential toward the old regime by insisting that its very institutions were employed as

democracy's midwife. In this way, the transition to democracy was legitimate under Francoist law. In 1976, the "Fundamental Laws," the guiding legal framework of the Franco regime, were amended by the Francoist parliament to liquidate the authoritarian regime by authorizing a package of political reforms including the legalization of political parties and trade unions and the scheduling of democratic elections for the following year.

Part II. The Politics of Cleansing

Different paths toward democracy in Portugal and Spain left in their wake divergent scenarios for the possibility of dispensing retroactive justice against the old regime. In Portugal, the sky seemed the limit, since the state apparatus was in a shambles and the left's influence was on the rise—an ideal scenario for the flourishing of a strong societal impulse to settle accounts with the old regimes and its allies in society.

According to the Portuguese historian Antonio Costa Pinto (2008: 308): "The nature of the Portuguese transition and the consequent state crisis created a window of opportunity in which the reaction to the past was much stronger in Portugal than in the other Southern European transitions." Key to this reaction was the vigorous mobilization of the public created by the sudden rupture with the old regime, which, at least among Iberian-Latin nations, must be regarded as one of the most intense and widespread. The principal agitator behind the mobilization of the public was the Portuguese Communist party, the main opposition force to the dictatorship, which after the April 1974 coup began to make punishing the authoritarian elites and the agents of collaboration within society one of its central demands.

Out of this political environment grew the policy of *saneamento*, which expanded from the initial decision to remove from power the more visible members of the dictatorial political elite and some conservative military officers to the civil service and eventually to the private sector. This process unraveled between 1974 and 1976, the heydays of revolutionary government, a period dominated by the JSN and powerful left-wing social movements affiliated with the Portuguese Communist party such as the trade union Workers' Commissions. It began with the expulsion from the Portuguese mainland of Marcelo Caetano and his closest allies, who were flown to the island of Madeira en route to exile in Brazil, where the former dictator eventually died. This conveniently avoided popular demands for military trials for the main leaders of the old regime. The revolutionary government also disbanded the anti-Communist militia (the dreaded Portuguese Legion), which was disarmed and its leadership sent to prison.

After this initial period of state cleansing, transitional justice developed in revolutionary Portugal along two parallel tracks: an official one and an extrajudicial one. The extra-judicial one was first to unfold, and to some extent it drove the official one. Neither one did much to advance democracy or the rule of law. Generally speaking, the policy of cleansing polarized Portuguese society by intensifying divisions between the left and the right and between the civilian government and the military, and contributed significantly to the breakdown of the civil order, given the ad hoc and seemingly arbitrary fashion in which justice was dispensed, which often involved little if any intervention from judicial bodies.

Almost from the start of the revolutionary period, the previously illegal Portuguese Democratic Movement, a front organization linked to the Portuguese

Communist party, took over local posts at the city council level, removed from their positions professors at some of the nation's leading universities such as Lisbon and Coimbra, business managers, and media leaders affiliated with the old regime. These were "savage purges," in the words of Costa Pinto (2001: 73), arising from the spontaneous desire of the unions and students' associations to exact revenge upon their former oppressors and the inability of the Communist party to control them. Partly in response to the spread of this informal and often chaotic form of transitional justice, and demands from the extreme left (the Communist party) and the moderate left (the Socialist party) for official action against the collaborators with the old regime, the revolutionary government felt compelled to institutionalize the process of purges.

In June 1974, two months into its tenure in office, the revolutionary government organized the "Inter-ministerial Purge and Reclassification Commission" and tasked it with enacting a government-wide effort to purge the state of former collaborationists. The legislation that authorized this commission (Decree Law 123 of March 1975) referred to the former regime as "fascist" and stated the purpose of the purging to account "for political acts committed during the dictatorship" (Costa Pinto 2008: 314). The purges were carried out by the Comissões de Saneamento (purge commissions) located throughout the public sector and later ratified by the Inter-ministerial Purge and Reclassification Commission, which allocated the penalty to be imposed. By February 1975, approximately 12,000 people had been removed from their posts or suspended; between March and November 1975, the number had risen to 20,000 (Costa Pinto 2001: 73). The purges, however, did not affect the state apparatus evenly, a reflection of the absence of a clear strategy and a coherent policy. For instance, the concept of

“collaborator” greatly shifted over time. Initially, it was strictly applied to those holding high positions within the previous regime. But gradually, the interpretation was dramatically expanded in keeping with the radicalization of society, especially left-wing groups. According to Costa Pinto (2001: 74), by the time the purges had moved from the military, where they had commenced, to the civil service, the definition of a collaborator included such criteria as “non-democratic behavior in the course of the duty after the coup, inability to adapt to the new democratic regime, and incompetence.”

The policy of purges was applied almost arbitrarily across the state depending on the party to which the ministry belonged to and the degree of pressure exerted by the unions. This explains why, ironically, transitional justice was less prevalent in the Ministry of Justice, which was staffed by lawyers from the “moderate left elite” associated with the Portuguese Socialist party, and was more far reaching in the Ministries of Labor and Education, which were controlled by the Communist party and the Workers Commissions. Especially telling is the case of the Ministry of Education, whose purge committee was headed by famous university professors, schoolteachers and writers. Its deliberations were largely guided by politics rather than legality: all university deans and directors of faculty were removed from their posts, and student associations simply denied entry to the university to some faculty, seldom bothering to file official purging procedures. Making matters worse, the students operated with a very loosely conceived, and capriciously applied, notion of a collaborator, which generally meant anyone possessing authoritarian attitudes.

Purges were also extended to various sectors of Portuguese society. The economic elite, which found itself on the losing side of the revolution, was an obvious

target for retribution. It is estimated that 2 percent of industrialists were officially purged and 19 percent were indirectly purged by the political and economic developments unleashed by the revolution (Costa Pinto 2001: 79). Fearing retribution from the Communist-infiltrated unions, there was a mass exodus of industrialists and entrepreneurs, with the majority of those leaving the country choosing to join former dictator Caetano by migrating to Brazil, whose economy was in the midst of an economic boom under the tutelage of a very business friendly right-wing military government (Makler 1983). Other members of the business elites left simply out of disgust with the economic program of the revolutionary government. According to one study (Solsten 1993), a total of 244 private enterprises were directly nationalized during the sixteen-month interval of March 14, 1975 and July 29, 1976. These nationalizations were followed by the consolidation of various economic sectors, with the government choosing to group previously independent companies into state monopolies, such as those created in the industrial sectors of air transport, cement, utilities and railways, among others.

Another sector dramatically affected by the purges was the media, which became a target for retaliation by journalists linked to the Portuguese Communist party and other organizations of the extreme left. Their work would significantly alter the Portuguese media environment during the transition to democracy. The heads of the management bodies of all radio and television stations were removed from their jobs, as well as that of the main newspapers. The official “dictatorial press,” which served largely the state’s vast bureaucracy, was dissolved. Only those papers already in the hands of the opposition under the old regime were spared. The Catholic Church radio station was

subjected to a hostile take over by its own journalists, which imposed a self-management system, and became an important mouthpiece for the extreme left.

Military trials, around which there was nearly unanimous consensus about their need within the revolutionary government, proved harder to organize. In July 1975, Constitutional Law 8/75 established procedures for the trial of military officers, members of the political police, and government officials directly responsible for repressing society under the old regime. Among other things, this new law provided sentences of up to 12 years and put no statute of limitations on criminal proceedings. The target of this new law was the International Police for the Defense of the State (PIDE), which conducted surveillance of ordinary Portuguese citizens. The prospect of military trials, however, triggered a counter-revolutionary coup in November 1975, which paradoxically marked the end of the policy of transitional justice and the beginning of the process of democratic institutionalization by reversing a period of acute state crisis and intense political polarization, which was in no small measure created by the attempt to settle scores with the past by cleansing the state and society of authoritarian influences.

Led by politically moderate and professional members of the Portuguese officers corps and a loose coalition of civilian leaders affiliated with the Social Democratic Center party, which integrated the conservative sectors of Portuguese society, the 1975 counter-coup succeeded in toppling the MFA radicals and in reversing the left-wing policies of the revolutionary period, such as the nationalization of industry, the collectivization of the land, and the process of transitional justice, while moving Portugal firmly in the direction of a conventional Western European democracy. In 1976, a new constitution was enacted and elections followed that gave General Antonio Ramalho

Eanes, the head coup plotter, the presidency of the new republic. In 1986, Mário Soares of the Social Democratic party succeeded Eanes as the first civilian president in Portugal since 1926, thereby formally ending the process of democratic transition with the final withdrawal of the military from the political arena.

Under both Ramalho Eanes and Soares, the government embraced a policy of “reconciliation and pacification,” which entailed a “re-evaluation” of the process of transitional justice of the revolutionary period. Of course, this new approach did not prevent the new regime from carrying its own policy of purges against the departing revolutionary government, a highly tense process that made real “the specter of civil war” (Maxwell 1986a: 129). After the 1975 counter-coup, members of the Communist party and the extreme left were removed from their posts in the government and public enterprises. Land and property taken during the revolutionary period was returned to their previous owners. An urgent task for the new government was dealing with the bounty of the “hunt of the *pides*,” the witch-hunt conducted by the revolutionary government against members of the state surveillance police, many of whom had languished in judicial limbo awaiting trial. In the ensuing political trials organized by the new government those who had not violated their parole by migrating out of the country received light sentences and those with good military service got benevolent treatment.

The new policy of reconciliation and pacification also called for the discontinuation of the purge policy and for the organization of the “Commission for the Analysis of Purge Proceedings” to allow those purged to appeal their sentences. In one notable incident, two judges who had been purged by the revolutionary government had their sentences revoked and eventually placed on the bench of the Supreme Court of

Justice, in the face of protest by the left. The commission continued to work until the early 1980s and “rehabilitated” the majority of people whose cases it reviewed. Remaining cases were dismissed and often accompanied by financial reparation such as the payment of lost wages and by validation of time in office for retirement purposes. The government also took steps to facilitate the return of members of the business community pushed into exile by the policy of purges of the revolutionary period, as a means to address the heavy drain of managerial and technical expertise occasioned by the attacks on Portuguese capitalism during the revolutionary period. A final order of business was deciding the fate of the archive of the political police, which generated a lively debate in the Portuguese parliament. These records were eventually incorporated into the national archives, to which the public was given limited access, owing to demands from scholars, human rights activists, and left-wing politicians.

Part III. The Politics of Forgetting

In Spain, a “pacted” transition to democracy effectively foreclosed the possibility for retroactive justice against the members of the Franco regime. In striking contrast to Portugal, arguments about retroactive justice never arose during the democratic transition. And this was intimately linked to the dynamics of the democratic transition. The state had survived the transition to democracy virtually intact; and this allowed the authoritarian elites the opportunity to reinvent themselves as democratic reformers. Former Francoist officials would for years into the new democracy continue to play a very influential role in politics. The election of Adolfo Suárez of the center-right Unión de Centro Democrático (UCD), as President of the first post-Franco government in 1977,

effectively brought to life the notion of “change within continuity.” During the UCD’s control of the government (1977-81) numerous individuals with close connections to the old regime remained in public office. According to one extensive study of ministers and regimes in Spain, “the overwhelming majority of the fifty-one UCD ministers had previously occupied second- or third level executive positions during the last years of Franco’s regime and the transition, and almost one-third of them had been members of the corporatist Cortes,” the Francoist parliament (Linz et al., 2001: 29). A clean break from the past for the state and government in Spain would have to wait until the 1982 elections, which were decisively won by the Spanish Socialist party and that brought the left back to power for the first time since the end of the Republican era in 1939.

The military, for its part, while accepting of the political transition, remained ever vigilant about the actions of the civilian elites. As noted by Stanley Payne (1986: 184), due to the residual power incorporated in the military left behind by the democratic transition, during the early years of democratization Spain operated as a *democracia vigilada* (guarded democracy), requiring civilian leaders to “negotiate each new step in policy or major personnel change with the senior military commanders.” Certainly, any attempt by the civilian government to pursue any kind of policy of transitional justice against the military would have put the nascent democracy “in mortal danger.”⁸ The possibility of a military coup became a reality a reality on February 23, 1981, when military rebels led by Lieutenant Colonel Antonio Tejero staged a rebellion against the new democracy by holding hostage the members of the Congress of Deputies. The proverbial straw that broke the camel’s back was the legislation introduced by the Suárez

⁸Interview with former Spanish Prime Minister Leopoldo Calvo Sotelo, March 21, 1994.

administration to grant limited autonomy to the Basques and the Catalans which the military, fully indoctrinated by Franco into the idea of an indissoluble Spain, read as a sign that that the nation was on the brink of coming apart. With the political class and the King firmly against the coup plotters, to say nothing of the millions of ordinary citizens that took to the streets in protest against this attack on democracy, a military coup stood no real chance of success. But it did remind the government and the nation of the capacity of the armed forces to disrupt the new political order, which gave the civilian leaders a renewed sensitivity of how far they could push the military.

Further sealing the desire not to delve into the political excesses of the past was the wave of violence that engulfed the Spanish transition, which eerily echoed the one that accompanied the advent of the Civil War in 1936. This violence made arguments about the dangers of *abrir heridas ya cerradas* (opening wounds already healed), especially compelling. Ironically, this view was popularized by the left, which bore the brunt of the violence of the Civil War and the repression of the Franco dictatorship, as reflected in this statement from Communist General Secretary Santiago Carrillo from May 1977: “In our country, there is but one way to reach democracy, which is to throw out anyone who promotes the memory of the civil war, which should never return, ever. We do not want more wars, we have had enough of them already.”⁹

Political violence during the Spanish transition emanated principally from radical Basque nationalists, who chose to distance themselves from the democratization process taking place in Madrid in protest for what they perceived to be an illegitimate transition to democracy, since neither the right nor the left in Spain approved of the principle of

⁹Reported in “Escasos incidentes,” *Pueblo* (May 14, 1977).

regional self-determination. ETA's terrorist campaign during the transition meant that Spain, which pursued a negotiated route to democracy, actually experienced a more violent process of democratization than "revolutionary" Portugal. The opening salvo of the violence of the Spanish transition was ETA's murder of Franco's alter ego and apparent political heir, Prime Minister Luis Carrero Blanco, in 1973. Between 1973 and 1982, the peak years of democratic transition and consolidation in Spain, ETA was responsible for 371 deaths, 542 injured, 50 kidnappings and hundreds of bomb explosions and other acts of violence and terrorism (Maravall and Santamaría 1986: 92). This violence was intended to provoke an all out repressive campaign by the government, but instead it put ETA squarely outside of the political mainstream and strengthened the resolve of the political class to find peaceful means for bringing about the end of the dictatorial regime.

A point of departure for those negotiating the end of the Franco regime on the part of the left was the need for amnesty for everyone involved any kind of wrongdoing before or after the dictatorship. Indeed, amnesty rather than retribution was the left's main demand during the years of democratic transition in Spain. Nowhere in the official documents of the Spanish Communist party of the era can one find even passing reference to the issue of retroactive justice. Quite the contrary, the party became an ardent advocate of amnesty. In a speech in the city of Burgos in May 1977 General Secretary Carrillo announced that in the first parliamentary session, the main objective of the Communists would be "an amnesty law for prisoners and exiles."¹⁰ The Socialist leadership accorded a similar priority to amnesty upon the return of the party's leadership

¹⁰Reported in "Carrillo: Los comunistas llevarán a las Cortes la voz del pueblo," *Pueblo* (May 30, 1977).

from exile in France in 1974. Upon re-entering politics in Spain the Socialists began to mobilize the masses, calling for the dissolution of all repressive institutions and the devolution of rights to all persons deprived of them for political or trade union activity. But these calls were intended to demand “the introduction of democratic reforms and not the expulsion or trials of those guilty of repression” (Aguilar 2001: 100). By the time of the 1977 elections, the Socialist legislative priorities were listed as follows: (1) amnesty law; (2) law of political parties; and (3) dissolution of repressive laws.¹¹

In expressing such a strong support for an amnesty law, the left-wing parties were taking their cues from ordinary Spaniards, who traumatized by the Civil War and the long dictatorship, were in no mood for entertaining any debate about the past. Around the time of the transition, 61 percent of the Spanish public approved of the idea of a blanket amnesty.¹² Underscoring this clear support for political amnesty was fear about the future. The public opinion data of the early 1970s suggests that the Spanish public anticipated the political transition as “a harsh and frightful experience, a sort of ordeal.” A poll from March 1975 found that 58 percent of Spaniards were anticipating the future “with worry,” 39 percent “with tranquility,” and 3 percent “did not know.” Worries about the future included the possibility of another civil war and the advent of another military dictatorship, perhaps one harsher than the one that had just ended. After the 1977 elections, the survey data consistently shows that the public’s “top priorities” were “peace, order and stability” (Aguilar 2001: 94).

¹¹Reported in “El PSOE comenzará hoy a presentar su programa legislativo,” *Ya* (September 21, 1977).

¹²Unless otherwise noted, the survey data reported in this section is found in Wert Ortega (1985: 74-75).

The 1977 Amnesty Law emptied the state's prisons of individuals convicted of crimes against the state (mainly Basque nationalists) and offered immunity to the military and the representatives of the old regime from any type of judicial retribution. This amnesty was critical to the rise of other political compromises that followed Franco's death in 1975; from the left's demand for the immediate liberalization of the trade unions and the legalization of the political parties, to the right's insistence that the Spanish Monarchy be incorporated into the evolving political framework of the new democracy, to the regionalists' desire to have their demands for self-governance recognized by the central government in Madrid. Certainly, the issue of the injustices of the past was not ignored completely during the transition, but the government dealt with it swiftly and superficially. This consisted largely of restoring the pensions of Republican civil war veterans and reinstatement of civil servants dismissed from their jobs under Franco for political reasons. In keeping with the intent of the amnesty law to forgive and forget, this would be the extent of reckoning with the past during the democratic transition. There would be no recognition for the mass killings of the Civil War, especially from the Nationalist side headed by Franco, nor of the large-scale repression of dissidents and regional nationalists that lasted until the final days of the dictatorship. Nor would the leadership of the Catholic Church, the media, and the business class be called to answer for their overt collaboration with the Franco regime. For instance, so embedded was the Church with the old regime, that the Spanish Conference of Bishops never fully endorsed the transition to democracy but rather chose to assume a position of neutrality.

Alongside the decision not to confront the past through any legal or political means, the Spanish political class was also determined not to use the past as a political

weapon for one political group to attack its opposition. Indeed, for decades the past would remain off-limits as a political weapon. After the transition was securely in place, neither the right nor the left showed any real interest in reviving the issue of the past. This was certainly the case of the right, which stood to pay the steepest toll from any settling of scores of the crimes of the past. Delving into the past was also a low priority for the Spanish Socialist party, the main party on the left after the 1977 elections, which was in the midst of an internal process of political modernization. The last thing the party needed as it sought to shed its identity as a Marxist institution and appeal to the voters as a forward-looking, “catch-all” political organization was a discussion of the party’s role during the Republican period and the Civil War. Among other things, this would have reminded voters of the role the party played in radicalizing the working class, antagonizing the Catholic Church, and terrorizing the business community. More generally, it would have awakened the memory of the political crimes committed by the left during the war. The Republican side was hardly an innocent bystander in this conflict. By one account, Republicans were responsible for 38,000 deaths as a result of political reprisals (Casanova 1992: 8-9).

With the thorny issue of the past conveniently tucked away, Spanish politicians moved quickly to enact a process of democratic institutionalization that has been hailed as a model of efficiency and order (Linz and Stepan 1996). Just months following the 1977 elections, the main political parties agreed to the landmark Pacts of Moncloa, which aimed at protecting the economy from the adverse domestic repercussion of the international energy crisis of the late 1970s, and that ushered in a period of unprecedented “tri-partite” collaboration between the trade unions, employers’

associations and the government on matters of labor and industrial relations. The pact's real intent, however, was to neutralize the political arena in order to facilitate the drafting of a new democratic constitution, which was conceived in secret by representatives of leading national parties, before it was put to a vote in the parliament and in a national plebiscite in 1978 (Encarnación 1997). By 1981, Spain had been re-invented as a quasi-federal state with the creation of *las autonomías*, a system of 17 self-governing regions, each with its own chief executive and parliament.

The advent of the Socialist administration of Felipe González (1982-1996) did little to upset the terms of the pact of silence. Quite the contrary, Spanish scholars have taken to refer to the years of Socialist rule during the 1980s and 1990s as the years of “great silence and no memory” (Gálvez Biesca 2006: 3). This was underscored during González's statement to mark the fiftieth anniversary of the beginning of the Civil War in 1986, when he noted that the war “was finally history” and that “it is no longer present and alive in the reality of the country” (Garton Ash 1998: 35). Instead of focusing on the past, González, like his center-right predecessor, devoted his political energies to implementing an ambitious domestic and foreign policy agenda aimed at modernizing Spain once and for all. It included legalizing abortion, abridging the role of the Catholic Church in education, reforming the judiciary, normalizing relations with newly created regional governments in the Basque Country and Catalonia, negotiating Spain's entry into the European Economic Community (EEC), the precursor to the European Union (EU), and modernizing the economy. It would not be until 2007, thirty years after the transition to democracy, that a government in Spain would officially endorse the idea of confronting the nation's dark past.

Prompted by the birth of a vigorous movement devoted to recovery of the historical memory and the rise of a new generation of left-wing leaders not beholden to the political compromises of the democratic transition, the socialist administration of José Luis Rodríguez Zapatero signed legislation designed to restore Spain's historical memory. The aptly-named Law of Historical Memory, approved by the Congress of Deputies in October 2007, calls for the Ministry of Justice to collect all claims of abuse or torture during the Civil War and the Franco era, to adjudicate financial and moral reparation for those who were orphaned by the war and/or lost their employment due to reprisals from the old regime, and to grant Spanish citizenship to the children and grandchildren of the Republican exile.¹³ Other provisions in the law call for the national and regional governments to finance the exhumation of thousands of unmarked Republican civil war graves and to pay for the reburial of the remains (the Franco regime had already done so for the Nationalists), for the removal from public view of monuments honoring either side of the Civil War and the Franco regime, and prohibits demonstrations at *El Valle de los Caídos* (Valley of the Fallen), Franco's monument to the victims of the Civil War which today serves as his burial site. Finally, the law calls for the establishment of a Civil War Documentary Center in the city of Salamanca devoted to the history of the Civil War and the Franco dictatorship.

Ironically, the new memory law preserves the old amnesty law, making it unlikely that Spain will ever convene a truth commission or that anyone be ever held accountable for the crimes of the past. Maintaining the amnesty accord was, arguably, the only point

¹³For a full transcript of the law see "Ley de la Memoria Histórica," 2007, accessed on the website of the Boletín Oficial del Estado (BOE) at <http://www.mpr.es/NR/rdonlyres/D03898BE-21B8-4CB8-BBD1-D1450E6FD7AD/85567/boememoria.pdf>, June 20, 2008.

of consensus between the right and the left in the acrimonious debate that accompanied the crafting of the new memory law. Ironically, the unintended outcome of the government's attempt to help Spain come to terms with the memory of the past was to launch a so-called "memory war" with overheated rhetoric as the preferred weapon of choice (Encarnación 2008). The right accused the Zapatero government of "opening old wounds that could only destabilize the country," as argued by the Conservative paper *ABC*.¹⁴ The left, backed by human rights activists, such as the Association for the Recuperation of the Historical Memory (ARMH), accused the right of wanting to keep a veil over "the Spanish Holocaust."¹⁵ Not surprisingly, neither side in the end was pleased with the final legislation. The right and its allies in society (including the Catholic Church), refused to support most of the stipulations of the final version of the bill was presented and approved in the parliament. Many on the left have pledged to push for a broader policy of "de-nazification" which might include removing Franco's remains from *El Valle de los Caídos*. "The law is a first, limited step in Spain to forge a collective memory about the horrors of the past," notes Emilio Silva, president of the ARMH.¹⁶

Yet, it appears that the new law has captured how the general public actually wants to deal with the past, a point underscored by the available public opinion data. Survey findings suggest that issue of historical memory is nowhere near as controversial and divisive within the public as it is within the political class. According to public opinion polls from the CIS, 54.1 percent of Spaniards are "very much in agreement" with

¹⁴"Editorial: Las estatuas como cortina de humo," *ABC* (August 15, 2006).

¹⁵Reported in "El gobierno quitó de la ley de la memoria el consejo de suprimir símbolos franquistas," *El País*, August 25, 2006.

¹⁶Interview with Emilio Silva, President, Asociación para la recuperación de la memoria histórica, July 9, 2009.

the adoption of “initiatives intended to recognize the victims of the Civil War,” with an additional 24.8 percent saying they were “in agreement,” and 11.4 percent “in disagreement.”¹⁷ Asked whether “government sponsored measures could help in repairing the suffering of the victims,” 44.8 percent of those polled responded to be “strongly in agreement,” with an additional 33.9 percent responding to be “in agreement,” and 11.0 percent responding to be “neither in agreement or disagreement.” These findings echo the contention of the historian Javier Tusell during the peak in intensity over the drafting of the new memory law that: “In Spain there is a willingness for amnesty not amnesia” (Elkin 2006: 3).

Part IV. Comparative Discussion

The Iberian experience pointedly suggests that the connection between justice and democratization is neither as positive nor as straightforward as presumed by the transitional justice movement. Although the revolution that triggered the transition to democracy in Portugal in 1974 can be regarded as a pillar of democratization by breaking down authoritarian institutions and expanding political participation, it is hard to make the case that the particular policy of transitional justice adopted by the revolutionary government did much to advance the rule of law and democracy; on the contrary, both were seriously undermined by the attempt to exact justice upon the old regime. The rule of law was severely weakened by the arbitrary dispensation of justice in the name of cleansing the state of its authoritarian past, a process in which some people were

¹⁷Centro de Investigaciones Sociológicas (CIS), survey no. 2622, October 2005. This survey sampled the national population of Spain and included 2,489 people of both sexes of age 18 and above. Available at the CIS website at <http://www.cis.es>.

punished for their political beliefs rather than for their political actions. Ironically, the rule of law began to consolidate in Portugal only after the process of transitional justice was halted and its legacy dismantled.

Certainly, the point being made here is not that transitional justice cannot reinforce the rule of law. A scrupulously applied policy of purging could have achieved that purpose in Portugal. Rather, the Portuguese experience highlights the flaw in the thinking that almost any effort at transitional justice will contribute to democratization. This overlooks the possibility that transitional justice will turn into transitional revenge, with justice becoming a tool for one political group to demonstrate its victory over another one, a prospect that is greatly facilitated by the fluidity of politics in times of regime transition. As for democracy itself, the political excesses of the revolutionary period, which certainly includes the policy of purges, are generally blamed for having tarnished the reputation of political institutions in the eyes of the citizenry, which some studies have identified as the main reason for the relatively low level of legitimacy of Portuguese democracy in the post-transition period (Morlino 1998: 118-119).¹⁸

In different but complimentary ways, the Spanish case also defies the conventional wisdom about transitional justice. Skirting any meaningful attempt to hold the Franco regime accountable for its heinous crimes did not result in any of the problems for democratization that the transitional justice movement warns about, such as the failure to secure the rule of law and/or robbing democracy of its legitimacy. Interestingly enough, Spain is generally regarded as having institutionalized democracy more rapidly

¹⁸According to this study, through the mid-1980s, Portugal registered the lowest level of democratic approval among Southern European publics: 61 percent of citizens in Portugal deemed democracy as “preferable to any other regime,” versus 70 percent for Italy, 70 percent for Spain, and 87 percent for Greece.

and more effectively than Portugal (and possibly any other Third Wave democracy), by moving rapidly to enact a new democratic constitution, to de-centralize the state, and to consolidate civilian control over the military).¹⁹ This largely accounts for the high level of democratic legitimacy prevalent in Spain in the post-Franco era, which some have credited to the efficient performance of the political system (Morlino 1998: 127-131). This performance, as seen already, included putting political stability ahead of accountability and justice.

To be sure, the price of “forgetting” for Spain has been real, as suggested by the bitter debate generated by the passage of the 2007 Law of Historical Memory. But there appears to be very little regret among Spanish politicians about the decision about the past made during the transition. They understood that there is in fact such a thing as a lesser evil when it comes to dealing with the past, another point often overlooked by transitional justice advocates, which often dictates the need to forget and move on, at least until democratic institutions have reached some resemblance of maturity. In Spain the choice to deal with the past by not dealing with it at all was shaped by the “pacted” nature of the democratic transition, the residual power of the military left in place after the transition, and widespread fears of wrecking another foray into democratization. Carlos Castresana, an icon in the human rights community for his celebrated role as the lead prosecutor in the indictment of General Pinochet on crimes against humanity, essentially resorts to a lesser evil argument when explaining why the Spanish left came to accept the passing of the Franco regime in 1977 without accountability and truth-telling:

¹⁹This point is broadly accepted in the literature on Iberian democratization. Agüero (1995: 133) writes that: “Spain achieved a cleaner democratic break with the past and settled its military problem earlier and more thoroughly than Portugal.”

“The years of democratic transition were spent in a permanent state of necessity that forced the least bad of bad options, which culminated in the untruthful process that gave us back our freedom.”²⁰

Taken together, the Spanish and Portuguese experiences reveal that there is no guarantee that transitional justice will bring about the pro-democratic benefits ascribed to it, and that it is neither a prerequisite nor a precondition for a successful experience with democratization. This conclusion is not limited to the Iberian experience. It is broadly echoed by other newly democratic states, especially in South America. A key component of the transition to democracy in Chile, arguably South America’s most successful, was the policy of “justice within the limits of the possible,” which in essence meant setting clear boundaries on how far the state would go in its pursuit of justice against the departing authoritarian regime (Zalaquett 1992).²¹ This policy reflected the political realities of Chile in the early 1990s, and in particular the legacy of the so-called *leyes de amarre* (literally, the binding laws), which all but precluded any significant attempt at justice during the transition to democracy. These laws were purposely designed by General Augusto Pinochet to limit the discretionary power of the incoming democratic regime to enact any meaningful policy of transitional justice by, among other things, granting Pinochet and his henchmen lifetime tenure as military officers, preventing the new congress from investigating the crimes of the previous regime, and setting limits on how far the new government could reform state institutions including the judiciary. It would be more than a decade before Chilean courts would begin to dismantle Pinochet’s

²⁰“Secretos de familia,” *El País* (July 16, 2007).

²¹This policy reflects the classic argument from political sociology that notions of absolute justice need to be tempered by the realities of what is possible and what is not. See Weber (1946).

legacy and proceed with an attempt at “post-transitional justice,” a process triggered by the dictator’s surprise arrest in London in 1998 on orders from a Spanish judge for the murder of Spanish citizens in Chile (Golob 2002).²²

In Argentina, by contrast, nine generals and admirals were sentenced to jail on charges of murder and kidnapping following the collapse of the old military regime in 1983, the first time in Latin American history that the military had faced a court of justice. But the military trials were hardly a “teachable” moment for advancing democracy and the rule of law. Quite the contrary, recent assessments of the trials have accused them of playing an anti-democratic role by contributing a new mode of authoritarianism and bigotry (Malamud-Goti 1995). Underpinning this harsh view of the legacy of the trials is their failure to treat all citizens as equal before the law. In an act of political expediency, the government settled on a controversial strategy of “selective prosecution,” hoping that condemning “paradigmatic behavior” would deter future human rights abuses (Alfonsín 1993). But the strategy resulted in the aborted prosecution of many notorious torturers, who were allowed to go free, giving the public the impression that impunity rather than justice had prevailed. Moreover, the intended lessons of selective prosecution were rendered moot after the amnesty process declared in 1986-87, under pressure from the military, foreclosed the possibility of future military trials and the 1990 presidential pardon of those military officers already convicted.²³

Little wonder that in recent years Argentina has seen the rise of “vigilante justice,” with

²²As might be expected, Pinochet’s 1996 indictment by a Spanish court was a catalyst for the emergence of the contemporary movement to recover Spain’s historical memory. See Encarnación (2007).

²³In 2005, Argentina’s highest court overturned the amnesty laws of the mid-1980s, allowing military trials to resume.

ordinary citizens exacting their own kind of punishment against human rights abusers, and that opinion polls routinely rank the judiciary among the most inefficient and mistrusted institutions in the country.²⁴

Why the connection between justice and democratization is not as positive as currently believed should not be that surprising. After all, nations usually confront the question of what to do with a difficult and painful past not as an ethical or moral dilemma (as this question is generally framed by the academic literature) but rather as a political one. As argued by Samuel Huntington (1992: 115), deliberations about the prosecution of authoritarian crimes are seldom determined by “moral and legal considerations” but almost always by “the workings of politics.” In other words, all kinds of political factors come into play when contemplating what to do about the past, with some having little to do with advancing democracy and the rule of law. It is clear that in Portugal, transitional justice was motivated by the desire of the Communist party to expand its political influence. It saw the policy of purges as serving the dual purpose of helping to implement its dream of radically altering the socio-economic and political structures of Portuguese society while exacting revenge on the authoritarian elite. This was in keeping with a radical vision of democratic life afforded by the revolution. As noted by Costa Pinto (2006: 198), “the new authorities felt that it was morally and politically desirable to replace and to punish some members of the previous elite, and to dissolve the

²⁴A famous incident was as the physical assault on Alfredo Astiz, the so-called “Blond Angel of Death,” who prior to the amnesty process had been charged with kidnapping hundreds of people and facilitating their torture at the notorious Naval Mechanics School. In 1997, while enjoying drinks at a disco in Gualeguay, a city north of Buenos Aires, Mr. Astiz was accosted by a mob of customers with accusations of “torturer” and other unprintable adjectives. They proceeded to assault him until guards rescued him from what could have been a lethal attack.

authoritarian institutions, especially because they had the political opportunity owing to the type of transition.”

In Spain, the choice to “forget” its past was no less political than Portugal’s decision to punish its former rulers. Letting bygones be bygones in Spain reflected the pragmatism of the politicians and the general public, which flowed from the limitations on political strategy afforded by the negotiated democratic transition but also from the desire to leave the past behind, both literally and figuratively. Some type of retributive justice was certainly desired by some on the left, but this was deemed less important than securing a workable foundation for the new democracy. This point was underscored in the parliamentary debate over the 2007 Law of Historical Memory. Ramón Jáuregui, a senior Socialist official argued that: “the transition to democracy demanded that we overlook thousands of memories and claims that weren’t convenient to bring up because they could endanger the pact of the transition.”²⁵

In sum, the Iberian experience highlights the need for more realistic and empirically grounded theorizing about the democratic virtues of transitional justice. Like any other political decision made during the transition to democracy, the question of what to do about the past is heavily influenced by the political realities of the day. As such, it would be naïve to expect any pre-ordained outcome. Acknowledging this reality demands recognizing the potential for unintended consequences for democracy of any attempt at transitional justice and lowering expectations about what transitional justice can do to advance democratization. It is apparent that for transitional justice to further democratization more than accountability and truth is required, a point already revealed

²⁵Reported in “Spain’s Dilemma: To Toast Franco or Banish His Ghost,” *New York Times* (October 8, 2006).

by global assessments of the legacy of the transitional justice movement (see Hayner 2002). Nations must also embrace the kind of institutional judicial reform that enhances the prosecutorial capacities of the government, safeguards the autonomy of judges, and empowers civil society watchdogs. In the Iberian countries, these reforms were consolidated well after the transition to democracy by admission into the EEC in 1986. In the absence of structural judicial reform, exposing the political excesses of the past and even holding those responsible for them will likely do little to advance the rule of law and democracy, to say nothing of preventing future human rights abuses.

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